

APPENDIX

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FEMA ENVIRONMENTAL DESK REFERENCE

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## A FIVE-MINUTE LOOK AT SECTION 106 REVIEW

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### About the Section 106 review process

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**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 by the Advisory Council on Historic Preservation, an independent Federal agency.

**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 much-needed public works projects. In the 1960s, 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.

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

**What is a historic property?** For purposes of Section 106, any property listed in or eligible for the National Register of Historic Places is considered historic.

The National Register is this country's basic inventory of historic resources and is maintained by the Secretary of the Interior. The list includes buildings, structures, objects, sites, districts, and archeological 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 archeological properties), but that possess significance, are subject to Section 106 review.

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**Figure 1: A brief look at Section 106 review****How does Section 106 review 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 five basic steps, as follows:

**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 Officer (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 such studies.

If properties, that is, districts, sites, buildings, structures, or objects, are found that may be eligible for inclusion in the National Register of Historic Places, but have not yet been included in the Register, 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. If a property has already been included in the National Register, of course, further evaluation is not ordinarily necessary. Section 106 review gives equal treatment to properties that have already been included in the Register and those that are eligible for inclusion.

**Step 2: Assess effects**

If historic properties, that is, properties included in or eligible for inclusion in the National Register, 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 effects must be accepted in the public interest.

If consultation proves unproductive, the agency or the 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 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**

The Section 106 regulations also spell out three alternative means of complying with Section 106. These are:

- Programmatic Agreements among an agency, the Council, one or more SHPOs, and 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.

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## About the Council

**What is the Advisory Council on Historic Preservation?** The 20-member Council is composed of a chairman, vice chairman, 6 other private citizen members, one Native American or Native Hawaiian, a governor, and a mayor—all appointed by the President of the United States. The Council also includes the Secretaries of the Interior and Agriculture, the heads of four Federal agencies designated by the President, the Architect of the Capitol, the chairman of the National Trust for Historic Preservation, and the president of the National Conference of State Historic Preservation Officers. The Council members usually meet four times during the year. Day-to-day business of the Council involving Section 106 review is conducted by an executive director and a professional staff of historians, architects, archeologists, planners, lawyers, and administrative personnel.

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## Section 106 participants

**Who initiates Section 106 review?** The Federal agency involved in the proposed project or activity is responsible for initiating and completing the Section 106 review process. Under certain circumstances, local governmental bodies may act as the responsible agency. The agency works with the State Historic Preservation Officer (an official appointed in each State or territory to administer the national historic preservation program) and the Council to do so. In this fact sheet, the term "agency" is used to mean the responsible unit of government, be it Federal or local. There can be other participants in Section 106 review as well. At times, local governments, representatives of Indian tribes, applicants for Federal grants, licenses or permits, and others may join in the review process when it affects their interests or activities.

**How long does Section 106 review take?** The timetable for Steps 1 through 3 (identification through consultation) are up to the agency, as the Council is not typically involved at this point. Once the agency submits a signed MOA (with needed documentation) for Council review, that review can take up to 30 days. If there is no MOA, the agency can request issuance of Council comments within 60 days of when the Council receives required documentation.

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## For more information

**Where is more information available?** This brief look at Section 106 review cannot tell the whole story. For complete information about the Council's review process, consult the Council's regulations at 36 CFR Part 800, published September 2, 1986. [51 FR 31115] The Council has available without charge an annotated version of its regulations, which aids understanding of the regulatory language, as well as a booklet entitled *Section 106, Step-by-Step*, which provides a more detailed introductory look at the review process. A complete list of publications in the "Working with Section 106" series is available from the Council.

For easy-to-understand training on Section 106 review, the Council offers a 3-day course, "Introduction to Federal Projects and Historic Preservation Law," which is offered in many locations around the country each year. The course is designed for the Section 106 novice and explains, step-by-step, what actions are required by Federal, State, and local officials to meet the requirements of the law.

For more information, please write the Advisory Council on Historic Preservation, 1100 Pennsylvania Avenue, NW., Suite 809, Washington, DC 20004. Telephone: (202) 606-8503 (executive offices) and (202) 606-8505 (Section 106 review and training offices).

*Revised October 1992*

## SECTION 106, STEP-BY-STEP

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## Introduction

Section 106 of the National Historic Preservation Act requires Federal agencies to consider the effects of their actions on historic properties and to seek comments from an independent reviewing agency, the Advisory Council on Historic Preservation. The purpose of Section 106 is to avoid unnecessary harm to historic properties from Federal actions. Now commonly known as Section 106 review, the procedure for meeting Section 106 requirements is defined in regulations of the Advisory Council on Historic Preservation, "Protection of Historic Properties." [36 CFR Part 800] These revised regulations, which become effective October 1, 1986, were published in the *Federal Register* on September 2, 1986, at 51 FR 31115. This booklet provides a discussion of the Section 106 review process and briefly explains each of its steps.

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## Some background on Section 106

The concerns that resulted in Section 106 began to develop during the 1950s and 1960s. During those decades, hundreds of Federal projects—such as highways, dams, and urban renewal—were completed with little regard for historic resources. As a result, those Federal projects destroyed or damaged thousands of historic properties, to the dismay of local citizens and policy makers.

Congress observed this and recognized that new legislation was needed to ensure that Federal agencies considered historic properties in their planning.

### *National Historic Preservation Act*

The National Historic Preservation Act of 1966 (NHPA) was passed to address this need. It has since been amended and strengthened several times. The cornerstone of Federal preservation law, NHPA established today's national historic preservation program, including identification, assistance, and protection of historic properties and resources.

Identification of historic properties is coordinated by the State Historic Preservation Officers (SHPOs), who are appointed by each governor. SHPOs develop comprehensive preservation plans, direct surveys and inventories of historic properties, and nominate properties to the National Register of Historic Places, which is maintained by the Department of the Interior. Identification is also carried out by Federal agencies, local communities, certified local government historic preservation programs, and private industry as part of project and program planning.

Assistance under NHPA is primarily provided by the Department of the Interior, which has authority to make grants-in-aid and offers technical guidance on many preservation issues. Other Federal assistance for historic preservation is available through tax incentives for rehabilitation and the use of various Federal grant programs to achieve preservation objectives.

Protection is generally integrated into the planning process for Federal actions that may affect historic properties. Sections 110 and 106 of NHPA assign planning and protection responsibilities to all Federal agencies.

#### *Section 110 of NHPA*

**Note:** The Council and the National Park Service has jointly issued *The Section 110 Guidelines: Annotated Guidelines for Federal Agency Responsibilities under Section 110 of the National Historic Preservation Act (Section 110 Guidelines)*. This publication contains the full text of the guidelines with annotations for further explanation and reference to guidance prepared since the guidelines became effective.

Under Section 110, all Federal agencies must carry out their programs in accordance with, and in furtherance of, national historic preservation policy; designate historic preservation officers to coordinate the agencies' activities under the act; identify and preserve historic properties under their ownership or control; and plan to minimize harm to National Historic Landmarks. The Department of the Interior and the Council have jointly published guidelines for implementing Section 110, which have been adopted for use in Section 106 review as well.

#### *Section 106 of NHPA*

Section 106 requires each agency to take into account the effects of its actions on historic properties. Furthermore, an agency must afford the Advisory Council on Historic Preservation—an independent Federal agency created by NHPA—an opportunity to comment on any of the agency's undertakings that could affect historic properties.

The text of Section 106 reads as follows:

**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. [16 U.S.C. § 470f]**

Section 106 applies to all properties already listed in the National Register, to properties formally determined eligible for listing, and to properties not formally determined eligible but that meet specified eligibility criteria. This means that properties that have not yet been listed, and even properties that have not yet been discovered, can be eligible for consideration under Section 106.

#### *Evolution of the Section 106 commenting process*

While Section 106 of NHPA tells agencies they must take the effects of their undertakings into account and afford the Council an opportunity to

comment, it does not tell them how. Acting under the authority of Section 211 of NHPA, the Council has developed a process for carrying out Section 106 responsibilities. This is set forth in the regulations, "Protection of Historic Properties," at 36 CFR Part 800.

The first Section 106 procedures were issued in 1968. They evolved over the years and were recast as regulations in 1979. The current regulations took effect on October 1, 1986. An annotated version of these regulations is available from the Council.

#### *Principles of Section 106 review*

Inherent in the philosophy underlying Section 106 is the belief that a built environment in which old and new blend harmoniously is the best in which to live and work. At the same time, this philosophy recognizes that total preservation of every historic property is unrealistic and not in the public interest.

Accordingly, Section 106 review does not require preservation in every case. Nor does it give the Council veto power over an agency's actions. Section 106 does require full consideration of preservation values by Federal agencies. Section 106 "solutions" resulting from the review process can range from the complete preservation to agreed-upon destruction of a property. Section 106 review is designed to ensure that an agency weighs preservation in the balance with the projected benefit of the completed undertaking, costs, and other factors.

Timing is crucial to the Section 106 process. It is important that consideration of historic properties occur in the early stages of project planning so that preservation concerns can receive thorough consideration as a project is planned. Early preservation review also permits modifications to a project while they are relatively easy to accomplish and reduces the potential for conflict and delay.

#### *Properties subject to Section 106*

Because Section 106 extends not only to National Register-listed properties but also to unlisted properties that meet the National Register criteria as well, it is essential to understand what qualifies a property for National Register listing.

Department of the Interior regulations describe the National Register criteria for listing this way:

The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or (b) that are associated with the lives of persons significant in our past; or (c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack

individual distinction; or (d) that have yielded or may be likely to yield, information important in prehistory or history. [36 CFR § 60.4]

The National Register criteria are broadly drawn, in response to clear Congressional direction that locally valued places be included. The criteria require that a property retain integrity. In addition, it must be associated with historic lives or events; historically, architecturally, or artistically distinctive; or valuable as a source of information.

Properties are nominated to the National Register by SHPOs, through certified local government historic preservation programs, and by Federal agencies (pursuant to Section 110 of NHPA). As of 1989 the National Register contained more than 52,000 listings, many of which are districts containing many individual properties, and more are being nominated daily.

*Federal actions subject to Section 106*

The word "undertaking" was used deliberately in NHPA and in Council regulations to connote a broad range of Federal actions. The statutory language refers to undertakings over which Federal agencies have either "direct" or "indirect" jurisdiction. Three kinds of undertakings are alluded to: Federal undertakings (actions undertaken directly by a Federal agency); federally assisted undertakings (for example, activities receiving direct Federal financial assistance or such indirect assistance as loan guarantees and mortgage insurance); and federally licensed undertakings (undertakings requiring permits or other approvals from Federal agencies).

In its regulations, the Council has defined the term "undertaking" to include Federal actions that can result in changes in the character or use of historic properties, if such properties are located in the area to be affected by an action. [Section 800.2(o)] The intent of this definition is to make it clear that actions that by their nature have no potential to affect historic properties (for example, providing hot lunches to school children or installing new radios in police cars) need not be subjected to Section 106 review, even though they are federally supported.

*Agencies subject to Section 106*

The agency responsible for meeting Section 106 requirements can be any component of the Federal Government directly or indirectly responsible for an undertaking. Most departments have delegated the responsibility for Section 106 compliance to their constituent bureaus and offices, and in many instances these units in turn look to their field offices to ensure compliance.

For certain programs of the Department of Housing and Urban Development (HUD), notably Community Development Block Grants (CDBGs) and related HUD programs, responsibility to comply with Section 106 has been delegated by statute to the local governments as recipients of the grants.

*Effect of Council regulations*

As Federal regulations, the procedures set forth in 36 CFR Part 800 are binding on all agencies, including the Council. While the regulations

specifically state at Section 800.3(b) that the procedures may be implemented in a flexible manner by agencies, agencies as well as the Council must meet the purposes of Section 106 of NHPA. Failure to do so may lead to litigation.

*Counterpart regulations*

Agencies may work with the Council's staff to develop counterpart regulations designed to meet the objectives of Section 106 while reflecting particular agency needs. When concurred in by the Council, counterpart regulations substitute for the Council's regulations. [Section 800.15]

*The relationship of Section 106 to NEPA and other authorities*

The Council encourages agencies to coordinate Section 106 review with the environmental review process required by the National Environmental Policy Act (NEPA). It is typical for agencies to design the draft environmental impact statement or draft environmental assessment so that it can also serve as part of the required documentation during Section 106 consultation. Normally an agency describes the outcome of the Section 106 review process in its final environmental impact statement or final environmental assessment. Undertakings that do not require environmental impact statements or environmental assessments under NEPA still are subject to Section 106 if the undertakings have the potential to affect historic properties.

The Council suggests coordination between Section 106 and other statutes, as well. Council regulations encourage agencies to design determinations and agreements so that the agencies also meet requirements of such other authorities as the Archeological and Historic Preservation Act of 1974 [P. L. 93-291; 16 U.S.C. 469(a) - (c)]; the Archeological Resources Protection Act of 1979 [P. L. 96-95; 16 U.S.C. § 470aa - II]; Section 110 of NHPA [16 U.S.C. 470h-2]; and Section 4(f) of the Department of Transportation Act [49 U.S.C. § 303]. [Section 800.14]

*Coordination with consideration of social and cultural values*

Special social and cultural values related to historic properties are often important to Native American groups and local communities. Historic properties sometimes receive special consideration under the American Indian Religious Freedom Act. [P. L. 95-341; U.S.C. 42 § 1996] The regulations encourage agencies to consider intangible social and cultural values related to historic properties. The regulations provide for traditional cultural leaders and other Native Americans to participate in the consultation process when historic properties of importance to them may be affected. [Sections 800.1(c)(2)(iii), 800.4(a)(1)(iii), 800.5(a), and 800.5(e)(1)(ii); see also Sections 800.7, 800.11, and 800.13]

*Coordination with State and local reviews*

Section 106 review is a Federal requirement separate from any environmental or planning reviews required by State and local laws and ordinances. Coordination of Section 106 review with State and local review is recommended, however, to avoid redundant efforts. Under some circumstances, Section 106 review and review under State and local laws may be explicitly combined. Section 800.7 of the regulations permits SHPOs to establish review processes which, when approved by the Council, can stand in place of Section 106 review. Such processes could be identical with processes established to carry out the requirements of a State historic preservation or environmental statute. Section 800.1(c)(2)(i) of

the regulations permits a local government whose historic preservation program has been certified pursuant to Section 101(c)(1) of NHPA to assume the duties of the SHPO when the local government, the SHPO, and the Council so agree. A local government assuming such duties could carry them out in coordination with functions required by a local ordinance. Section 800.1(c)(2)(iii) of the regulations provides for coordination of Section 106 review with the historic preservation procedures of Indian tribes.

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### Basic Section 106 review steps

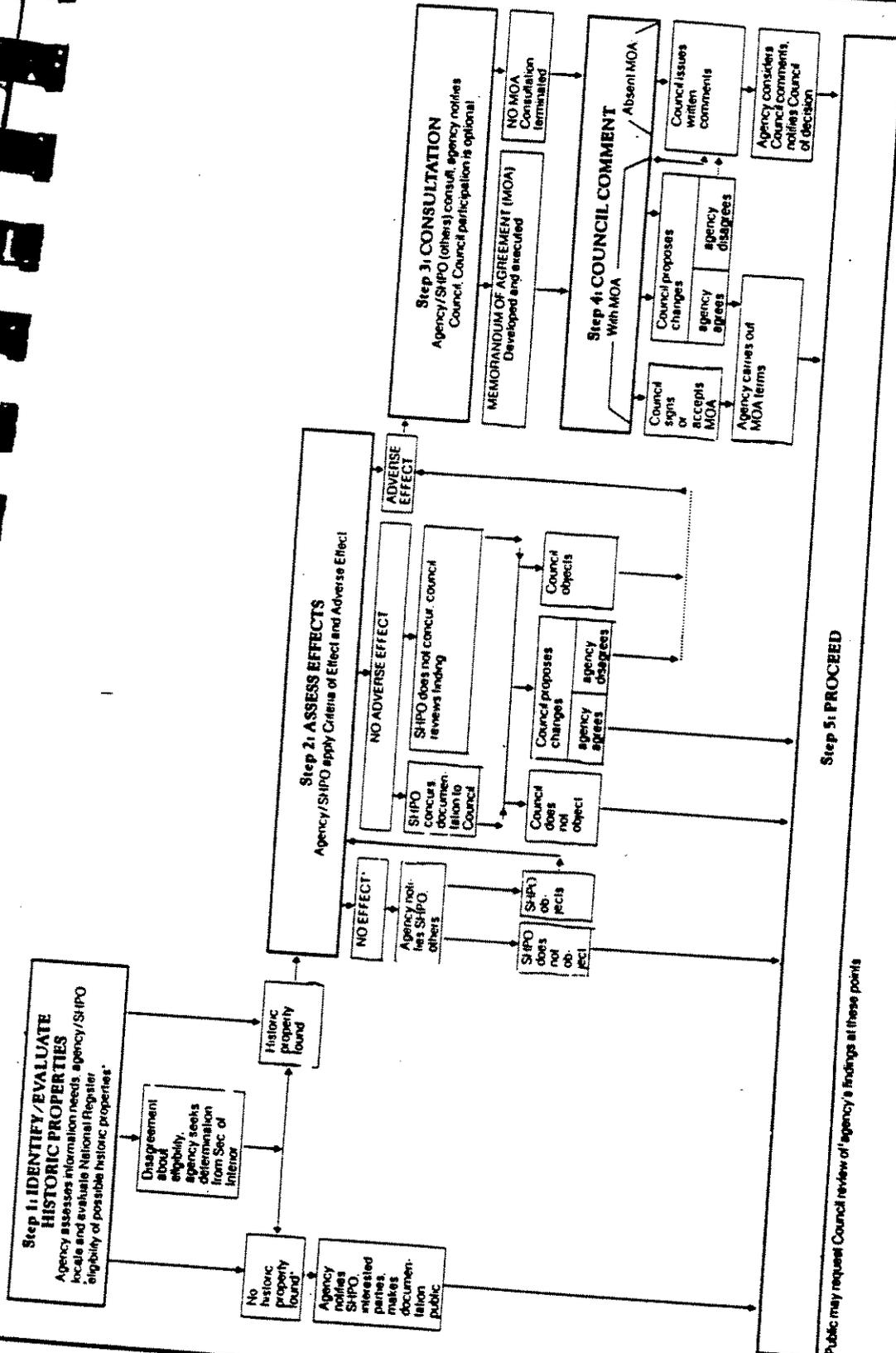
The Section 106 review process includes steps for identifying and evaluating historic properties, assessing effects of an undertaking on them, and consultation about ways to avoid, reduce, minimize, or otherwise address any possible adverse effects.

Consultation to address potential adverse effects always involves the agency and generally the SHPO. Typically, consultation results in a Memorandum of Agreement (MOA), which sets out specific steps for avoiding or reducing harm to historic properties. When an MOA has been accepted by the Council, it serves as the Council's comment under Section 106. In those cases in which the consulting parties cannot reach agreement, consultation may be terminated and the agency may request Council comments directly.

Normally, Section 106 review is carried out on a project-by-project basis. As an alternative, however, agencies may obtain Council comment on a programmatic basis, eliminating the need for case-by-case review. This approach can save time and money, and institutionalize attention to historic properties in agency program operation.

The remainder of this booklet briefly explains each step of the Section 106 review process. Bracketed references throughout refer the reader to the Council's current regulations, and marginal notes refer to additional guidelines, regulations, and publications.

Figure 1: Section 106 flowchart



PARTICIPANT'S DESK REFERENCE

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## Preliminary determinations

Before beginning identification, the agency establishes that its proposed action constitutes an "undertaking." [Section 800.4(a)(1)] That is, the agency determines whether the proposed action could result in changes in the character or use of any historic properties, in the event any such properties are located in the area of potential effects. [Section 800.2(o)]

It is important to note that determining whether a given action constitutes an "undertaking" does not require that an agency know that historic properties will be subject to change. Considering whether an action could affect historic properties is a prospective activity in which the agency considers generically whether the action is of a sort that could affect historic properties, if any are there to be affected.

For example, a program designed to provide day-care assistance for Federal workers would not normally have the potential to affect historic properties, and so would not be an undertaking for purposes of Section 106. But, if the program could result in the modification or construction of buildings to provide space for day care facilities, the program would be an undertaking, because if any of the existing buildings or new construction sites were historic properties, the program would have the potential to affect them.

### *Determining the area of potential effects*

The agency must also determine prior to the identification stage the undertaking's "area of potential effects," which is defined as "the geographic area or areas within which an undertaking may cause changes in the character or use of historic properties, if any such properties exist." [Section 800.2(c)] It is not necessary to know that the area in question contains historic properties, or even to suspect that such properties exist, in order to recognize the area of potential effect.

For example, the area in which a federally assisted construction project will disturb land or result in the alteration of buildings is always part of the area of potential effects, because if any historic properties exist there, they will surely experience change because of the project.

The area of potential effects need not be a contiguous area; it can include multiple alternative project sites or multiple areas in which possible changes are anticipated. For example, the area of potential effects of a highway construction project might include alternative construction corridors; locations from which borrow material might be obtained; areas where access might be provided to archeological sites, resulting in their disturbance by artifact seekers; areas where visual or audible changes could occur; and areas where the project could result in modified traffic patterns that might affect the livability or commercial viability of historic districts.

## Step 1: Identify and Evaluate Historic Properties

**Note:** Agencies should refer to the Council/National Park Service publication, *Identification of Historic Properties: A Decision-making Guide for Managers (Identification)* for detailed guidance.

Identification of historic properties is the responsibility of the agency official with direct or indirect jurisdiction over the undertaking. [Section 800.4] When the undertaking involves providing assistance or issuing a license, the agency may rely on the applicant to assist with identification efforts, but the final responsibility for identification is the agency's. [Section 800.1(c)(1)(i)] Council regulations state that efforts to identify historic properties should follow *Archeology and Historic Preservation: Secretary of the Interior's Standards and Guidelines* and the agency's program for compliance with Section 110(a)(2) of NHPA. [Section 800.4(b)]

### Assessing information needs

The first requirement in identification is that the agency review all available information that can help in determining whether there might be historic properties in the area of potential effects. [Section 800.4(a)(1)]

**Note:** The National Register also publishes bulletins that provide special guidance regarding evaluation and documentation of particular property types.

One readily available source of information on known historic properties is the published *National Register of Historic Places*. (See Appendix A for further information.) In addition, listings of properties already determined by the Secretary of the Interior to be eligible for the National Register are published periodically in the *Federal Register*. Information on National Register listings may also be obtained from the SHPO.

Although the published National Register is an important source of information on what is already known about the historic resources of an area, it cannot be assumed to be comprehensive. Historic properties are constantly being discovered and added to the National Register; many others remain to be discovered. Thus, the fact that an area of potential effects contains no properties presently included in or determined eligible for inclusion in the National Register does not mean that it contains no historic properties subject to review under Section 106

#### *Other sources of information and advice*

Therefore, in addition to reviewing information on properties already recorded in the National Register, the agency must consult other sources. The SHPO, a primary source for information, can advise the agency on previous identification studies pertinent to the area, previously recorded historic properties not listed in the National Register, and the likelihood that undiscovered or unrecorded properties exist in the area. The SHPO can provide information on properties being nominated and on State registers or State inventories. [Section 800.4(a)(1)(ii)] Other sources of information include the State Archeologist (where such an official exists), local academic institutions and museums, historical and archeological societies, local governments, Indian tribes, and published or unpublished background studies pertinent to the area. [Section 800.4(a)(1)(i)]

**Note:** The Council publication, *Public Participation in Section 106 Review: A Guide for Managers*, provides guidelines for involvement of interested persons throughout Section 106 review.

The regulations require that the agency also seek information from local governments, Indian tribes, public and private organizations, and others who may have knowledge of historic properties in the area or who may be concerned about such properties. This requirement serves two purposes: it aids the agency in determining what it needs to do to identify historic properties, and it permits interested persons to express their interests in historic properties early in the agency's planning process so they can be considered in a timely manner. The agency is encouraged to use its existing planning process to seek such information. [Section 800.4(a)(1)(iii)] Agencies are encouraged, however, to examine their administrative process to ensure that they provide adequately for this and other forms of public participation, and to consult with the Council to develop improved processes if impediments to public participation are found to exist. [Section 800.1(b)]

The agency must also request the SHPO's views about whether further actions are needed to identify historic properties—for example, field surveys or additional background research. [Section 800.4(a)(1)(ii)] Based on its review of available information and the advice of the SHPO, the agency then decides whether any further information gathering will be necessary to identify historic properties. Typical further actions include field surveys and the use of predictive models, which are discussed below and in *Identification*. [Section 800.4(a)(2)]

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### Locating historic properties

**Note:** The specific standards and guidelines that are applicable to this stage of Section 106 review are the Secretary of the Interior's Standards and Guidelines for Preservation Planning, published at 48 FR 44720, September 29, 1983, and the Secretary of the Interior's Standards and Guidelines for Identification, published at 48 FR 44723, September 29, 1983.

#### *Surveys and predictive models*

**Note:** Additional useful guidance about surveys can be found in two National Park Service publications: *Guidelines for Local Surveys: A Basis for Preservation Planning* and *The Archeological Survey: Methods and Uses*. See Appendix A for more information on this guidance.

Based on its assessment of existing information, the agency is subsequently required to make a reasonable and good faith effort to locate historic properties that may be affected by the undertaking and to gather enough information to evaluate the properties' eligibility for inclusion in the National Register. This effort is carried out in consultation with the SHPO and should be consistent with *Archeology and Historic Preservation: Secretary of the Interior's Standards and Guidelines*. This effort should also be consistent with the agency's program for carrying out the identification requirements set forth in Section 110(a)(2) of NHPA, guidance for which is included in the Section 110 Guidelines. The Council/National Park Service publication *Identification* should also be referenced.

If a survey is needed, the SHPO will probably be able to provide State or regional guidelines for surveying and forms for recording survey methods and properties discovered. The SHPO may also be able to help identify individuals, institutions, and firms that can do survey work under contract. Some SHPOs conduct survey work themselves on behalf of Federal agencies, an activity authorized by Section 110(g) of NHPA. When large areas of potential effects are involved, an agency may find it useful to prepare a predictive model—that is, a set of predictions about where historic properties of different kinds are likely to occur, based on background data—and then to orient its survey work to test and use this model as a guide to conducting and analyzing fieldwork.

Reports of all identification work should be filed with the SHPO—even if no historic properties were found—so that the results can be incorporated into the SHPO's inventory of historic properties. This is not a requirement of the regulations, but it will help prevent redundant future studies of the same area.

*Identifying classes of historic properties*

In some cases, agencies may find it useful to identify "classes" of historic properties. For example, if an undertaking will have difficult-to-define effects on a large area—as would be the case when a federally assisted water project makes it possible to begin irrigation agriculture in a large valley, or when a federally assisted housing program will rehabilitate buildings throughout a city—it may not be feasible to identify all individual properties subject to effect prior to project approval. It may, however, be possible to predict that the undertaking will affect certain kinds of archeological sites in the agricultural valley or certain kinds of historic buildings in the city. Knowing that such effects will occur, it may be possible to develop ways to protect the significant characteristics of such properties. Thus the fact that it may not always be feasible to identify specific historic properties does not mean that an agency cannot carry out its responsibilities under Section 106.

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## Evaluating historic significance

When properties are found that may be historic but have not been evaluated, the agency's ensuing responsibility is to ascertain whether the properties are eligible for the National Register. To determine whether a property is eligible, the agency reviews the property with reference to the National Register listing criteria, listed on page IV-9 of this booklet. The regulations require that agencies also follow the *Secretary of the Interior's Standards and Guidelines for Evaluation*, published at 48 FR 44723-44726. [Section 800.4(c)(1)] The regulations require that the agency's determination be made in consultation with the SHPO; if the SHPO does not provide views, the SHPO is presumed to agree with the agency's determination. [Section 800.4(c)(5)]

In evaluating properties for historic significance agencies should be aware that the passage of time and changing perceptions of significance may justify re-evaluation of properties that were previously determined to be eligible or ineligible for the National Register. [Section 800.4(c)(1)]

*When the agency and SHPO agree about eligibility*

The agency and SHPO consult about eligibility for each property within the area of potential effects that may be historic. If the agency and SHPO agree that a property is eligible, it is treated as eligible for purposes of Section 106. [Section 800.4(c)(2)] If they agree that a property is not eligible, it is treated as not eligible for purposes of Section 106. [Section 800.4(c)(3)] If the Council is requested to review an eligibility finding, it will refer the matter to the Secretary of the Interior. [Section 800.6(e)(3)]

*When disagreement about eligibility occurs*

If the agency and the SHPO cannot agree about National Register eligibility, the agency must obtain a formal determination from the Keeper of the National Register, who acts on behalf of the Secretary of

the Interior, in accordance with National Park Service regulations. [36 CFR Part 60] If either the Council or the Secretary so requests—as either might after reviewing an agency/SHPO agreement about eligibility—the agency must obtain a formal determination of eligibility from the Keeper. [Section 800.4(c)(4)]

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### **Agency action when no historic properties are found**

Based on the identification process described above, the agency may find that no historic properties that may be affected exist within the area of potential effects. In that event, the agency must provide documentation to the SHPO that it has found no historic properties; should notify other interested parties, such as those with whom the agency has consulted during identification; and should make pertinent documentation available to the public. [Section 800.4(d)]

Once the agency has taken the above actions, it has completed the Section 106 process. [Section 800.4(d)] However, any member of the public may question the agency's determination that there are no historic properties and may request a Council review of that finding. The Council must conduct its review within 30 days of such a request; the Council's finding may cause the agency to reconsider its finding. [Section 800.6(e)]

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### **Agency action when historic properties are found**

If the agency finds one or more historic properties within the area of potential effects, the agency proceeds to Step 2 in Section 106 review, assessing effects. [Section 800.4(e)]

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## **Step 2: Assess effects**

Once the agency has identified historic properties, it then determines whether its proposed activity could affect the properties. Again, the agency consults with the SHPO and takes into account the views of any interested persons. [Section 800.5(a)] The agency's judgment about whether there could be an effect is based on the criteria of effect and adverse effect, which are found in the Council's regulations. [Section 800.9] See Figure 2 for a summary of the Council's criteria of effect and adverse effect.

## Figure 2: Criteria of Effect and Adverse Effect

### Criterion of Effect:

"An undertaking has an effect on a historic property when the undertaking may alter characteristics of the property that may qualify the property for inclusion in the National Register. For the purpose of determining effect, alteration to features of a property's location, setting, or use may be relevant depending on a property's significant characteristics and should be considered." [Section 800.9(a)]

### Criteria of Adverse Effect:

"An undertaking is considered to have an adverse effect when the effect on a historic property may diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Adverse effects on historic properties include, but are not limited to:

- Physical destruction, damage, or alteration of all or part of the property;
- Isolation of the property from or alteration of the character of the property's setting when that character contributes to the property's qualification for the National Register;
- Introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting;
- Neglect of a property resulting in its deterioration or destruction; and
- Transfer, lease, or sale of the property." [Section 800.9(b)]

### Exceptions to the Criteria of Adverse Effect:

"Effects of an undertaking that would otherwise be found to be adverse may be considered as being not adverse for the purpose of these regulations:

- When the historic property is of value only for its potential contribution to archeological, historical, or architectural research, and when such value can be substantially preserved through the conduct of appropriate research, and such research is conducted in accordance with applicable professional standards and guidelines;
- When the undertaking is limited to the rehabilitation of buildings and structures and is conducted in a manner that preserves the historical and architectural value of affected property through conformance with the Secretary's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings; or
- When the undertaking is limited to the transfer, lease, or sale of historic property, and adequate restrictions or conditions are included to ensure preservation of the property's significant historic features." [Section 800.9(c)]

## Applying the criteria of effect and adverse effect

Basically, if the undertaking could change in any way the characteristics that qualify the property for inclusion in the National Register, for better or for worse, it is considered to have an "effect." If the undertaking could diminish the integrity of such characteristics, it is considered to have an "adverse effect."

Effects may occur at the same time and place as the undertaking, or they may occur later than or at a distance from the location of the undertaking. For example, highway construction clearly has the potential to affect historic properties in the area or areas the highway traverses. If it can reasonably be anticipated that the highway, once built, will cause or ac-

celerate changes in land use or traffic patterns in other areas, these changes are also potential effects of the action. The latter kind of effect is sometimes called "indirect," though this terminology is not used in the Council's regulations.

When applying the criteria of effect and adverse effect, there are three possible findings:

- **No effect:** There is no effect of any kind (that is, neither harmful nor beneficial) on the historic properties;
- **No adverse effect:** There could be an effect, but the effect would not be harmful to those characteristics that qualify the property for inclusion in the National Register; or
- **Adverse effect:** There could be an effect, and that effect could diminish the integrity of such characteristics.

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### Agency action for a finding of no effect

If there is no effect on historic properties, the agency must

- notify the SHPO and any interested persons who have made their concerns known to the agency (for example, parties with whom the agency has consulted during identification) that there has been a finding of no effect; and
- compile the documentation that supports the finding and make that documentation available for public inspection.

Unless (a) the SHPO objects to the finding of no effect within 15 days, (b) the agency reconsiders its finding after review by the Council under Section 800.6(e)(1), or (c) the project changes in some way after the determination is made, these actions complete the agency's Section 106 responsibilities. [Section 800.5(b)]

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### Agency action if effect is found

If the agency determines that there is an effect, or if the SHPO objects to the agency's finding of no effect, the agency must consider whether the effect is adverse, using the criteria of adverse effect in the regulations. This is done in consultation with the SHPO. [Sections 800.5(c), 800.5(b), and 800.9(b)]

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#### If the effect is not adverse

If there is effect, but the effect is not considered adverse, the agency has a choice. It may either

- obtain the SHPO's concurrence with the finding of no adverse effect and then notify the Council with summary documentation, which it must also make available for public inspection [Section 800.5(d)(1)(i)]; or
- submit the finding of no adverse effect directly to the Council for a 30-day review period and notify the SHPO of its action. In this case, the agency must submit specific documentation spelled out in Section 800.8(a) of the regulations. [Section 800.5(d)(1)(ii)]

*Submitting notice with summary documentation to the Council when SHPO concurs*

When the SHPO concurs with the agency's finding of no adverse effect, the agency should provide the following summary documentation when notifying the Council:

- a map or other documentation showing the area of potential effects,
- the name and a brief description of the undertaking,
- a brief summary of the historic properties subject to effect,
- a brief explanation of why the undertaking will have no adverse effect on the historic properties involved,
- the written concurrence of the SHPO, and
- the views of interested persons, if any.

*Submitting no adverse effect documentation for Council review without SHPO concurrence*

When the agency chooses to have the Council review its finding of no adverse effect (without SHPO concurrence), Section 800.8(a) of the regulations prescribes the following documentation to be sent to the Council:

- a description of the undertaking, including photographs, maps and drawings, as necessary;
- a description of historic properties that may be affected by the undertaking;
- a description of the efforts used to identify historic properties;
- a statement of how and why the criteria of adverse effect were found inapplicable; and
- the views of the SHPO, affected local governments, Indian tribes, Federal agencies, and the public, if any were provided, as well as a description of the means employed to solicit those views.

The Council's 30-day review period does not commence until all of this documentation has been provided.

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### Council response to a determination of no adverse effect

The Council may object to determinations of no adverse effect, whether made with the concurrence of the SHPO or submitted directly to the Council. If the Council does not object to the agency's determination within 30 days after it receives the agency's documentation, the agency has completed its Section 106 requirements. [Section 800.5(d)(2)]

If the Council does object, it may propose changes in or conditions to the agency's finding. If the agency accepts and carries out these changes, it has completed its Section 106 requirements. [Section 800.5(d)(2)]

If the agency does not accept proposed Council changes or if the Council objects to the finding without proposing changes, the effect is considered adverse, and the agency then proceeds to Step 3 of the Section 106 process, consultation to resolve adverse effect. [Section 800.5(d)(2)]

If the agency requires the Council's response in less than the 30 days allowed by the regulations, the agency should contact the Council to make special arrangements.

#### *Agency fulfillment of conditions*

In reaching a determination of no adverse effect, an agency may specify that the undertaking will be carried out in accordance with particular conditions (for example, that construction specifications will be reviewed and approved by the SHPO), or it may agree to such conditions when proposed by the SHPO or by the Council, as described above. If the agency has committed itself to conditions in this way, it must honor its commitments as it proceeds with its undertaking. [Section 800.5(d)(2)]

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#### If the effect is adverse

#### *Agency action for a finding of adverse effect*

If there is adverse effect, the agency proceeds with Step 3 of the Section 106 process, consultation to resolve adverse effect. [Section 800.5(e)]

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## Step 3: Consultation to resolve adverse effect

When an agency's proposed action will cause adverse effect, the agency initiates consultation to avoid or reduce the adverse effect. At a minimum, consultation usually takes place between the agency and the SHPO. The agency is required to notify the Council that consultation is beginning. The Council may participate in the consultation if either the SHPO or the agency so requests, and may also do so without an invitation to join. [Section 800.5(e)] If the SHPO declines to participate, the agency must consult with the Council. [Section 800.1(c)(1)(ii)]

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### Involving interested persons

Interested persons must be invited to join the consultation under some circumstances, and may be invited to do so in other cases at the discre-

tion of the agency, the SHPO, and the Council, if participating. Interested persons who must be invited to consult are the following:

- The head of a local government, upon his or her request, when the undertaking may affect historic properties within the local government's jurisdiction; [Section 800.5(e)(1)(i); see also 800.1(c)(2)(i)]
- Applicants for and holders of grants, permits, or licenses involved in the undertaking, and owners of affected lands, upon their request; [Section 800.5(e)(1)(iii); see also 800.1(c)(2)(ii)]
- The representative of an Indian tribe, when the undertaking will affect Indian lands; [Sections 800.5(e)(1)(ii) and 800.1(c)(2)(iii)] and
- Other interested persons, when the agency official, SHPO, and the Council (if the latter is a consulting party) jointly deem it appropriate. [Section 800.5(e)(1)(iv)]

The regulations identify traditional cultural leaders of Indian tribes and other Native Americans as interested persons when historic properties of significance to such persons are involved, either within or beyond the boundaries of Indian lands. [Section 800.1(c)(2)(iii)] The regulations more generally identify "the public" as potentially interested persons. [Section 800.1(c)(2)(iv)] Members of the public who often participate in consultation include local historical, historic preservation, and archeological organizations; civic and business associations; neighborhood organizations; and individuals concerned with historic properties in the area of potential effects.

#### *Purpose of consultation*

The purpose of consultation is to seek agreement on ways to avoid, reduce, minimize, or mitigate the adverse effects of the undertaking on historic properties. A successful consultation accommodates the needs of the agency's undertaking and the integrity of the historic property in a way that the consulting parties agree best serves the public interest.

#### *Considering alternatives that avoid or minimize damage*

Consultation typically gives first consideration to alternative ways of accomplishing the agency's goals without doing unacceptable damage to historic properties. Alternative sites, alternative undertakings, and alternative designs are typically addressed in an agency's planning process as well as during consultation. The alternative of not carrying out the undertaking at all should also always be considered in weighing the importance of the undertaking against the severity of its effects.

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### **Mitigation of adverse effect**

Consultation also considers mitigation alternatives, that is, actions that limit or compensate for the damage an undertaking does to historic properties. Typical mitigation measures include

- limiting the magnitude of the undertaking;

- modifying the undertaking through redesign, reorientation of construction on the project site, or other similar changes;
- repair, rehabilitation, or restoration of an affected historic property (as opposed, for instance, to demolition);
- preservation and maintenance operations for involved properties;
- documentation (drawings, photographs, histories) of buildings or structures that must be destroyed or substantially altered;
- relocation of historic properties; and
- salvage of archeological or architectural information and materials.

#### *Unavoidable damage*

There are instances in which no alternatives or mitigation are feasible and the undertaking's benefits in relation to the significance of the property justify damage—or even destruction—as an acceptable loss. Agreement on this is also a possible outcome of consultation.

#### *Documentation provided to consulting parties*

The agency official provides each consulting party with documentation for use during consultation. [Section 800.5(e)(2)] The following documentation is required:

- A description of the undertaking, including photographs, maps, and drawings, as necessary;
- A description of the efforts to identify historic properties;
- A description of the affected historic properties, using materials already compiled during evaluation of significance, as appropriate; and
- A description of the undertaking's effects on historic properties. [Section 800.8(b)]

Other documentation that may be developed in the course of consultation is to be shared with the consulting parties. [Section 800.5(e)(2)]

#### *Public involvement in consultation*

In addition to involving interested persons in consultation, the agency official must provide opportunities for members of the public to receive information and express their views about preservation issues pertinent to the undertaking. Agency officials are encouraged to use procedures for public involvement already in place within their agencies, but should ensure that these procedures adequately inform the public of preservation issues so as to elicit and seek to resolve public concerns about such issues. The agency official, SHPO, or Council may meet with interested persons or members of the public or may conduct a public information meeting in order to help involve the public. [Section 800.5(e)(3); see also Section 800.1(c)(2)(iv)]

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## The Memorandum of Agreement (MOA)

In most cases, the consulting parties can agree on ways to accommodate historic preservation concerns as the undertaking proceeds. The product of consultation in such a case is a Memorandum of Agreement (MOA). An MOA specifies how the undertaking will be carried out in order to avoid or mitigate adverse effects, or documents acceptance of such effects.

Since MOAs are legally binding documents, care must be taken in drafting them. Suggested language for use in MOAs addressing commonly recurring types of undertakings and effects can be found in the Council's *Preparing Agreement Documents*.

The parties who sign an MOA may vary. When the Council participates in consultation, the Council, the agency, and the SHPO are signatories; when the Council is not a participant, the MOA is signed by the agency and the SHPO and is then submitted to the Council for review. [Section 800.5(e)(4)] Should the SHPO decline to sign an MOA, however, or fail to respond within 30 days to the agency's request for the SHPO's participation, the MOA may be signed by the agency and the Council, without the SHPO. [Section 800.1(c)(ii)]

When an undertaking will affect Indian lands, the governing body of the responsible Indian tribe must be invited to concur in the MOA. If a tribe declines such an invitation, the MOA can still go forward without it. [Section 800.1(c)(2)(iii)] Although the regulations do not require that other consulting parties be invited to concur in the MOA, the agency, the SHPO, and the Council (if it is a participant in consultation) may agree to extend such an invitation. [Section 800.5(e)(4)]

If the Council is a consulting party, its execution of the MOA concludes the Section 106 process. If the Council is not consulting party, the agency submits a signed MOA for Council review, [Section 800.5(e)(4)] which takes place as described below under Step 4.

### *Amendments to an MOA*

If an undertaking is modified after an MOA is executed, or if for some reason the terms of the MOA cannot be carried out, it is necessary to amend the MOA. Amendments to an MOA are developed through consultation in the same manner as the original MOA. [Section 800.5(e)(5)]

### *If consultation fails*

The Council encourages agencies to use consultation to the fullest extent practicable. However, if the consulting parties cannot agree on terms for an MOA, the agency, the SHPO, or the Council may state that further consultation will not be productive and thereby terminate consultation.

If this happens, the agency official must request the Council's comments on the undertaking, notifying all other consulting parties of its request and providing the Council with specific documentation. [Section 800.5(e)(6)] See Step 4, Council comment, for a discussion of how this is done.

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## Step 4: Council comment

Council comment can occur in one of two ways:

- **With an MOA:** If the Council is a consulting party, as noted under Step 3, its execution of the MOA serves as the Council's comment on the undertaking. If the Council is not a consulting party, but rather reviews and accepts an MOA submitted by an agency, its acceptance of the submitted MOA serves as the Council's comment.
- **Absent an MOA:** If consultation fails and the agency submits no MOA, the Council issues written comments.

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### Council comment, with an MOA

When the Council has been a consulting party, neither the MOA nor additional documentation need be submitted to the Council after an MOA is executed, since these will already have been obtained by the Council. When the Council has not been a consulting party, the agency submits the MOA, signed by all consulting parties, to the Council for review. [Section 800.5(e)(4)] The agency must also submit with the MOA specific documentation, which is spelled out in Council regulations at Sections 800.8(b) and 8(c) and described below. [Section 800.6(a)(1)]

#### *Documentation for Council comment, with an MOA*

The Council requires the following documentation for review of an MOA:

- copies of the basic descriptive data developed when consultation was initiated (see "Documentation provided to consulting parties" on page IV-24);
- the signed MOA;
- a description and evaluation of any proposed mitigation measures or alternatives that were considered to deal with the undertaking's effects; and
- a summary of the views of the SHPO and any interested persons. [Section 800.8(c)]

Council review of an MOA submitted by the agency yields one of the following three results:

- Within 30 days after it receives that MOA and accompanying documentation, the Council accepts the MOA and informs all consulting parties. This concludes the Section 106 process. [Section 800.6(a)(1)(i)]
- Within 30 days after it receives the MOA and accompanying documentation, the Council advises the agency of changes to the MOA that

would make it acceptable to the Council. If the agency and SHPO agree to these changes, or if the agency, the SHPO, and the Council reach agreement on alternative changes, the modified MOA will be accepted by the Council, concluding the Section 106 process. [Section 800.6(a)(1)(ii)] If the agency, SHPO, and Council cannot agree on changes, the agency notifies the Council. The Council provides written comments to the agency within 30 days of receiving this notice. [Section 800.6(a)(2)] OR

- Within 30 days after it receives the MOA and accompanying documentation, the Council advises the agency that it has decided to comment directly on the undertaking rather than accepting or seeking to modify the agreement. Unless the agency agrees to a longer time period, the Council issues written comments within 60 days after it receives the complete MOA submission. [Section 800.6(a)(1)(iii)]

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### Council comment, absent an MOA

When consultation has been terminated and there is no MOA, the agency requests written Council comments directly. In making such a request, the agency must provide the Council with specific documentation, which is spelled out in Council regulations at Section 800.8(d). The agency may request that the Council provide its written comments within 60 days after the agency submits complete documentation. [Section 800.6(b)(1)]

#### *Documentation for Council comment, absent an MOA*

Documentation required for Council comment, absent an MOA, is as follows:

- a description of the undertaking, with photographs, maps, and drawings, as necessary;
- a description of the efforts to identify historic properties;
- a description of the affected historic properties, with information on the significant characteristics of each property;
- a description of the effects of the undertaking on historic properties and the basis for the determinations;
- a description and evaluation of any alternatives or mitigation measures that the agency proposes for dealing with the undertaking's effects;
- a description of any alternatives or mitigation measures that were considered but not chosen and the reasons for their rejection;
- documentation of consultation with the SHPO regarding the identification and evaluation of historic properties, assessment of effect, and any consideration of alternatives or mitigation measures;
- a description of the agency's efforts to obtain and consider the views of affected local governments, Indian tribes, and other interested persons;

- the planning and approval schedule for the undertaking; and
- copies or summaries of any written views submitted to the agency concerning the effects of the undertaking on historic properties and alternatives to reduce or avoid these effects. [Section 800.8(d)]

The agency should provide additional information concerning the undertaking so that the Council can complete an adequate review of the agency's proposed activity. The Council may also ask the agency to help arrange an onsite inspection of the undertaking site and a public meeting. [Section 800.6(b)(2)]

The Council issues its written comments to the head of the agency that has requested comments, providing copies to the SHPO, interested persons, and others as appropriate. [Section 800.6(b)(3)]

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## Step 5: Proceed

### *Agency's response to Council comment*

**With an MOA:** If the Council has commented by executing or accepting an MOA, the agency simply proceeds with its undertaking in accordance with the terms of that MOA. Carrying out the terms of the MOA evidences that the agency has fulfilled its Section 106 responsibilities. [Section 800.6(c)(1)]

**Absent an MOA:** Absent an MOA, the agency must take into account the Council's written comments and then make a final decision about whether and how to proceed with its undertaking. The agency notifies the Council of its decision, if possible before work on the undertaking begins. [Section 800.6(c)(2)]

Either outcome concludes the Section 106 review process and satisfies the agency's Section 106 responsibilities, unless subsequent changes in the undertaking or in the agency's implementation of the MOA require further review (see "Amendments to an MOA" above), or unless unexpected effects are discovered during implementation (see next section).

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## Some special situations

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### Failure to carry out an MOA

If an agency has signed an MOA but fails to carry it out, the agency must resubmit the undertaking for review in the form of a revised MOA under Section 800.6(a), or as a request for comment under Section 800.6(b). [Section 800.6(c)(1)]

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### Agency foreclosure of the Council's opportunity to comment

The Council may advise an agency that, in the Council's view, the agency has not provided the Council a reasonable opportunity to comment. This situation is most likely to arise if an agency has proceeded on an undertaking before Section 106 review has taken place or been completed, so that alternatives to the agency's approach can no longer realistically be considered.

The decision to advise an agency that it has foreclosed the Council's opportunity to comment is made by majority vote of the Council membership or by majority vote of a panel consisting of three or more Council members with the concurrence of the Council chairman. [Section 800.6(d)(1)]

Before determining whether an agency has foreclosed Council opportunity to comment, the Council will notify the agency that it is considering such an action and give the agency a reasonable opportunity to respond. [Section 800.6(d)(2)]

Foreclosing the Council's opportunity to comment leaves the agency vulnerable to litigation for failure to carry out its Section 106 responsibilities.

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### Public requests for Council review of agency determinations

The Council has general authority to monitor how its regulations are complied with and to respond to public inquiries. There are several points in Section 106 review at which the regulations specify that any person, regardless of his or her formal involvement in the process, can request Council review of an agency's finding. [Section 800.6(e)] Such review may address

- identification of historic properties (described at Section 800.4 (b));
- evaluation of historic significance of properties (described at Section 800.4(c));
- finding that no historic properties are present (described at Section 800.4(d)); and
- finding no effect on historic properties (described at Section 800.5(b)).

When requested, the Council contacts the relevant agency and others for information, and must complete a review within 30 days of the request and advise the agency, SHPO, and requestor of the results. [Section 800.6(e)(1)] In light of the Council's views, the agency should reconsider its finding. However, such a request for Council review does not require the agency to suspend action on an undertaking. [Section 800.6(e)(2)]

When an inquiry concerns an agency's judgment about the National Register eligibility of a potential historic property, the Council refers the

matter to the Secretary of the Interior, who is responsible for issuing formal determinations of National Register eligibility. [Section 800.6(e)(3)]

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### Other special considerations

The regulations also provide for several special situations agencies might encounter in the course of their business. These are:

- adverse effects on National Historic Landmark properties, [Section 800.10]
- properties discovered after a project has begun, [Section 800.11] and
- Federal actions taken in response to a declared disaster or state of emergency. [Section 800.12]

Discussion of each these special situations follows.

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#### Protecting National Historic Landmarks

Section 110(f) of NHPA requires that agency officials "to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm" to any National Historic Landmark (NHL) that may be directly and adversely affected by an undertaking. NHLs are a special category of historic property designated by the Secretary of the Interior as nationally significant in American history, architecture, archeology, engineering, or culture in accordance with the Historic Sites Act of 1935 [U.S.C. §§ 461-467].

When dealing with NHLs, agencies must use the Section 106 review process described at Sections 800.4 through 800.6, with the following special provisions:

- The Council must be included as a consulting party when an MOA is being developed; [Section 800.10(1)]
- The Council may request from the Secretary of the Interior (under ~~Section 213~~ of NHPA) a report detailing the significance of the NHL, describing effects of the undertaking on it, and recommending measures to avoid or mitigate harm to it; [Section 800.10(2)] and
- The Council must report the outcome of Section 106 review to the President, Congress, and Secretary of the Interior, as well as the head of the responsible Federal agency. [Section 800.10(3)]

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#### Properties discovered after a project has begun

Sometimes, even after an agency has fully complied with Section 106 requirements, historic properties are discovered after work has begun on a project. This often happens in the case of projects that involve excavation or ground-disturbing activities, when previously undiscovered

archeological resources may be uncovered during the process of construction or excavation. In other cases, a project has unexpected effects on known historic properties.

If an agency discovers properties that have not previously been listed in or formally determined eligible for listing in the National Register, it may assume the properties to be eligible for purposes of Section 106. [Section 800.11(d)(1)]

*When the agency develops a plan for discoveries*

In cases where newly discovered historic properties are likely, the agency is encouraged to develop a plan for treating such properties before work begins. Often, agencies will realize as they complete the identification step of Section 106 review [Section 800.4] that discovery of additional properties is likely later on.

For example, an agency planning a surface mine or other project that will involve deep ground disturbance might find that certain portions of its project area contain deep sediments, under which very ancient archeological sites may lie buried. However, it might not be financially or environmentally feasible to remove such sediments before the mining or construction itself gets underway. In such a case, development of a plan to handle discoveries during implementation would be appropriate.

Plans for handling discoveries should be included in the documentation developed during the assessment of effects [Section 800.5] and consultation [Section 800.5(e)] steps of Section 106 review. [Section 800.11(a); see also Section 800.5] In the surface mine example mentioned above, such a plan might provide for stripping the sediment with care and providing time and funds for necessary archeological survey, testing, and data recovery before excavation continues.

When an agency has developed such a plan and then discovers historic properties after completing Section 106 requirements, the agency simply follows the plan that was approved during the consultation and Council comment steps of Section 106 review. When it has done so, the agency has met its Section 106 requirements regarding the newly discovered properties. [Section 800.11(b)(1)]

*When the agency has no plan for new discoveries*

If an agency has not prepared a plan in anticipation of newly discovered historic properties, the procedure is a bit more complex. In this case, the agency must afford the Council an opportunity to comment on effects to these newly discovered historic properties in one of the following ways:

- The agency can comply with Section 800.6, which means either consulting to develop an MOA and submitting that MOA for Council review, or requesting Council comments without an MOA. (See pages IV-26 to 28 of this booklet for further discussion of Council comment, Step 4 of Section 106 review.) [Section 800.11(b)(i)] If the agency chooses this option, the Council will provide its comments in a time period consistent with the agency's schedule, even if this is shorter than the 30 days normally allotted for Council review. [Section 800.11(c)(1)], or

Note: Specific guidance for compliance with AHPA is the responsibility of the Department of the Interior. The Department of the Interior is developing AHPA regulations which, when issued, will appear at 36 CFR Part 66. (See Appendix A for further information.)

- The agency can develop and implement actions to handle the newly discovered properties, taking into account the undertaking's effects on them and comments received from the SHPO and the Council. [Section 800.11(b)(2)(ii)] When an agency chooses this option, it should notify the SHPO and Council at the earliest possible time. The Council will provide interim comments about the plan to the agency within 48 hours of the request, and final comments within 30 days of the request. [Section 800.11(c)(2)], or
- The agency can comply with the requirements of the Archeological and Historic Preservation Act (AHPA) instead of Section 106 requirements, if the newly discovered historic property is principally of archeological value and subject to the requirements of AHPA [16 U.S.C. § 469 (a)-(c)]. [Section 800.11(b)(2)(ii)] When the agency chooses this option, the agency provides the SHPO an opportunity to comment on the work undertaken and provides the Council with a report on the work after it has been completed. [Section 800.11(c)(3)]

When a discovery occurs on lands under the jurisdiction of an Indian tribe, the agency consults with the Indian tribe in completing Section 106 requirements. [Section 800.11(d)(2)]

If historic properties are discovered after work has begun, Council regulations do not require agencies to stop work on the undertaking. However, depending on the nature of the property and the undertaking's apparent effects on it, agencies should try to avoid or minimize harm to any historic properties until the Section 106 requirements have been met. [Section 800.11(b)(3)] For example, work might be delayed in the immediate vicinity of the discovery while continuing elsewhere.

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#### Emergency undertakings

The regulations make special provisions for agency actions that are undertaken in response to an emergency situation. [Section 800.12(a)] "Emergency" in this context refers to an officially declared disaster or state of emergency, undertakings that will not be implemented within 30 days of the emergency must go through the Section 106 process outlined in Sections 800.4 through 800.6, rather than following the emergency process. [Section 800.12(d)]

In an emergency, an agency may choose one of two courses of action:

- When applicable, a Federal agency may elect to waive the requirements of the Council's regulations and comply instead with 36 CFR Part 78. "Waiver of Federal Agency Responsibilities under the National Historic Preservation Act." [Section 800.12(a)] These regulations, published by the Department of the Interior, spell out procedures by which NHPA requirements may be waived. 36 CFR Part 78 may be invoked only in a limited range of circumstances involving "major natural disaster or imminent threat to the national security"; these terms are defined in 36 CFR Part 78, or

- When the agency proposes an emergency action as an essential and immediate response to a disaster declared by the President or a Governor, the agency may notify the Council and SHPO of its proposed actions and afford them an opportunity to comment within seven days, if circumstances permit. [Section 800.12(b)] This course of action can also be employed, for purposes of actions assisted under Title I of the Housing and Community Development Act of 1974 as amended [42 U.S.C. §§ 5301-5320], in case of an imminent threat to the 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. In the latter circumstance, however, if either the SHPO or the Council objects to the undertaking, the undertaking must undergo Section 106 reviews according to Sections 800.4 through 800.6. [Section 800.12(c)]

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### Alternatives to case-by-case Section 106 review under Sections 800.4 through 800.6

To give agencies added flexibility, the Council's regulations provide three possible alternatives to the standard review process [Sections 800.4 through 800.6] described in the preceding pages. Agencies may choose

- to develop a Programmatic Agreement with the Council, thus completing Section 106 review for a group of related Federal actions at once; [Section 800.13]
- to prepare counterpart regulations, in consultation with and approved by the Council, which substitute for 36 CFR Part 800; [Section 800.15] or
- to comply with a substitute State historic preservation review process, to which the Council has agreed. [Section 800.7]

A discussion of each of these alternatives follows.

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#### Programmatic Agreements (PA)

A Programmatic Agreement (PA) is developed between the agency, the Council, and, as appropriate, the SHPO, several SHPOs, or the National Conference of SHPOs (NCSHPO). A PA fulfills Section 106 requirements for a large or complex project or a class of undertakings that would otherwise require numerous individual requests for comments under Section 106. [Section 800.13(a)]

*When PAs are appropriate*

Programmatic Agreements are appropriate for projects or programs such as these:

- When effects on historic properties are multi-State or national in scope (for example, the U.S. Coast Guard's lighthouse automation program); [Section 800.13(a)(1)]

- When effects on historic properties are similar and repetitive (for example, when a financial assistance program will result in the rehabilitation of many houses in a community); [Section 800.13(a)(1)]
- When effects on historic properties cannot be fully determined prior to approval of the undertaking (for example, when a large oil exploration program must be approved before surveys, which would have been done to identify specific properties subject to impacts by roads and well pads); [Section 800.13(a)(2)]
- When non-Federal parties are delegated major decisionmaking responsibilities in the undertaking (for example, when Federal financial assistance is channeled to a State or local agency for parceling out to individual applicants); [Section 800.13(a)(3)]
- When undertakings involve regional or area land-management plans (for example, National Forest plans, plans for multiple-use management of public lands, or coastal zone management plans); [Section 800.13(a)(4)] or
- When undertakings involve routine management activities at Federal installations (for example, the operation of a military base or training facility). [Section 800.13(a)(5)]

#### *How PAs are developed*

The agency and Council consult to develop a PA. When the proposed Federal action would affect only one State, the SHPO is invited to be a consulting party. When the action would affect several States, the SHPO of each affected State is invited to be a consulting party. If the action is national in scope, the president of NCSHPO is invited by the Council to be a consulting party. The agency and Council may also invite other parties to participate in consultation, as appropriate. [Section 800.13(b)]

The Council, assisted by the agency, arranges for public notice that consultation is underway and for public involvement as appropriate. The consulting parties are required to invite views from affected units of State and local government, Indian tribes, industries, and organizations. The agency and Council consider the views of these parties and, upon reaching agreement, execute a PA. Other consulting parties may also sign the agreement, as appropriate. [Sections 800.13(c) and (d)]

Once the agreement is signed, the Council publishes notice of the PA in the *Federal Register* and makes copies available to the public. [Section 800.13(f)] A PA satisfies agency Section 106 responsibilities for any undertaking carried out under its terms. It remains in force until it expires or is terminated. [Section 800.13(e)]

If an agency fails to carry out the terms of a PA, it must complete Section 106 review for each individual undertaking that otherwise would be covered by the agreement, in accordance with 36 CFR Sections 800.4 through 800.6. [Section 800.13(g)]

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### Counterpart regulations

Sometimes the requirements of 36 CFR Part 800 mesh poorly with existing agency procedures or specific statutory provisions (which might, for instance, establish specific timeframes that differ from those in the Council's regulations). In such cases, agencies are encouraged to develop their own alternative regulations for fulfilling their Section 106 responsibilities.

The agency develops the counterpart regulations in consultation with the Council. Once concurred in by the Council, these regulations stand in place of 36 CFR Part 800 and are complied with by the agency to satisfy Section 106 requirements. [Section 800.15]

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### State review processes

Section 800.7 of the regulations provides that any SHPO may enter into an agreement with the Council to substitute a State review process for the procedures spelled out at 36 CFR Part 800. A specific procedure for creating such agreements is set forth in that section. [Section 800.7(a)(5)]

#### *How agencies use a State's review process*

In States where a substitute review process has been approved by the Council, Federal agencies may elect to comply with the State process rather than 36 CFR Part 800. At any time during a State review, if the agency decides it would prefer to terminate State review and comply instead with 36 CFR Part 800, the agency may do so. [Sections 800.7(b)(1) and (2)] The Council may participate in a State review of an undertaking at any time, and participants using a State's review process are encouraged to draw upon the Council's expertise when that is appropriate. [Section 800.7(b)(3)]

The Council monitors a State's activities under its substitute review process in coordination with an overall review of State programs that is carried out by the Secretary of the Interior under Section 101(b)(1) of NHPA. [Section 800.7(c)(1)] Either the Council or the State may terminate a substitute State review process. If a State review process is revoked or terminated, a pending review may nevertheless be concluded under the State process if the agency responsible for the undertaking elects to do so. [Section 800.7(c)(2)-(4)]

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### Conclusion

The Council's regulations at 36 CFR Part 800 have evolved over years of use. They offer a wide range of procedural options for ensuring that historic values are taken into account as Federal agency actions are planned and carried out. The regulations are based on the idea that the public interest may best be found through reasoned consultation and negotiation among interested parties. It is this philosophy that should guide all participants in the Section 106 review process.

*To learn more about  
Section 106 review*

This brief booklet obviously cannot present all of the facts about the Section 106 review process. For specific regulatory language, consult the regulations themselves, 36 CFR Part 800, which were published in the *Federal Register* on September 2, 1986, at 51 FR 31115. Single annotated copies of the regulations are available from the Council on request.

For training in the Section 106 review process, the Council offers a 3-day course, "Introduction to Federal Projects and Historic Preservation Law," in many locations around the country each year. This course provides up-to-date information about procedures and regulatory developments and explains, step-by-step, what actions are needed to meet the requirements of the law.

For more information, write: Advisory Council on Historic Preservation  
1100 Pennsylvania Avenue, NW., Suite 809, Washington, DC 20004;  
telephone (202) 606-8503 (executive offices and publications) or  
(202) 606-8505 (training, Section 106 review, and agency program  
review office).

*Revised October 1992*

Since the National Environmental Policy Act (NEPA) and NHPA are completely distinct authorities, the Council cannot specify how an agency should comply with NEPA. However, since they serve related purposes and the Council's regulations encourage agencies to coordinate their compliance with the two statutes, you may want to consider the following suggestions.

1. Remember that compliance with one statute does not constitute compliance with the other.
2. In determining whether an action can qualify as a categorical exclusion (CX) under NEPA, be sure to consider "the degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places..." [40 CFR Part 1508.27(8), *Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act*] In order to do this, an agency will need to perform the initial steps of the Section 106 process: defining the area of potential effects, finding any properties there that might be historic, and applying the National Register Criteria to them. Bear in mind that an action that can be a categorical exclusion under NEPA may nevertheless require review under Section 106.
3. If an agency is doing an environmental assessment (EA) or an environmental impact statement (EIS), it should begin identification of historic properties – by assessing information needs – when planning the EA or

doing scoping for the EIS. It should then identify historic properties and determine whether the action will affect them – by applying the Criteria of Effect and Adverse Effect – as part of preparing the EA or draft EIS (DEIS).

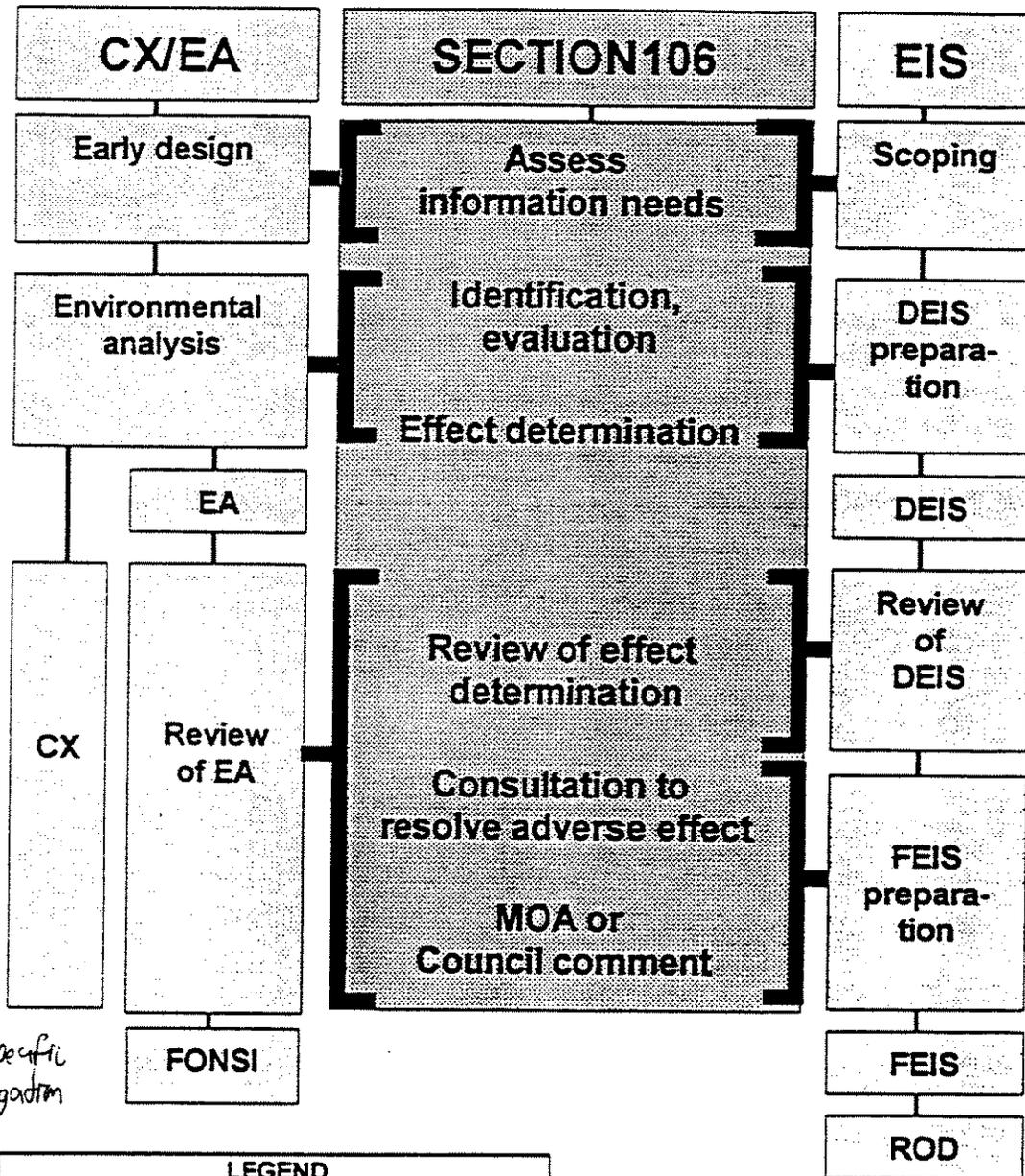
4. An agency can then use the EA or DEIS as documentary support for the determinations it sends to the SHPO and/or the Council and others – determinations of no effect, no adverse effect, or adverse effect.
5. If an agency needs to consult to resolve adverse effects, or negotiate to get acceptance of a determination of no effect or no adverse effect, the results – for example, an MOA, or an agreement-based determination of no adverse effect – should be documented in the final EIS (FEIS), or in supplements to the EA.
6. Section 106 review should always be completed before a finding of no significant impact (FONSI) or record of decision (ROD) is issued.

Figure 12 illustrates the coordination of NEPA compliance and Section 106 review.

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Figure 12. Coordinating NEPA and Section 106 review

*Assess info  
↓  
Identification  
+ evaluation  
↓  
Programmatic  
Agreement*



*Determination of specific effects + mitigation after EA.*

LEGEND	
CX	– Categorical Exclusion
DEIS	– Draft Environmental Impact Statement
EA	– Environmental Assessment
EIS	– Environmental Impact Statement
FEIS	– Final Environmental Impact Statement
FONSI	– Finding of No Significant Impact
MOA	– Memorandum of Agreement
ROD	– Record of Decision



# Sample Programmatic Agreement

## PURPOSE

This sample programmatic agreement outlines the roles and responsibilities of the Federal Emergency Management Agency, the State Historic Preservation Officer (SHPO), the State Emergency Management Agency, and the Advisory Council on Historic Preservation regarding damage to historic properties resulting from a disaster and FEMA funded or supported activities potentially affecting historic properties. This PA covers FEMA's Public Assistance Program and the Hazard Mitigation Grant Program pursuant to the Stafford Act and the implementing regulations.

Generally, this PA does the following things:

- Forms unique partnerships between FEMA, State, SHPO, Advisory Council
- Excludes routine activities with little potential to adversely effect historic properties from SHPO or Council review
- Delegates review responsibilities to SHPO to promote efficiency so effects of these undertakings can be considered and delays to FEMA's delivery of assistance would be minimal.
- Provides a mechanism for reimbursement to SHPO for identification, evaluation, and review activities not required of the SHPO under the Section 106 review process
- Provides for SHPO and Council reviews to be conducted in abbreviated timeframes
- Permits SHPO to delegate its responsibilities to a SHPO representative
- Council waives its responsibility to comment on projects that have no effect or no adverse effect on historic structures
- Provides standard treatment measures for adverse effects

## IMPLEMENTATION

FEMA must consult with appropriate parties on a state by state basis to develop a PA. The PA is developed pursuant to 36 CFR 800 implementing Section 106 of the National Historic Preservation Act.

All Programmatic Agreements are initiated from FEMA Headquarters by the Agency's Federal Preservation Officer, Karen Forbes. 202-646-3807

## PREPARATION OF A MEMORANDUM OF AGREEMENT

Contact Karen Forbes for guidance on MOAs and other historic preservation topics.



DRAFT

PROGRAMMATIC AGREEMENT  
AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY,  
THE (State) STATE HISTORIC PRESERVATION OFFICE,  
THE (State Emergency Management Agency), AND  
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION

WHEREAS, the Federal Emergency Management Agency (FEMA) proposes to administer Federal disaster public assistance programs and the Hazard Mitigation Grant Program (HMGP) pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act, P.L. 93-288, as amended, and its implementing regulations contained in Title 44 CFR Part 206, for the assistance, the repair or replacement of damaged facilities and structures), and the planning and implementation of HMGP Projects affected by Disaster Number FEMA-\_\_\_-DR-\_\_\_ (initial disaster); and,

WHEREAS, FEMA has determined that the implementation of these programs may have an effect upon properties included in or eligible for inclusion in the National Register of Historic Places and has consulted with the Advisory Council on Historic Preservation (Council) and the (State) State Historic Preservation Office (SHPO) pursuant to Section 800.13 of the regulations, 36 CFR Part 800, implementing Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. 470f, and,

WHEREAS, FEMA, the Council, and the SHPO acknowledge that the implementation of disaster assistance will be more effective if specific procedures are developed to exclude from Council and SHPO review routine activities with little potential to adversely affect historic properties; and further, to promote efficiency so that the effects of these undertakings on historic properties can be considered while delays to FEMA's delivery of assistance are minimized; and,

WHEREAS, the State will receive financial and technical assistance from FEMA as a result of this major disaster and will in turn provide monies and other assistance to qualified applicants to alleviate the effects of the major disaster, and as such the (State Emergency Management Agency) (State acronym) is responsible for administering the disaster assistance program, and has participated in this consultation and been invited to execute this Programmatic Agreement (PA); and,

NOW, THEREFORE, FEMA, the Council, the SHPO, and the (State acronym) agree that this disaster assistance program shall be administered in accordance with the following Stipulations to satisfy FEMA's Section 106 responsibilities for all undertakings of the program.

STIPULATIONS

To the extent of its legal authority and in coordination with the Council, SHPO, and (State acronym), FEMA will require that the following measures are carried out:

I. APPLICABILITY.

- A. This Programmatic Agreement (PA) applies immediately for this initial disaster (FEMA - \_\_\_-DR) after execution by all parties. This PA also applies to subsequent disasters

when FEMA so notifies the signatories in writing. This PA will remain in effect for the duration of the period that the disaster remains open for FEMA funding.

- B. The signatories shall comply with the Stipulations set forth in this PA for all undertakings resulting from the disaster. This PA addresses all undertakings that are assisted entirely or in part by monies from the programs of FEMA listed above. FEMA shall not fund any application for assistance under these programs until the review of individual undertakings is completed pursuant to Stipulation IV, except that immediate actions in response to the disaster which may be funded during the expedited review period shall be reviewed in accordance with Stipulation III. Any undertaking that does not qualify for review under the terms of this PA shall be reviewed in accordance with the procedures outlined in 36 CFR Part 800.

## II. INITIAL COORDINATION

- A. Within 10 working days of the execution of this PA for the initial disaster, or within 10 working days of notice of implementation of this PA for a subsequent disaster:
1. FEMA will ensure that the (State acronym), SHPO, and FEMA point of contacts in the disaster field office established for the disaster have been provided with the names, addresses, and telephone numbers of the others. Additionally, these parties will be provided with information on individuals at the Council, FEMA's Regional and Headquarters Offices, SHPO, and (State acronym) that may be contacted for further assistance.
  2. The SHPO will:
    - a. provide FEMA with available listing of properties within the declared disaster area that are included in the (State) Historic Sites Inventory;
    - b. provide staff, through (State acronym) interagency agreement or Damage Survey Report (DSR), to the FEMA disaster field office to assist FEMA in the development and review of determinations of National Register eligibility and project effect for these disasters;
    - c. assist FEMA in working with organizations in the area affected by the disaster that are known to have an interest in historic properties to ensure that the public has a reasonable opportunity to comment on FEMA's activities pursuant to its responsibilities and this PA.

### ( OPTIONAL PARAGRAPH)

- d. provide (State acronym) and FEMA with a listing of historic and archeological professionals, deemed qualified by the SHPO, which may be recommended by (State acronym) and FEMA and employed by project applicants for the disciplines required under the terms of this PA to ensure that applicants use qualified individuals to implement FEMA's historic preservation activities.

- B. The SHPO's participation in the public assistance program and HMGP, when possible, will help ensure that historic preservation issues are adequately addressed.

### III. EXPEDITED REVIEW FOR EMERGENCY UNDERTAKINGS

- A. Applicability of Expedited Review Procedures: FEMA anticipates that it will be required to perform or fund emergency actions in response to an immediate threat to the preservation of human life or property as a result of the declared disaster. Any action that is not in response to an immediate threat to the preservation of human life or property, as determined by FEMA, shall be reviewed under the procedures of Stipulation IV. The parties agree that the 30 day emergency waiver of FEMA's Section 106 requirements permitted under 36 CFR Section 800.12 will begin at the time that FEMA determines that an emergency action is required and will only be applicable if:
1. FEMA reasonably anticipates that the emergency action will be initiated within the following 30 day period; and
  2. the action may adversely affect an identified historic property or a property that is determined to be fifty years old or older through the partial or total demolition or other substantial alteration of the property.
  3. Emergency actions that FEMA has determined will not adversely affect an identified historic property or a property that is determined to be 50 years old or older may proceed without further review pursuant to this PA unless FEMA elects to consult with the SHPO. FEMA will document this decision with a written record in the project file.
- B. Implementation of Expedited Review Procedures: If FEMA determines that the expedited review procedures apply, FEMA will notify the SHPO that it intends to review an emergency action pursuant to Stipulation III. and will share all information upon which the decision was made with the SHPO. If the SHPO does not object to FEMA's notice within 2 business days, FEMA may fund the emergency action after it completes the following expedited review:
1. FEMA will request that the SHPO determine if such a property has been listed on or previously determined eligible for inclusion in the National Register or to determine if a previously unevaluated property appears to meet the National Register criteria. The SHPO will notify FEMA as soon as possible, but in no case later than 5 calendar days after receiving FEMA's request, if a property is listed in or has previously been determined eligible for listing in the National Register or if a previously unevaluated property appears to meet one or more of the National Register criteria. The SHPO shall document its recommendations, and FEMA shall accept or reject any SHPO recommendation regarding National Register eligibility in writing. FEMA and the SHPO shall mutually agree on standards and formats for any such recommendation developed by the SHPO for an emergency action.
  2. If it appears that an emergency action will adversely affect a historic property during the 30 day expedited review period, FEMA shall provide the SHPO with

available information about the condition of the property, the proposed action, and prudent and feasible measures that would take the adverse effect into account, and request the SHPO's comments. FEMA may furnish this information to the SHPO using written requests, telephone conversations (followed in writing or telefax), telefaxes or meetings, at its discretion. The SHPO will respond to any FEMA request for comments within 5 calendar days after receipt.

3. If FEMA does not accept the recommendations provided by the SHPO pursuant to this Stipulation, or the SHPO objects to FEMA's proposal to use this expedited review procedure, FEMA shall notify the Council and request the Council's comments. The Council shall provide final comments to FEMA in response to such a request within 2 business days following receipt of FEMA's request. Any Council comments received within this time period shall be taken into account by FEMA in reaching a final decision.
4. Failure of the SHPO or the Council to respond to FEMA within the time periods established by this stipulation shall not preclude FEMA from proceeding as it may deem necessary or as justified by the emergency. FEMA will document this decision with a written record in the project file.

#### IV. PROJECT REVIEW FOR NON-EMERGENCY INDIVIDUAL UNDERTAKINGS

For non-emergency stabilization, demolition, and repair activities, or following the 30 calendar day expedited review period and prior to FEMA's decision to fund a DSR or an HMGP application resulting from the declared disaster, FEMA will require that the following review be completed:

- A. Projects Not Requiring Review by SHPO or Council: If FEMA determines that the work described in a DSR prepared by the joint Federal/State inspection team or in the repair scope of work developed by an applicant for a particular project or in an HMGP application is limited to those items included in Appendix 1 to this PA or will only affect properties that are less than 50 years of age (as qualified by Stipulation IV.D), FEMA may approve the DSR, funding request, or HMGP application and release funds for such projects without review by the SHPO or Council. FEMA will document this decision in writing, retain it in its project files and conclude the review required by this PA. FEMA is not required to determine the National Register eligibility of properties that will be affected by these activities.
- B. Area of Potential Effects: The parties agree that the Area of Potential Effects (APE) will be the individual structure when a proposed undertaking is limited to the repair or rehabilitation of its interior or exterior features. FEMA shall determine the APE and may consult with the SHPO to establish the APE for applicant projects that require designation as alternate or improved projects; projects that involve any ground disturbing activities or new construction, including additions; or the removal, including demolition, of character defining features or structures provided that such actions are not exempted from review pursuant to Stipulation IV.A. above. Ground disturbing activities with the potential to affect historic properties may include: subsurface disturbance, removal of trees; excavation for footings and foundations; installation of utilities such as sewer, water, storm drains, electrical, gas, leach lines, and septic tanks except where these activities are

restricted solely to areas previously disturbed by the installation, replacement, or maintenance of such systems.

C. Damage From Previous Disaster: Where damage from the current disaster compounds unrepaired damage or an HMGP project from any previously declared disaster, the review procedures, for all the activities related to that project, will be under the provisions of this PA (i.e., all previous and current disaster activities will be reviewed under the most recent PA), with the following qualifications:

1. If there is an ongoing Section 106 consultation from a previous disaster, the consulting parties will determine whether to continue the Section 106 process as required by the previous disaster or to follow the provisions of this PA. In either case that consultation will be expanded to consider the damage from this disaster.
2. FEMA may rely upon a previous determination for National Register eligibility unless subsequent damage, changes in the perception of significance, or the passage of time warrants re-evaluation. Any re-evaluation shall be in accordance with Stipulation IV.D.
3. FEMA may utilize any information, study, or construction documents developed during FEMA's previous or ongoing Section 106 review for any review required by this PA.
4. Any existing effects determination from a previous disaster shall be considered in the Review of Project Effects from the current disaster in accordance with Stipulation IV.E.
5. If consultation from a previous disaster has concluded in a signed document of Standard Mitigation Measures Agreement (SMMA), Memorandum of Agreement (MOA) or PA, FEMA shall consult with the SHPO, and the Council, if appropriate, to consider amending the existing document or determine if the existing document will adequately address the treatment of additional damage.

D. Review of National Register Eligibility: FEMA will provide the SHPO with copies of all applications for assistance and any information that it may have regarding properties, including potential archeological properties, traditional cultural properties, and those properties located within a recognized Historic District, within the APE of the proposed project which FEMA determines to be the subject of this PA and which are not exempted from review pursuant to Stipulation IV.A. The SHPO shall review the available information to identify historic properties, as defined in 36 CFR §800.2(e), within the APE and, except as noted in item 3 of this Stipulation, shall provide FEMA the following information within 10 calendar days after receipt of project information:

1. The SHPO shall determine if any properties located within the APE have previously been determined eligible or not eligible for listing on the National Register and advise FEMA if the previous determination should be changed. FEMA shall review this information and determine within 5 calendar days after receipt whether it will rely on this information. If the properties are listed or eligible for listing on the National Register, FEMA will proceed to the review

- of project effects pursuant to Stipulation IV.E. If the properties are not eligible for listing on the National Register, FEMA will notify the SHPO if it will accept the previous determination or revised determination, and conclude, within 5 calendar days, the review required by this PA for that property.
2. The SHPO shall notify FEMA if there are any properties within the APE less than 50 years of age that may be eligible for the National Register and make recommendations if further research is required to identify historic properties. FEMA shall review this information and determine, within 5 calendar days, if there are any other properties within the APE that may be eligible for the National Register, or if the SHPO should conduct further research, and proceed with item 3 of this Stipulation.
  3. If the SHPO determines that the APE contains properties 50 years old or older that have not previously been evaluated for National Register eligibility, or if FEMA determines that additional steps are necessary to identify and evaluate properties within the APE, the SHPO will prepare, in consultation with the project applicant, documentation to meet the requirements of 36 CFR §800.4(b). The SHPO shall review this documentation to determine if the properties within the APE meet any of the National Register criteria set forth in 36 CFR Section 60.4, and shall provide its recommendations regarding National Register eligibility to FEMA in writing. All SHPO determinations and recommendations made pursuant to this Stipulation shall address the integrity of properties using the integrity evaluation guidelines set forth in Section VIII, pages 44-49, National Register Bulletin 15, "How To Apply the National Register Criteria for Evaluation," National Park Service, 1991.
  4. The SHPO shall have 30 calendar days following receipt of project information to provide FEMA with the information and recommendations required pursuant to item 3 above. Within 10 calendar days following receipt of the SHPO's information and recommendations, FEMA shall complete its review as follows:
    - a. If the SHPO notifies FEMA that a property appears to be eligible under the National Register criteria and FEMA accepts this recommendation, the property shall be treated as eligible for the National Register for purposes of this PA and FEMA will proceed to the review of project effects pursuant to Stipulation IV.E.
    - b. If the SHPO notifies FEMA that the property does not appear to meet the National Register criteria and FEMA accepts this recommendation, the property shall be considered not eligible for the National Register for purposes of this PA. Such properties require no further review under the terms of this PA, and FEMA may fund the proposed undertaking.
    - c. If FEMA rejects any SHPO recommendation regarding National Register eligibility, it shall consult further with the SHPO for 10 calendar days following the date of rejection to reach agreement. If agreement cannot be reached within this time frame, FEMA shall obtain a formal determination

of eligibility from the Secretary of Interior pursuant to the applicable National Park Service regulations, 36 CFR Part 63.

- d. In accordance with 36 CFR §800.4(c)(4), the Council may request information on any determination of eligibility made pursuant to this PA and may request, at its discretion, that FEMA obtain a determination of eligibility from the Secretary of the Interior.

E. Review of Project Effects: After the scope of work has been determined eligible for funding, FEMA may require the project applicant for any project that may affect a historic property, as defined in 36 CFR §800.2(e), to review the eligible scope of work in consultation with the SHPO to suggest methods of repair/construction that will conform with the recommended approaches set out in the Secretary of the Interior's Standards for Rehabilitation with Guidelines for Rehabilitating Historic Buildings 1990 (Standards), the Secretary of the Interior's Guidelines for Archeological Documentation (Guidelines) 48 FR 44734-37, or any other applicable Secretary of the Interior's Standards. FEMA will review the suggestions, proposed by the project applicant and the SHPO, for funding eligibility and possible modification of the DSR. Within 30 calendar days of receipt of the adequate information, FEMA will:

1. Make a determination that the project will have no effect or that it conforms to the Standards and will not adversely affect historic properties pursuant to 36 CFR §800.9(c)(2). FEMA will provide project documentation and notify the SHPO of its determination. Unless the SHPO objects within 30 calendar days, FEMA may fund the project and no further review is required.
2. If the SHPO objects within 30 calendar days, FEMA may consult further with the SHPO and the applicant to modify the project to ensure that it will conform to the Standards. If the applicant modifies the project in response to the SHPO's and FEMA's concerns, FEMA may fund the project and notify the SHPO accordingly. If the project applicant cannot modify the project in response to the SHPO's or FEMA's concerns, FEMA will initiate adverse effect consultation pursuant to Stipulation IV.F.
3. If the project cannot be modified to conform to the Standards, FEMA will initiate adverse effect consultation pursuant to Stipulation IV.F.

F. Resolution of Adverse Effects: If FEMA determines in accordance with Stipulation IV.E.2 or IV.E.3 that the project will adversely affect a historic property, it will determine if the property will be treated according to the Standard Mitigation Measures set out below or the consultation process set out in 36 CFR §800.5(e), and will notify the SHPO in writing of its decision. If SHPO does not object to FEMA's decision to treat the adverse effect according to the Standard Mitigation Measures, within 14 calendar days, FEMA will proceed as set out below. Standard Mitigation Measures do not apply if the property is a National Historic Landmark or in the situations listed in Stipulation IV.F.2.

1. Developing an Agreement without Council Participation
  - a. FEMA, (State acronym), and the project applicant shall consult to develop a written Agreement that establishes the mitigation and recordation measures such as but not limited to impacts to archeological sites, and the salvage, storage, and reuse of any significant architectural features that may otherwise be demolished. FEMA will submit the signed SMMA to the SHPO for concurrence. The Council will not be a party to this SMMA.
  - b. FEMA may elect to consult informally at any time during this process with the SHPO and/or likely parties to the agreement regarding the appropriateness of developing an SMMA, or to resolve preliminary questions concerning its development.
  - c. If the SHPO does not accept the SMMA as developed in Stipulation IV.F.1.a., or if SHPO requests to participate, or if FEMA requests the participation of the SHPO in the development of the SMMA then FEMA, SHPO, (State acronym), and the project applicant shall consult to develop an SMMA as outlined herein.
  - d. An SMMA shall include one or more of the following measures, modified as necessary to consider the effects of the specific undertaking:
    - i. Recordation: FEMA shall ensure that the historic property is documented prior to its demolition or alteration according to a Recordation Plan developed in consultation with the project applicant and the SHPO. At a minimum, this Plan will establish recordation methods and standards, and designate the appropriate archives for the deposit of this material. FEMA and the SHPO may mutually agree to waive the recordation requirement if the affected historic property will be repaired in substantial, although not necessarily complete, conformance with the Standards.
    - ii. Curation: If the property will be demolished, FEMA, the SHPO, the project applicant, and the property owner, if different from the project applicant, may consult to determine if the property contains significant architectural features that could be feasibly reused or curated. If such features exist, and if an appropriate party can be found to accept delivery for curation or reuse, FEMA, the project applicant or property owner, and the SHPO will develop measures to ensure that the selected features are removed in a manner that minimizes damage and are delivered to the agreed upon party for curation or reuse. If no acceptable party can be found, recordation shall be considered adequate.
    - iii. Relocation: If FEMA determines that it is necessary to relocate an individual structure, subject to the limitations set out in Stipulation XV, FEMA will consult with the SHPO, the project

applicant, and the property owner, if different from the project applicant, to determine: an appropriate site for relocation; methods for moving the structure consistent with the approaches set out in "Moving Historic Buildings" (John Obed Curtis, 1979, AASLH); archeological monitoring on both sites; plans for rehabilitation; and re-evaluation of the structure's National Register eligibility on the new site.

iv. Data Recovery: If an archeological property will be affected by the undertaking, FEMA, the SHPO, the project applicant, and the property owner if different from project applicant, will consult to develop a data recovery plan consistent with the Guidelines and take into account the Council's publication, "Treatment of Archeological Properties."

e. Copies of the signed SMMA will be sent to FEMA Headquarters and the Council as a record of decision.

2. Developing an Agreement with the Council as a Consulting Party

The consultation process set out in 36 CFR §800.5(e) will be followed and FEMA will provide the Council with an adverse effect notice if

- a. FEMA determines not to implement a SMMA;
- b. the SHPO objects in writing within 14 calendar days after receipt of FEMA's notice that it will proceed with development of a SMMA;
- c. during the consultation to develop the SMMA, set out in Stipulation IV.F.1, the SHPO determines that the effects of an Undertaking cannot be adequately addressed;
- d. the SHPO withdraws from consultation;
- e. the undertaking is known to have public opposition;
- f. the undertaking will adversely affect a National Historic Landmark;
- g. the undertaking may affect a historic property containing human remains;

G. Time Limitation for SHPO Comments: Unless otherwise provided herein, the SHPO will provide comments within 30 calendar days after receipt of adequate documentation to requests regarding project effects or to combined submittals requesting the SHPO's review of National Register eligibility and effect.

1. If the SHPO fails to develop the information within the time frames required under Stipulation IV.D (National Register Eligibility), FEMA will consult with the SHPO to determine if the SHPO can develop this documentation in a timely manner. If FEMA and the SHPO are unable to agree on alternative time frames, FEMA may treat the property as though it were eligible for the National Register and proceed to Review of Project Effects in Stipulation IV.E., or FEMA shall notify the Council and may take alternative measures to develop this documentation.

2. If the SHPO does not comment within the agreed upon time frame under Stipulation IV.E (Review of Project Effects), then the SHPO is presumed to agree with FEMA's determination and FEMA may proceed as required by this PA.

## V. ARCHEOLOGICAL SURVEYS AND TREATMENT

- A. The project applicant shall notify FEMA if the project will involve ground disturbing activities described in Stipulation IV.B. FEMA will request the SHPO's opinion on the potential that archeological properties may be present and may be affected by such activities. If FEMA and the SHPO, in consultation with the project applicant if appropriate, determine that there is a potential that archeological properties may be affected by the undertaking, the SHPO and FEMA will determine if an archeological survey or other identification measures should be pursued. If archeological properties are identified through this survey, the SHPO will notify the applicant and the properties will be evaluated by the SHPO to determine if they meet one or more of the National Register criteria.
- B. The SHPO shall advise the project applicant on any feasible steps that should be accomplished to avoid any National Register eligible archeological property or make recommendations for the development of a treatment plan for the recovery of archeological data from the property. This plan shall be consistent with the Guidelines and take into account the Council's publication, "Treatment of Archeological Properties." If the project applicant is unable to avoid the archeological property, it will forward information regarding the treatment plan it developed in consultation with the SHPO to FEMA, the SHPO, and the Council for review. The SHPO and Council will review this information to determine if the treatment will substantially preserve the value of the property and if the proposed research will be conducted in accordance with applicable professional standards and guidelines. If the SHPO and the Council do not object within 15 calendar days of receipt of the plan, FEMA may direct the project applicant to implement the plan. If either the Council or the SHPO object to the plan, FEMA shall consult further with the project applicant, the Council, and the SHPO to resolve the objection.
- C. In consultation with the SHPO, FEMA shall ensure that all materials and records resulting from archeological survey and data recovery conducted for the project are curated at a repository within the State of \_\_\_\_\_ and in accordance with 36 CFR Part 79. If human remains are recovered, the signatories to this agreement shall consult further to determine the appropriate disposition of the remains in accordance with the provisions of the Native American Graves Protection and Repatriation Act (NAGPRA), P.L. 101-601, and any applicable laws of the State.
- D. FEMA shall ensure that all final archeological reports resulting from actions pursuant to this PA will be provided to the SHPO and in a format acceptable to the National Park Service. Final archeological reports may be considered for possible submission to the National Park Service and the National Technical Information Service (NTIS). FEMA shall ensure that all such reports are responsive to contemporary standards, and to the Guidelines. Precise locational data shall be provided in a separate appendix which may be withheld from release to the public if the SHPO advises FEMA that its release could jeopardize archeological sites or cultural values, consistent with the authority and criteria provided in Section 304 of NHPA.

## **VI. REVIEW OF CHANGES TO THE APPROVED SCOPE OF WORK AND SUPPLEMENTAL APPLICATIONS**

FEMA shall require notification from (State acronym) as soon as practicable of all changes in the approved scope of work for a National Register eligible or listed property. (State acronym) also is required to notify FEMA as soon as practicable of all changes that may result in the submission of a Supplemental DSR or modify an HMGP project. FEMA shall review the additional work items and determine if they will have an effect on the property. If FEMA determines that the additional items will have no effect or no adverse effect, FEMA will forward documentation to the SHPO to support this finding. Unless the SHPO objects within 10 calendar days of receiving such notice, FEMA may authorize the project applicant to proceed with the additional work. If the SHPO objects to FEMA's determination or FEMA determines that the additional work will result in an adverse effect to a historic property, FEMA will initiate adverse effect consultations pursuant to Stipulation IV.F.

## **VII. COORDINATION WITH OTHER FEDERAL AGENCIES**

(State acronym) will request information from the applicant to determine if the applicant may receive other forms of federal assistance. If any party determines that a FEMA funded or assisted project will receive funding or assistance from another Federal agency, this party will notify FEMA. FEMA will determine if it is feasible to coordinate the review required by this PA with the Section 106 review that will be performed by such other Federal agency and will share documentation developed by FEMA as appropriate to facilitate this review. If FEMA determines that this coordination is not feasible, it shall provide the SHPO, the Council, (State acronym), and the project applicant with an explanation and may proceed to conclude the consultation process.

## **VIII. DISCOVERIES**

FEMA shall require notification from (State acronym) as soon as practicable if it appears that a FEMA funded or assisted undertaking will affect a previously unidentified property that may be eligible for inclusion in the National Register or affect a known historic property in an unanticipated manner. FEMA may require the project applicant to stop construction in the vicinity of the discovery and will require the project applicant to take all reasonable measures to avoid or minimize harm to the property until FEMA concludes consultation with the SHPO. If the newly discovered property has not previously been included in or determined eligible for the National Register, FEMA may assume that the property is eligible for purposes of this PA. FEMA will notify the SHPO at the earliest possible time and consult to develop actions that will take into account the effects of the undertaking. FEMA will notify the SHPO of any time constraints, and FEMA and the SHPO will mutually agree upon time frames for this consultation. (State acronym) and the project applicant may participate in this consultation. FEMA will provide the SHPO with written recommendations that take the effect of the undertaking into account. If the SHPO does not object to FEMA's recommendations within the agreed upon time frame, FEMA will require the project applicant to modify the scope of work as necessary to implement the recommendations.

## **IX. PUBLIC INVOLVEMENT**

- A. FEMA will consult with the SHPO to determine if there are organizations or individuals that may be concerned with the effects of an undertaking on historic properties, and will provide notice to identified parties of the undertaking. FEMA may also provide notice and

opportunity for public comment or participation in an undertaking through the public participation process of the National Environmental Policy Act (NEPA) and its implementing regulations set out at 44 CFR Part 10 as well as the Executive Orders 11988 and 11990 set out in 44 CFR Part 9 relating to floodplains and wetlands. With the concurrence of the SHPO and Council, FEMA shall invite interested persons to participate as consulting parties in adverse effect consultations as required in 36 CFR §800.5(e)(1) and shall integrate such consultation within the requirements of NEPA.

- B. At any time during the implementation of the measures stipulated in this PA should an objection to any measure within the PA or its manner of implementation be raised by a member of the public, FEMA shall take the objection into account and consult as needed with the objecting party, the SHPO, or the Council to address the objection. If the objection pertains to FEMA's decision to implement standard mitigation measures pursuant to Stipulation IV.F, FEMA shall terminate the abbreviated consultation process and initiate consultation with the SHPO, the Council, the interested public and any other consulting parties pursuant to 36 CFR §800.5(e).

## X. ENVIRONMENTAL CONSIDERATIONS

When an environmental document is required pursuant to NEPA for an undertaking subject to this PA, FEMA shall integrate the SHPO's advice or comments, as well as all surveys and studies required to comply with this PA and 36 CFR Part 800, into the NEPA review process. FEMA shall coordinate and document in the NEPA document the identification, evaluation, assessment, and resolution of adverse effects through consultation and public participation for historical and cultural resources, as well as for natural and social environmental issues. Even when an undertaking does not require NEPA documentation because it is statutorily excluded from further review under NEPA, FEMA still shall comply with the requirements of this PA and 36 CFR Part 800.

## XI. FEMA, COUNCIL, SHPO, (*State acronym*), AND APPLICANT RESPONSIBILITIES

- A. FEMA recognizes that Stipulation IV.D.3. and Stipulation IV.E. of this PA require the SHPO to perform additional activities not normally required by the Section 106 process set out in the Council's regulations at 36 CFR Part 800. FEMA shall provide 100% funding under the Robert T. Stafford Disaster Relief and Emergency Assistance Act to (*State acronym*) for these additional eligible SHPO costs in accordance with 44 CFR Part 206. SHPO activities that are normally required under 36 CFR Part 800 will not be a part of FEMA's reimbursement. (*State acronym*) will enter into an interagency agreement with the SHPO or, through a DSR, to provide for the reimbursement of such costs.
- B. The SHPO, at its discretion, may:
1. delegate all or some of the SHPO's responsibilities under this PA to persons who are not currently members of the SHPO staff and who will serve as the SHPO's representative with respect to the decisions and actions required by this PA. The SHPO shall consult with (*State acronym*) and FEMA regarding the representative selected, the scope of responsibilities delegated and implementing procedures related to the decisions and actions delegated. Any (*State acronym*) objection to the representative selected, to the scope of, or to the manner in which the delegated

responsibilities are to be carried out must be provided to FEMA in writing within 5 calendar days following receipt of the objection, or if FEMA does not concur with the SHPO, FEMA shall forward all documentation relevant to the dispute to the Council for resolution pursuant to Stipulation XII. The SHPO's representative shall meet or exceed the Secretary of the Interior's Professional Qualifications Standards (48 FR 44738-9) for the applicable discipline required under the terms of this PA. All references to the SHPO within this PA apply equally to any such SHPO representative.

2. delegate the responsibility for research and preparation of summary documentation in determining the National Register eligibility of a property, not previously evaluated, as stipulated in IV.D.3., to a qualified preservation consultant, who meets or exceeds the Qualifications Standards referenced above, hired by the applicant. The applicant shall submit the names of consultants being considered for this responsibility to SHPO for approval. This will be a reimbursable expense for the applicant. The SHPO will consult with the approved consultant to coordinate the appropriate format and content of the document submitted to SHPO for approval. SHPO will have 10 calendar days to review the consultants documentation and make a recommendation to FEMA regarding the eligibility of the subject property for listing on the National Register. FEMA will complete its review in accordance with Stipulation IV.D.4.
- C. FEMA will notify appropriate staff and (State acronym) of the execution of this PA and will develop management procedures to ensure that its terms are implemented. The SHPO and the Council, as appropriate, will provide occasional basic historic preservation training to FEMA, (State acronym), project applicants, and consultants. This training can include, but may not be limited to, the implementation of the PA and the application of the Standards to rehabilitation projects. FEMA will assist the SHPO and the Council in explaining its programs and policies and will cooperate with the SHPO and the Council to develop procedures that can effectively integrate historic preservation concerns with the needs of FEMA's undertakings.
  - D. FEMA shall document its review of the SHPO recommendations and its determinations for each undertaking in its project or environmental files. This information, including the general project documentation, shall be available for review by the SHPO or Council following reasonable notice.
  - E. (State acronym), as grantee, shall ensure that its applicants do not initiate construction on projects, for which they are seeking federal funding, prior to compliance with this PA.
  - F. FEMA, SHPO, or applicants with numerous projects, may request that the parties develop alternate Programmatic Agreements that redelegate or modify responsibilities assigned to FEMA or the SHPO by this agreement. Such alternate agreements will require the applicant to contract with qualified preservation consultants to carry out any redelegated responsibilities. The applicant shall submit the names of consultants being considered for this responsibility for approval by FEMA, SHPO, and (State acronym).

## XII. DISPUTE RESOLUTION

- A. Should the SHPO or Council object within time frames provided by this PA to any plans, specifications, or actions provided for review pursuant to this PA, FEMA will consult further with the objecting party to seek resolution. Should FEMA object within time frames provided by this PA to any plans, specifications, or actions provided for review pursuant to this PA, FEMA will consult further with the other parties to seek resolution. If FEMA determines within 14 calendar days of receipt that the SHPO's or the Council's objection cannot be resolved, FEMA will forward to the Council all documentation relevant to the dispute including FEMA's proposed resolution to the objection. Within 30 calendar days after receipt of all pertinent documentation, the Council will either:
1. advise FEMA that it concurs in FEMA's proposed resolution whereupon FEMA will respond to the objection accordingly; or
  2. provide FEMA with recommendations, which FEMA will take into account in reaching a final decision regarding the dispute; or
  3. notify FEMA that it will comment pursuant to 36 CFR §800.6(b), and proceed to comment. Any Council comment provided in response to such a request will be taken into account by FEMA in accordance with 36 CFR §800.6(c)(2) with reference to the subject of the dispute.
- B. Any recommendation or comment provided by the Council will be interpreted to pertain only to the subject of the dispute, and FEMA's responsibility to carry out all actions under this PA that are not subject to the dispute will remain unchanged.

## XIII. ACQUISITIONS AND ASSOCIATED DEMOLITIONS

FEMA may provide initial funding for the administrative action of acquiring properties, and (State acronym) will ensure that the applicant community agrees to secure the structures from physical alteration, illegal entry, and damage until the requirements of this PA are completed. Applicant communities shall agree to the above provisions in writing before FEMA will release any project funding. FEMA will not release funding for demolition or structure removal until the requirements of this PA have been met.

## XIV. ANTICIPATORY DEMOLITION

FEMA agrees that it will not grant assistance to an applicant who, with intent to avoid the requirements of this PA or NHPA, has intentionally and significantly adversely affected a historic property to which the assistance would relate, or having legal power to prevent it, allowed such significant adverse effect to occur. FEMA may, after consultation with the Council, determine that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. FEMA shall specifically advise (State acronym) of this Stipulation and will request that (State acronym) advise project applicants of this requirement.

## XV. PROJECTS OUTSIDE THE SCOPE OF THIS PA

Relocations of an entire town, or portion thereof, shall be considered undertakings outside the scope of this PA, except as permitted under Stipulation IV.F.1.d.iii. FEMA shall review any application it receives to relocate a town or community or any portion thereof according to the procedures set out in the Council's regulations, 36 CFR Part 800.

## XVI. MONITORING

The SHPO and the Council may monitor any activities carried out pursuant to this PA, and the Council will review any activities if requested. FEMA and (State acronym) will cooperate with the SHPO and Council in carrying out these monitoring and review responsibilities, and FEMA will maintain records that document compliance with the terms of the PA for all projects reviewed pursuant to this PA.

## XVII. REPORTING

FEMA shall provide the SHPO and the Council with an annual report for the previous calendar year on January 31st of each year that this PA is in effect. This report will summarize the actions taken to implement the terms of this PA and recommend any actions or revisions that should be considered during the next year. The parties will review this information to determine if amendments are necessary. FEMA shall notify all parties to the PA when its actions under the disaster have been concluded.

## XVIII. AMENDMENTS AND NON-COMPLIANCE

- A. If any of the signatories to this PA believes that the terms of the PA cannot be carried out, or that an amendment to the terms of this PA must be made, that signatory shall immediately consult with the other signatories to develop amendments to this PA. The process of amending this PA shall be the same as that exercised in creating the original PA. If an amendment cannot be agreed upon, the dispute resolution process set forth in Stipulation XII. will be followed.
- B. Should any of the signatories raise an objection at any time during implementation of the undertaking as to compliance with the stipulations in this PA, FEMA shall take such objection into account and consult with the objecting party, and the other signatories to resolve such objection. If the objection cannot be resolved, the dispute resolution process set forth in Stipulation XII. will be followed.

## XIX. REVIEW AND RENEWAL OF PA

FEMA will ensure that the signatories will review the provisions and requirements of this PA within two years of the date of the initial execution to determine the efficacy of continuing the terms contained herein or whether it should be revised, amended, or terminated. If the parties agree that changes are not warranted, FEMA will notify the parties in writing that the terms of this PA will be extended for a subsequent two year period. This PA will remain in effect until it is amended, renewed, or terminated.

## XX. TERMINATION

- A. FEMA, the SHPO, or Council may terminate this PA by providing 30 calendar days written notice to the other parties, provided that the parties will consult during the period prior to termination to seek agreement on amendments or other actions that would avoid termination. Any party that elects to terminate this PA shall notify the other parties if its intention is to terminate its effectiveness regarding any previously declared disaster or its applicability to subsequent disasters. Termination of this PA will require compliance with 36 CFR Part 800.
- B. This PA may be terminated by the execution of a subsequent PA that explicitly terminates or supersedes its terms.

## XXI. EXECUTION OF PA

This PA may be executed in counterparts, with a separate page for each signatory, and FEMA will ensure that each party is provided with a copy of the fully executed PA. This PA will become effective on the date that FEMA receives the last signature.

EXECUTION AND IMPLEMENTATION of this Programmatic Agreement evidences that FEMA has afforded the Council a reasonable opportunity to comment on its administration of the Federal disaster Public Assistance program and the Hazard Mitigation Grant Program (HMGP) pursuant to Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, for the repair or replacement of damaged facilities and structures required as a result of the disaster and the planning and implementation of HMGP Projects and further evidences that FEMA has satisfied its Section 106 responsibilities for all individual undertakings of the programs.

**FEDERAL EMERGENCY MANAGEMENT AGENCY**

By: \_\_\_\_\_  
Lacy E. Suiter, Executive Associate Director,  
Response and Recovery Directorate

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Michael J. Armstrong, Associate Director,  
Mitigation Directorate

Date: \_\_\_\_\_

By: \_\_\_\_\_  
(Name), Regional Director, Region \_\_\_\_

Date: \_\_\_\_\_

**ADVISORY COUNCIL ON HISTORIC PRESERVATION**

By: \_\_\_\_\_  
John M. Fowler, Executive Director

Date: \_\_\_\_\_

(State) STATE HISTORIC PRESERVATION OFFICE

By: \_\_\_\_\_  
(Name and Title)

Date: \_\_\_\_\_

(State) STATE EMERGENCY MANAGEMENT AGENCY

By: \_\_\_\_\_  
(Name and Title)

Date: \_\_\_\_\_

## APPENDIX 1

The following list of project activities do not require review by the SHPO or Council pursuant to Stipulation IV.A. Activities may be added to or deleted from this list without amending the entire PA through a letter agreement that includes concurrence by FEMA, the SHPO, and Council.

### I. STRUCTURES

#### A. Interior Floors, Walls, Stairs and Ceilings

1. Floor refinishing if work is done in-kind to exactly match existing materials;
2. Repair or replacement of floors when work is done in-kind to exactly match existing materials and form;
3. Repair or replacement of interior stairs when work is done in-kind to exactly match existing materials and form;
4. Repair of interior walls and ceilings including plaster and dry wall to exactly match existing walls, this can include the repair of interior cracks up to one inch wide. Any material used to repair such cracks should match the color and workmanship of the existing materials. The repairs must be restricted to the damaged area and care must be taken in the application to avoid damage to adjacent materials. This exception does not apply to walls that have decorative plaster trim or other finishes that contribute to the architectural significance of the property;
5. Replacement or repair of suspended or glued ceiling tiles;

#### B. Interior Appurtenances

1. Installation of grab bars and minor interior modifications for handicapped accessibility;
2. Replacement or repair of furniture and equipment;
3. Replacement of books and book storage equipment;

#### C. Utilities and Mechanical

1. Minor electrical work within buildings, limited to upgrading or in-kind replacement, with the exception of historic fixtures that shall be repaired when possible;
2. Minor plumbing work within buildings, limited to upgrading or in-kind replacement, with the exception of historic fixtures that shall be repaired when possible;

3. Installation of mechanical equipment within a building, that does not affect the exterior of the building or require installation of new duct work throughout the interior;
4. Replacement or installation of fire or smoke detectors;
5. Replacement of damaged security devices or installation of new security devices including dead bolts, door locks, window latches, door peepholes or intrusion detection devices;

D. Seismic Upgrades

1. The installation of the following seismic upgrades provided that such upgrades are not visible on the exterior or within character defining historic interiors: cross bracing on pier and post foundations; metal fasteners; collar ties; gussets; tie downs; strapping and anchoring of furniture or mechanical, electrical and plumbing equipment; concealed anchoring of furniture; installation of plywood diaphragms beneath first floor joists, above top floor ceiling rafters and on roofs; and the addition of seismic automatic gas shut off valves;

E. Windows

1. Repair or replacement of severely damaged or deteriorated windows when the repair or replacement is done in-kind to exactly match the existing materials and form;
2. Replacement of window panes in-kind or with double or triple glazing so long as the glazing is clear and untinted and the window does not alter the existing window material and form. The replacement of existing archaic or decorative glass is not included in this exclusion. Historic windows and/or glazing may be treated with window films provided that films are without color or tint;

F. Exterior Walls, Cornices, Porches and Foundations

1. Repainting of existing painted surfaces provided that destructive surface preparation treatments, including, but not limited to waterblasting, sandblasting and chemical cleaning, are not used;
2. Repair or partial replacement of porches, cornices, exterior siding, doors, balustrades, stairs, or other trim when the repair or replacement is done in-kind to exactly match existing material and form;
3. Repair or replacement of signs or awnings when work is done in-kind to closely match existing materials and form;
4. Temporary bracing or shoring as part of stabilization;

5. Anchoring of masonry walls to floor systems so long as anchors are embedded and concealed from exterior view such as in the Hilti systems;
6. Reconstruction or repair of parapets, chimneys, and cornices to exactly match existing in all material and visual aspects. Bracing and reinforcing of chimneys and fireplaces as long as bracing and reinforcing are either concealed from exterior view or removable in the future;
7. Stabilization of foundations and the addition of foundation bolts;

G. Roofing

1. Repair or replacement of roofing, gutters, and downspouts when replacement is done in-kind to exactly match existing materials and form, however, cement asbestos shingles may be replaced with asphalt based shingles and untreated wood shingle may be replaced with fire resistant wood shingles;

H. Weatherproofing and Insulation

1. Caulking and weather-stripping with compatibly colored material; road bed soil as well as the repair of asphaltic concrete and portland cement concrete pavement. The repair of brick or stone paving is not included in this exclusion nor is the regrading of native materials to reconstruct the road bed;
2. Replacement or installation of insulation provided that decorative interior plaster, woodwork or exterior siding is not altered by this work item, with the exception of urea formaldehyde foam insulation or any other thermal insulation that contains water in its chemical composition and is installed within wall cavities;

I. Exterior Site

1. Repair or replacement of driveways, parking lots and walkways when work is done in kind to exactly match existing material and form;
2. Repair or replacement of fencing and freestanding exterior walls or retaining walls when work is done in-kind to exactly match existing materials and form;
3. Repair or replacement of metal utilitarian structures including major exposed pipelines, pumphouses, antenna towers, if reconstructed in-kind, or in the same size and configuration using (superior functioning) modern materials. The finish on modern materials must be sympathetic to the site and context. Bridges and water towers are not considered metal utilitarian structures for the purposes of this exclusion;

4. Pruning or replacement of damaged landscaping in-kind or with a similar species. - Repair or replacement of related hardscaping and utilities including paving, planters, trellises, irrigation, and lighting if done in-kind to match existing materials and form;

J. Equipment, Fees and Services

1. Miscellaneous labor costs;
2. Rental or purchase of vehicles or other motorized equipment;
3. Builders fees;
4. Fees for architectural, engineering or other design services;
5. Reimbursement of applicant's insurance deductible not exceeding \$1,000;
6. Rental and installation of scaffolding; and
7. Installation of temporary, reversible barriers such as chain link fences, and polyethylene sheeting or tarps.
8. Installation of temporary structures to house uses such as classrooms, offices or housing.
9. Non-destructive testing for hazardous materials (lead paint, asbestos, etc.) or testing in concealed/concealable locations.

II. ROADS AND ROADWAYS

1. Repair of road to pre-disaster geometric design standards and conditions using in-kind materials: number and width of lanes; shoulders; medians; curvature; grades; clearances; and side slopes;
2. Repair of road composition with in-kind materials to maintain pre-disaster size, traffic capacity, and load classifications of motor vehicles such as the reshaping and compacting
3. Repair of traffic control devices such as traffic signs, delineators, pavement markings, ramp and traffic surveillance control systems, and traffic signals;
4. Repair of road lighting with in-kind systems;
5. Repair of other road appurtenances with in-kind appurtenances such as curbs, berms, sidewalks, and fences. The repair of brick sidewalks is not included in this exclusion;

6. Repair of roadway safety elements with in-kind elements such as barriers, guardrails, and impact-attenuation devices;
7. Repair of culvert systems, to include headwalls and wingwalls, with in-kind systems and materials without altering the pre-disaster disturbed earth cross-section. Attention shall be paid to mortar composition and color for stone construction.



# **RESPONDING TO MORE THAN DISASTERS**

## **FEMA'S COMPLIANCE WITH THE NATIONAL HISTORIC PRESERVATION ACT**

### **Your Tool Kit Contains:**

- **Analysis of the MSPA**
- **MOA and PA in the Disaster Context (Katchka)**
- **36 CFR Part 800: Protection of Historic Properties**
- **1992 Amendments to NHPA: Implications for Section 106 Review**
- **SHPO and Deputy SHPO List**
- **A practical Guide to Cultural Resource Compliance (Wheaton)**
- **SHPO Home Pages from the WWW**
- **Standard Section 106 Compliance Diagramed**
- **FEMA's Historic Review According to the MSPA**
- **Methods of Implementing Section 106 Review**

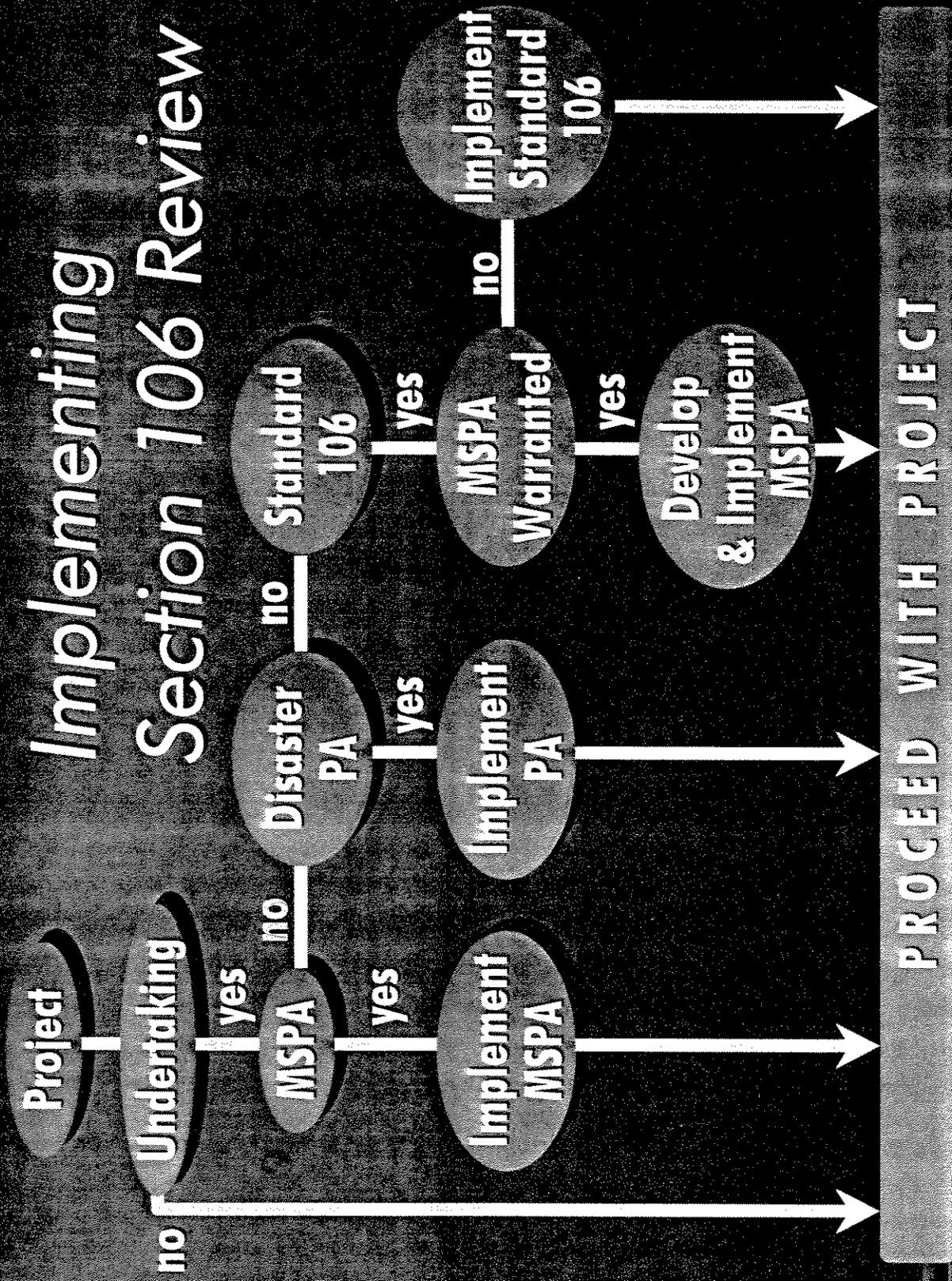
**Federal Emergency Management  
Agency, Region I  
Maynard, Massachusetts  
March 4, 1998**

*Karen Forbes - Fed Principal office  
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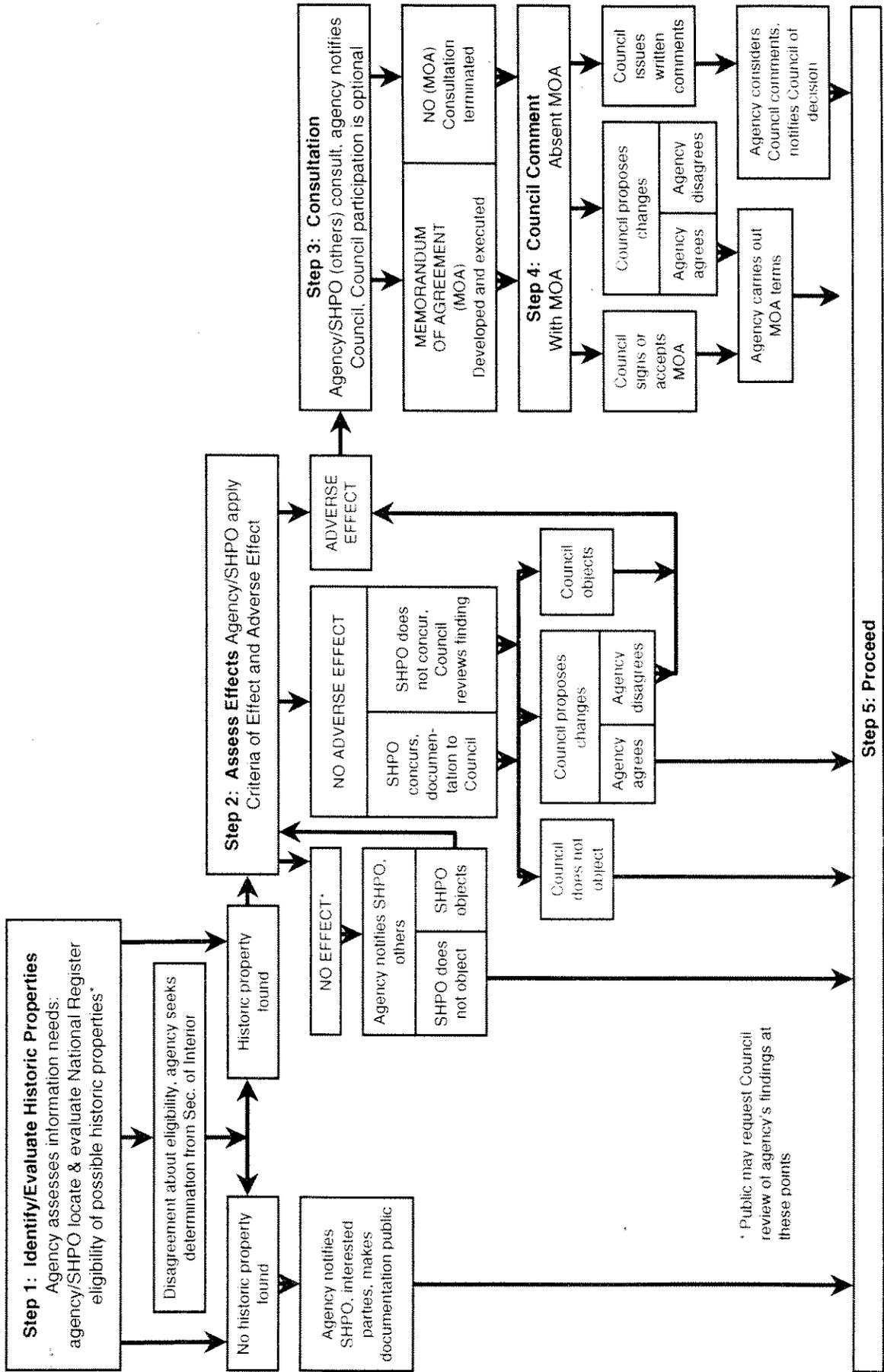


# Methods Of Implementing Section 106 Review





# Section 106 Review Diagrammed

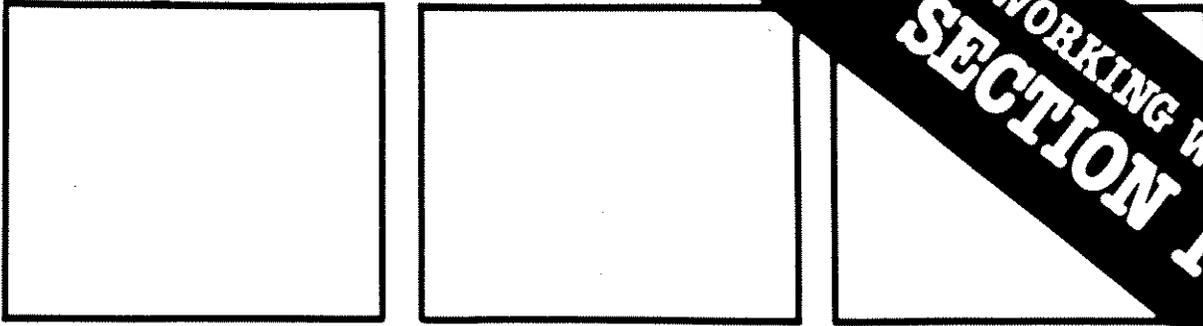








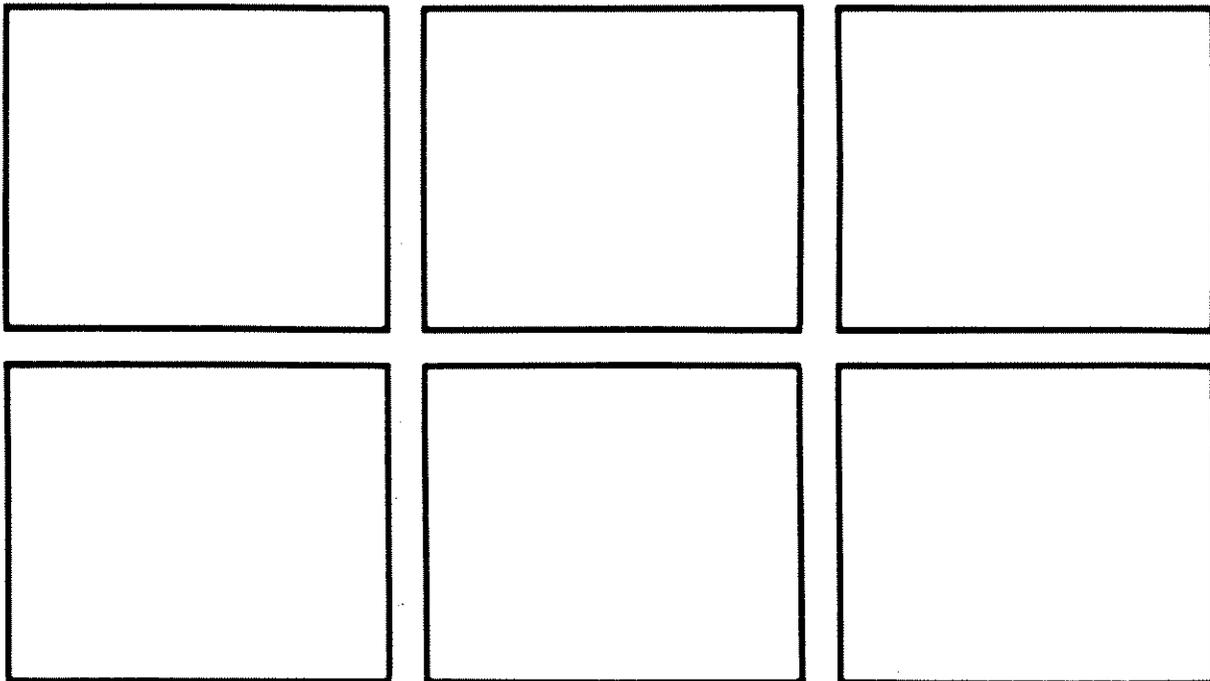
**WORKING WITH  
SECTION 106**



# **36 CFR Part 800:**

## **Protection of Historic Properties**

Regulations of the  
Advisory Council on Historic Preservation  
Governing the Section 106 Review Process



**Advisory Council on Historic Preservation**

Effective October 1, 1986



## 36 CFR PART 800: PROTECTION OF HISTORIC PROPERTIES

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*The italicized marginal annotations are intended to aid the reader in locating regulatory topics. They are not a part of the formal regulations.*

*The text immediately below was published in the Federal Register on September 2, 1986 (51 FR 31115), as 36 CFR Part 800, "Protection of Historic Properties." These regulations govern the Section 106 review process established by the National Historic Preservation Act of 1966, as amended.*

### SUBPART A—BACKGROUND AND POLICY

#### 800.1 Authorities, purposes, and participants.

*What §106 requires of Federal agencies*

(a) **Authorities.** Section 106 of the National Historic Preservation Act requires a Federal agency head with jurisdiction over a Federal, federally assisted, or federally licensed undertaking to take into account the effects of the agency's undertakings on properties included in or eligible for the National Register of Historic Places and, prior to approval of an undertaking, to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking. Section 110(f) of the Act requires that Federal agency heads, 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 and, prior to approval of such undertaking, afford the Council a reasonable opportunity to comment. These regulations define the process used by a Federal agency to meet these responsibilities, commonly called the Section 106 process.

*What §110(f) requires of Federal agencies*

(b) **Purposes of the Section 106 process.** The Council seeks through the Section 106 process to accommodate 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. The Council encourages this accommodation through consultation among the Agency Official, the State Historic Preservation Officer, and other interested persons during the early stages of planning. The Council regards the consultation process as an effective means for reconciling the interests of the consulting parties.

*Accommodation of historic preservation concerns and needs of Federal undertakings*

Integration of the Section 106 process into the normal administrative process used by agencies for project planning ensures early, systematic consideration of historic preservation issues. To this end, the Council encourages agencies to examine their administrative processes to see that they provide adequately for the efficient identification and consideration of historic properties, that they provide for participation by the State Historic Preservation Officer and others interested in historic preservation, that they provide for timely requests for Council comment, and that they promote cost-effective implementation of the Section 106 process. When impediments are found to exist in the agency's administrative process, the agency is encouraged to consult with the Council to develop special Section 106 procedures suited to the agency's needs.

*Early integration of §106 into project planning*

§106 participants

Consulting parties

Federal agency's general responsibilities

SHPO's general responsibilities

Council's general responsibilities

Interested persons' participation

Local governments' participation

**(c) Participants in the Section 106 process.**

(1) *Consulting parties.* Consulting parties are the primary participants in the Section 106 process whose responsibilities are defined by these regulations. Consulting parties may include:

(i) *Agency Official.* The Agency Official with jurisdiction over an undertaking has legal responsibility for complying with Section 106. It is the responsibility of the Agency Official to identify and evaluate affected historic properties, assess an undertaking's effect upon them, and afford the Council its comment opportunity. The Agency Official may use the services of grantees, applicants, consultants, or designees to prepare the necessary information and analyses, but remains responsible for Section 106 compliance. The Agency Official should involve applicants for Federal assistance or approval in the Section 106 process as appropriate in the manner set forth below.

(ii) *State Historic Preservation Officer.* The State Historic Preservation Officer coordinates State participation in the implementation of the National Historic Preservation Act and is a key participant in the Section 106 process. The role of the State Historic Preservation Officer is to consult with and assist the Agency Official when identifying historic properties, assessing effects upon them, and considering alternatives to avoid or reduce those effects. The State Historic Preservation Officer reflects the interests of the State and its citizens in the preservation of their cultural heritage and helps the Agency Official identify those persons interested in an undertaking and its effects upon historic properties. When the State Historic Preservation Officer declines to participate or does not respond within 30 days to a written request for participation, the Agency Official shall consult with the Council, without the State Historic Preservation Officer, to complete the Section 106 process. The State Historic Preservation Officer may assume primary responsibility for reviewing Federal undertakings in the State by agreement with the Council as prescribed in Section 800.7 of these regulations.

(iii) *Council.* The Council is responsible for commenting to the Agency Official on an undertaking that affects historic properties. The official authorized to carry out the Council's responsibilities under each provision of the regulations is set forth in a separate, internal delegation of authority.

(2) *Interested persons.* Interested persons are those organizations and individuals that are concerned with the effects of an undertaking on historic properties. Certain provisions in these regulations require that particular interested persons be invited to become consulting parties under certain circumstances. In addition, whenever the Agency Official, the State Historic Preservation Officer, and the Council, if participating, agree that active participation of an interested person will advance the objectives of Section 106, they may invite that person to become a consulting party. Interested persons may include:

(i) *Local governments.* Local governments are encouraged to take an active role in the Section 106 process when undertakings affect historic properties within their jurisdiction. When a local government has legal responsibility for Section 106 compliance under programs such as the Community Development Block Grant Program, participation as a consulting party is required. When no

such legal responsibility exists, the extent of local government participation is at the discretion of local government officials. If the State Historic Preservation Officer, the appropriate local government, and the Council agree, a local government whose historic preservation program has been certified pursuant to Section 101(c)(1) of the Act may assume any of the duties that are given to the State Historic Preservation Officer by these regulations or that originate from agreements concluded under these regulations.

*Federal applicants' participation*

(ii) *Applicants for Federal assistance, permits, and licenses.* When the undertaking subject to review under Section 106 is proposed by an applicant for Federal assistance or for a Federal permit or license, the applicant may choose to participate in the Section 106 process in the manner prescribed in these regulations.

*Indian tribes' participation*

(iii) *Indian tribes.* The Agency Official, the State Historic Preservation Officer, and the Council should be sensitive to the special concerns of Indian tribes in historic preservation issues, which often extend beyond Indian lands to other historic properties. When an undertaking will affect Indian lands, the Agency Official shall invite the governing body of the responsible tribe to be a consulting party and to concur in any agreement. When an Indian tribe has established formal procedures relating to historic preservation, the Agency Official, State Historic Preservation Officer, and Council shall, to the extent feasible, carry out responsibilities under these regulations consistent with such procedures. An Indian tribe may participate in activities under these regulations in lieu of the State Historic Preservation Officer with respect to undertakings affecting its lands, provided the Indian tribe so requests, the State Historic Preservation Officer concurs, and the Council finds that the Indian tribe's procedures meet the purposes of these regulations. When an undertaking may affect properties of historic value to an Indian tribe on non-Indian lands, the consulting parties shall afford such tribe the opportunity to participate as interested persons. Traditional cultural leaders and other Native Americans are considered to be interested persons with respect to undertakings that may affect historic properties of significance to such persons.

*Public participation*

(iv) *The public.* The Council values the views of the public on historic preservation questions and encourages maximum public participation in the Section 106 process. The Agency Official, in the manner described below, and the State Historic Preservation Officer should seek and consider the views of the public when taking steps to identify historic properties, evaluate effects, and develop alternatives. Public participation in the Section 106 process may be fully coordinated with, and satisfied by, public participation programs carried out by Agency Officials under the authority of the National Environmental Policy Act and other pertinent statutes. Notice to the public under these statutes should adequately inform the public of preservation issues in order to elicit public views on such issues that can then be considered and resolved, when possible, in decisionmaking. Members of the public with interests in an undertaking and its effects on historic properties should be given reasonable opportunity to have an active role in the Section 106 process.

<i>Definitions</i>	<b>800.2 Definitions.</b>
<i>"Act"</i>	(a) "Act" means the National Historic Preservation Act of 1966, as amended, 16 U.S.C. §§ 470-470w-6.
<i>"Agency Official"</i>	(b) "Agency Official" means the Federal agency head or a designee with authority over a specific undertaking, including any State or local government official who has been delegated legal responsibility for compliance with Section 106 and Section 110(f) in accordance with law.
<i>"Area of potential effects"</i>	(c) "Area of potential effects" means the geographic area or areas within which an undertaking may cause changes in the character or use of historic properties, if any such properties exist.
<i>"Council"</i>	(d) "Council" means the Advisory Council on Historic Preservation or a Council member or employee designated to act for the Council.
<i>"Historic property"</i>	(e) "Historic property" means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register. This term includes, for the purposes of these regulations, artifacts, records, and remains that are related to and located within such properties. The term "eligible for inclusion in the National Register" includes both properties formally determined as such by the Secretary of the Interior and all other properties that meet National Register listing criteria.
<i>"Indian lands"</i>	(f) "Indian lands" means all lands under the jurisdiction or control of an Indian tribe.
<i>"Indian tribe"</i>	(g) "Indian tribe" means the governing body of any Indian tribe, band, nation, or other group that is recognized as an Indian tribe by the Secretary of the Interior and for which the United States holds land in trust or restricted status for that entity or its members. Such term also includes any Native village corporation, regional corporation, and Native Group established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. §1601, et seq.
<i>"Interested person"</i>	(h) "Interested person" means those organizations and individuals that are concerned with the effects of an undertaking on historic properties.
<i>"Local government"</i>	(i) "Local government" means a city, county, parish, township, municipality, borough, or other general purpose political subdivision of a State.
<i>"National Historic Landmark"</i>	(j) "National Historic Landmark" means a historic property that the Secretary of the Interior has designated a National Historic Landmark.
<i>"National Register"</i>	(k) "National Register" means the National Register of Historic Places maintained by the Secretary of the Interior.
<i>"National Register Criteria"</i>	(l) "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).
<i>"Secretary"</i>	(m) "Secretary" means the Secretary of the Interior.

"SHPO"

(n) "State Historic Preservation Officer" 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.

"Undertaking"

(o) "Undertaking" means any project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects. The project, activity, or program must be under the direct or indirect jurisdiction of a Federal agency or licensed or assisted by a Federal agency. Undertakings include new and continuing projects, activities, or programs and any of their elements not previously considered under Section 106.

*How the §106 process works*

## SUBPART B—THE SECTION 106 PROCESS

### 800.3 General.

*Scope of the regulations;  
alternative methods of meeting  
§106 requirements*

(a) **Scope.** The procedure in this subpart guides Agency Officials, State Historic Preservation Officers, and the Council in the conduct of the Section 106 process. Alternative methods of meeting Section 106 obligations are found in Section 800.7, governing review of undertakings in States that have entered into agreements with the Council for Section 106 purposes, and Section 800.13, governing Programmatic Agreements with Federal agencies that pertain to specific programs or activities. Under each of these methods, the Council encourages Federal agencies to reach agreement on developing alternatives or measures to avoid or reduce effects on historic properties that meet both the needs of the undertaking and preservation concerns.

*Procedural flexibility*

(b) **Flexible application.** The Council recognizes that the procedures for the Agency Official set forth in these regulations may be implemented by the Agency Official in a flexible manner reflecting differing program requirements, as long as the purposes of Section 106 of the Act and these regulations are met.

*Timing of the §106 process*

(c) **Timing.** Section 106 requires the Agency Official to 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 or permit. The Council does not interpret this language to bar an Agency Official from expending funds on or authorizing nondestructive planning activities preparatory to an undertaking before complying with Section 106, or to prohibit phased compliance at different stages in planning. The Agency Official should ensure that the Section 106 process is initiated early in the planning stages of the undertaking, when the widest feasible range of alternatives is open for consideration. The Agency Official should establish a schedule for completing the Section 106 process that is consistent with the planning and approval schedule for the undertaking.

*Allowance for nondestructive  
planning before the §106  
process is completed*

*Steps of the §106 process*

*Agency's determination of what information will be needed to complete the §106 process*

*Agency's location of historic properties in the project area*

*Agency's evaluation of whether properties found are "historic"*

*Agency/SHPO agreement about National Register eligibility of properties found*

## **800.4 Identifying historic properties.**

### **(a) Assessing information needs.**

(1) Following a determination by the Agency Official that a proposed project, activity, or program constitutes an undertaking and after establishing the undertaking's area of potential effects, the Agency Official shall:

(i) Review existing information on historic properties potentially affected by the undertaking, including any data concerning the likelihood that unidentified historic properties exist in the area of potential effects;

(ii) Request the views of the State Historic Preservation Officer on further actions to identify historic properties that may be affected; and

(iii) Seek information in accordance with agency planning processes from local governments, Indian tribes, public and private organizations, and other parties likely to have knowledge of or concerns with historic properties in the area.

(2) Based on this assessment, the Agency Official should determine any need for further actions, such as field surveys and predictive modeling, to identify historic properties.

**(b) Locating historic properties.** In consultation with the State Historic Preservation Officer, the Agency Official shall make a reasonable and good faith effort to identify historic properties that may be affected by the undertaking and gather sufficient information to evaluate the eligibility of these properties for the National Register. Efforts to identify historic properties should follow the Secretary's "Standards and Guidelines for Archeology and Historic Preservation" (48 FR 44716) and agency programs to meet the requirements of Section 110(a)(2) of the Act.

### **(c) Evaluating historical significance.**

(1) In consultation with the State Historic Preservation Officer and following the Secretary's Standards and Guidelines for Evaluation, the Agency Official shall apply the National Register Criteria to properties that may be affected by the undertaking and that have not been previously evaluated for National Register eligibility. The passage of time or changing perceptions of significance may justify reevaluation of properties that were previously determined to be eligible or ineligible.

(2) If the Agency Official and the State Historic Preservation Officer agree that a property is eligible under the criteria, the property shall be considered eligible for the National Register for Section 106 purposes.

(3) If the Agency Official and the State Historic Preservation Officer agree that the criteria are not met, the property shall be considered not eligible for the National Register for Section 106 purposes.

*Disagreement about National Register eligibility of properties found*

(4) If the Agency Official and the State Historic Preservation Officer do not agree, or if the Council or the Secretary so request, the Agency Official shall obtain a determination from the Secretary of the Interior pursuant to applicable National Park Service regulations.

(5) If the State Historic Preservation Officer does not provide views, then the State Historic Preservation Officer is presumed to agree with the Agency Official's determination for the purpose of this subsection.

*Agency's actions if no historic properties are found*

**(d) When no historic properties are found.** If the Agency Official determines in accordance with Sections 800.4(a)-(c) that there are no historic properties that may be affected by the undertaking, the Agency Official shall provide documentation of this finding to the State Historic Preservation Officer. The Agency Official should notify interested persons and parties known to be interested in the undertaking and its possible effects on historic properties and make the documentation available to the public. In these circumstances, the Agency Official is not required to take further steps in the Section 106 process.

*Agency's actions if historic properties are found*

**(e) When historic properties are found.** If there are historic properties that the undertaking may affect, the Agency Official shall assess the effects in accordance with Section 800.5.

*Agency's assessment of project effects on historic properties found*

#### **800.5 Assessing effects.**

*Agency's use of Criteria of Effect*

**(a) Applying the Criteria of Effect.** In consultation with the State Historic Preservation Officer, the Agency Official shall apply the Criteria of Effect (Section 800.9(a)) to historic properties that may be affected, giving consideration to the views, if any, of interested persons.

*Agency's actions if no effect is found*

**(b) When no effect is found.** If the Agency Official finds the undertaking will have no effect on historic properties, the Agency Official shall notify the State Historic Preservation Officer and interested persons who have made their concerns known to the Agency Official and document the finding, which shall be available for public inspection. Unless the State Historic Preservation Officer objects within 15 days of receiving such notice, the Agency Official is not required to take any further steps in the Section 106 process. If the State Historic Preservation Officer files a timely objection, then the procedures described in Section 800.5(c) are followed.

*Agency's use of Criteria of Adverse Effect*

**(c) When an effect is found.** If an effect on historic properties is found, the Agency Official, in consultation with the State Historic Preservation Officer, shall apply the Criteria of Adverse Effect (Section 800.9(b)) to determine whether the effect of the undertaking should be considered adverse.

*Agency's actions if effects are not adverse*

**(d) When the effect is not considered adverse.**

(1) If the Agency Official finds the effect is not adverse, the Agency Official shall:

(i) Obtain the State Historic Preservation Officer's concurrence with the finding and notify and submit to the Council summary documentation, which shall be available for public inspection; or

(ii) Submit the finding with necessary documentation (Section 800.8(a)) to the Council for a 30-day review period and notify the State Historic Preservation Officer.

(2) If the Council does not object to the finding of the Agency Official within 30 days of receipt of notice, or if the Council objects but proposes changes that the Agency Official accepts, the Agency Official is not required to take any further steps in the Section 106 process other than to comply with any agreement with the State Historic Preservation Officer or Council concerning the undertaking. If the Council objects and the Agency Official does not agree with changes proposed by the Council, then the effect shall be considered as adverse.

*Agency's actions if effects are adverse*

*Consultation to avoid or reduce adverse effects; Council participation is optional*

*Invitation to interested persons to join in consultation*

**(e) When the effect is adverse.** If an adverse effect on historic properties is found, the Agency Official shall notify the Council and shall consult with the State Historic Preservation Officer to seek ways to avoid or reduce the effects on historic properties. Either the Agency Official or the State Historic Preservation Officer may request the Council to participate. The Council may participate in the consultation without such a request.

(1) *Involving interested persons.* Interested persons shall be invited to participate as consulting parties as follows when they so request:

(i) The head of a local government when the undertaking may affect historic properties within the local government's jurisdiction;

(ii) The representative of an Indian tribe in accordance with Section 800.1(c)(2)(iii);

(iii) Applicants for or holders of grants, permits, or licenses, and owners of affected lands; and

(iv) Other interested persons when jointly determined appropriate by the Agency Official, the State Historic Preservation Officer, and the Council, if participating.

*Documentation needed for consultation*

(2) *Documentation.* The Agency Official shall provide each of the consulting parties with the documentation set forth in Section 800.8(b) and such other documentation as may be developed in the course of consultation.

*Public notification about consultation*

(3) *Informing the public.* The Agency Official shall provide an adequate opportunity for members of the public to receive information and express their views. The Agency Official is encouraged to use existing agency public involvement procedures to provide this opportunity. The Agency Official, State Historic Preservation Officer, or the Council may meet with interested members of the public or conduct a public information meeting for this purpose.

*Memorandum of Agreement (MOA) reached through consultation; MOA signatories*

(4) *Agreement.* If the Agency Official and the State Historic Preservation Officer agree upon how the effects will be taken into account, they shall execute a Memorandum of Agreement. When the Council participates in the consultation, it shall execute the Memorandum of Agreement along with the Agency Official and the State Historic Preservation Officer. When the Council has not participated in consultation, the Memorandum of Agreement shall be submitted to the Council for comment in accordance with Section 800.6(a). As appropriate, the Agency Official, the State Historic Preservation Officer, and the Council, if participating, may agree to invite other consulting parties to concur in the agreement.

*Amendments to MOA's*

(5) *Amendments.* The Agency Official, the State Historic Preservation Officer, and the Council, if it was a signatory to the original agreement, may subsequently agree to an amendment to the Memorandum of Agreement. When the Council is not a party to the Memorandum of Agreement, or the Agency Official and the State Historic Preservation Officer cannot agree on changes to the Memorandum of Agreement, the proposed changes shall be submitted to the Council for comment in accordance with Section 800.6.

*Ending consultation*

(6) *Ending consultation.* The Council encourages Agency Officials and State Historic Preservation Officers to utilize the consultation process to the fullest extent practicable. After initiating consultation to seek ways to reduce or avoid effects on historic properties, the State Historic Preservation Officer, the Agency Official, or the Council, at its discretion, may state that further consultation will not be productive and thereby terminate the consultation process. The Agency Official shall then request the Council's comments in accordance with Section 800.6(b) and notify all other consulting parties of its requests.

#### **800.6 Affording the Council an opportunity to comment.**

*Council review of an MOA*

##### **(a) Review of a Memorandum of Agreement.**

*Documentation for MOA review*

(1) When an Agency Official submits a Memorandum of Agreement accompanied by the documentation specified in Section 800.8(b) and (c), the Council shall have 30 days from receipt to review it. Before this review period ends, the Council shall:

(i) Accept the Memorandum of Agreement, which concludes the Section 106 process, and inform all consulting parties; or

(ii) Advise the Agency Official of changes to the Memorandum of Agreement that would make it acceptable; subsequent agreement by the Agency Official, the State Historic Preservation Officer, and the Council concludes the Section 106 process; or

(iii) Decide to comment on the undertaking, in which case the Council shall provide its comments within 60 days of receiving the Agency Official's submission, unless the Agency Official agrees otherwise

(2) If the Agency Official, the State Historic Preservation Officer, and the Council do not reach agreement in accordance with Section 800.6(a)(1)(ii), the Agency Official shall notify the Council, which shall provide its comments within 30 days of receipt of notice

*Council comment, absent an MOA*

##### **(b) Comment when there is no agreement.**

*Documentation for Council comment, absent an MOA*

(1) When no Memorandum of Agreement is submitted, the Agency Official shall request Council comment and provide the documentation specified in Section 800.8(d). When requested by the Agency Official, the Council shall provide its comments within 60 days of receipt of the Agency Official's request and the specified documentation.

*Additional information, onsite inspection, public meeting, absent an MOA*

(2) The Agency Official shall make a good faith effort to provide reasonably available additional information concerning the undertaking and shall assist the Council in arranging an onsite inspection and public meeting when requested by the Council.

*How the Council provides comments, absent an MOA*

(3) The Council shall provide its comments to the head of the agency requesting comment. Copies shall be provided to the State Historic Preservation Officer, interested persons, and others as appropriate.

*Agency's response to Council comment*

**(c) Response to Council comment.**

(1) When a Memorandum of Agreement becomes final in accordance with Section 800.6(a)(1)(i) or (ii), the Agency Official shall carry out the undertaking in accordance with the terms of the agreement. This evidences fulfillment of the agency's Section 106 responsibilities. Failure to carry out the terms of a Memorandum of Agreement requires the Agency Official to resubmit the undertaking to the Council for comment in accordance with Section 800.6.

*Failure to carry out terms of an MOA*

(2) When the Council has commented pursuant to Section 800.6(b), the Agency Official shall consider the Council's comments in reaching a final decision on the proposed undertaking. The Agency Official shall report the decision to the Council, and if possible, should do so prior to initiating the undertaking.

*Agency's consideration of Council comment*

**(d) Foreclosure of the Council's opportunity to comment.**

(1) The Council may advise an Agency Official that it considers the agency has not provided the Council a reasonable opportunity to comment. The decision to so advise the Agency Official will be reached by a majority vote of the Council or by a majority vote of a panel consisting of three or more Council members with the concurrence of the Chairman.

*Agency actions that preempt reasonable opportunity for Council comment*

(2) The Agency Official will be given notice and a reasonable opportunity to respond prior to a proposed Council determination that the agency has foreclosed the Council's opportunity to comment.

*Public objection to agency determinations about whether historic properties or effects are present*

**(e) Public requests to the Council.**

(1) When requested by any person, the Council shall consider an Agency Official's finding under Sections 800.4(b), 800.4(c), 800.4(d), or 800.5(b) and, within 30 days of receipt of the request, advise the Agency Official, the State Historic Preservation Officer, and the person making the request of its views of the Agency Official's finding.

(2) In light of the Council views, the Agency Official should reconsider the finding. However, an inquiry to the Council will not suspend action on an undertaking.

(3) When the finding concerns the eligibility of a property for the National Register, the Council shall refer the matter to the Secretary

*Substitute review processes  
developed by States for §106  
review*

## **800.7 Agreements with States for Section 106 reviews.**

### **(a) Establishment of State agreements.**

(1) Any State Historic Preservation Officer may enter into an agreement with the Council to substitute a State review process for the procedures set forth in these regulations, provided that:

(i) The State historic preservation program has been approved by the Secretary pursuant to Section 101(b)(1) of the Act; and

(ii) The Council, after analysis of the State's review process and consideration of the views of Federal and State agencies, local governments, Indian tribes, and the public, determines that the State review process is at least as effective as, and no more burdensome than, the procedures set forth in these regulations in meeting the requirements of Section 106.

(2) The Council, in analyzing a State's review process pursuant to Section 800.7(a)(1)(ii), shall:

(i) Review relevant State laws, Executive Orders, internal directives, standards, and guidelines;

(ii) Review the organization of the State's review process;

(iii) Solicit and consider the comments of Federal and State agencies, local governments, Indian tribes, and the public;

(iv) Review the results of program reviews carried out by the Secretary; and

(v) Review the record of State participation in the Section 106 process.

(3) The Council will enter into an agreement with a State under this section only upon determining, at minimum, that the State has a demonstrated record of performance in the Section 106 process and the capability to administer a comparable process at the State level.

(4) A State agreement shall be developed through consultation between the State Historic Preservation Officer and the Council and concurred in by the Secretary before submission to the Council for approval. The Council may invite affected Federal and State agencies, local governments, Indian tribes, and other interested persons to participate in this consultation. The agreement shall:

(i) Specify the historic preservation review process employed in the State, showing that this process is at least as effective as, and no more burdensome than, that set forth in these regulations;

(ii) Establish special provisions for participation of local governments or Indian tribes in the review of undertakings falling within their jurisdiction, when appropriate;

(iii) Establish procedures for public participation in the State review process;

(iv) Provide for Council review of actions taken under its terms, and for appeal of such actions to the Council; and

(v) Be certified by the Secretary as consistent with the Secretary's "Standards and Guidelines for Archeology and Historic Preservation."

*Council review of a proposed  
substitute State review process*

*SHPO/Council consultation  
about a proposed substitute  
State review process*

(5) Upon concluding a State agreement, the Council shall publish notice of its execution in the *Federal Register* and make copies of the State agreement available to all Federal agencies.

*Agency's use of substitute State review processes*

**(b) Review of undertakings when a State agreement is in effect.**

(1) When a State agreement under Section 800.7(a) is in effect, an Agency Official may elect to comply with the State review process in lieu of compliance with these regulations.

(2) At any time during review of an undertaking under a State agreement, an Agency Official may terminate such review and comply instead with Sections 800.4 through 800.6 of these regulations.

(3) At any time during review of an undertaking under a State agreement, the Council may participate. Participants are encouraged to draw upon the Council's expertise as appropriate.

*Monitoring or terminating substitute State review processes*

**(c) Monitoring and termination of State agreements.**

(1) The Council shall monitor activities carried out under State agreements, in coordination with the Secretary of the Interior's approval of State programs under Section 101(b)(1) of the Act. The Council may request that the Secretary monitor such activities on its behalf.

(2) The Council may terminate a State agreement after consultation with the State Historic Preservation Officer and the Secretary.

(3) An agreement may be terminated by the State Historic Preservation Officer.

(4) When a State agreement is terminated pursuant to Section 800.7(c)(2) and (3), such termination shall have no effect on undertakings for which review under the agreement was complete or in progress at the time the termination occurred.

**800.8 Documentation requirements.**

*Documentation for finding of no adverse effect*

**(a) Finding of no adverse effect.** The purpose of this documentation is to provide sufficient information to explain how the Agency Official reached the finding of no adverse effect. The required documentation is as follows:

(1) A description of the undertaking, including photographs, maps, and drawings, as necessary;

(2) A description of historic properties that may be affected by the undertaking;

(3) A description of the efforts used to identify historic properties;

(4) A statement of how and why the Criteria of Adverse Effect were found inapplicable;

(5) The views of the State Historic Preservation Officer, affected local governments, Indian tribes, Federal agencies, and the public, if any were provided, as well as a description of the means employed to solicit those views.

*Documentation required for consultation*

**(b) Finding of adverse effect.** The required documentation is as follows:

(1) A description of the undertaking, including photographs, maps, and drawings, as necessary;

(2) A description of the efforts to identify historic properties;

(3) A description of the affected historic properties, using materials already compiled during the evaluation of significance, as appropriate; and

(4) A description of the undertaking's effects on historic properties.

*Documentation required for submitting a signed MOA for Council review*

**(c) Memorandum of Agreement.** When a memorandum is submitted for review in accordance with Section 800.6(a)(1), the documentation, in addition to that specified in Section 800.8(b), shall also include a description and evaluation of any proposed mitigation measures or alternatives that were considered to deal with the undertaking's effects and a summary of the views of the State Historic Preservation Officer and any interested persons.

*Documentation required for requesting written Council comment, absent an MOA*

**(d) Requests for comment when there is no agreement.** The purpose of this documentation is to provide the Council with sufficient information to make an independent review of the undertaking's effects on historic properties as the basis for informed and meaningful comments to the Agency Official. The required documentation is as follows:

(1) A description of the undertaking, with photographs, maps, and drawings, as necessary;

(2) A description of the efforts to identify historic properties;

(3) A description of the affected historic properties, with information on the significant characteristics of each property;

(4) A description of the effects of the undertaking on historic properties and the basis for the determinations;

(5) A description and evaluation of any alternatives or mitigation measures that the Agency Official proposes for dealing with the undertaking's effects;

(6) A description of any alternatives or mitigation measures that were considered but not chosen and the reasons for their rejection;

(7) Documentation of consultation with the State Historic Preservation Officer regarding the identification and evaluation of historic properties, assessment of effect, and any consideration of alternatives or mitigation measures;

(8) A description of the Agency Official's efforts to obtain and consider the views of affected local governments, Indian tribes, and other interested persons;

(9) The planning and approval schedule for the undertaking; and

(10) Copies or summaries of any written views submitted to the Agency Official concerning the effects of the undertaking on historic properties and alternatives to reduce or avoid those effects.

### 800.9 Criteria of Effect and Adverse Effect.

#### *Criteria of Effect*

(a) An undertaking has an effect on a historic property when the undertaking may alter characteristics of the property that may qualify the property for inclusion in the National Register. For the purpose of determining effect, alteration to features of the property's location, setting, or use may be relevant depending on a property's significant characteristics and should be considered.

#### *Criteria of Adverse Effect*

(b) An undertaking is considered to have an adverse effect when the effect on a historic property may diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Adverse effects on historic properties include, but are not limited to:

(1) Physical destruction, damage, or alteration of all or part of the property;

(2) Isolation of the property from or alteration of the character of the property's setting when that character contributes to the property's qualification for the National Register;

(3) Introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting;

(4) Neglect of a property resulting in its deterioration or destruction; and

(5) Transfer, lease, or sale of the property.

#### *Exceptions to the Criteria of Adverse Effect*

(c) Effects of an undertaking that would otherwise be found to be adverse may be considered as being not adverse for the purpose of these regulations:

(1) When the historic property is of value only for its potential contribution to archeological, historical, or architectural research, and when such value can be substantially preserved through the conduct of appropriate research, and such research is conducted in accordance with applicable professional standards and guidelines;

(2) When the undertaking is limited to the rehabilitation of buildings and structures and is conducted in a manner that preserves the historical and architectural value of affected historic property through conformance with the Secretary's "Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings"; or

(3) When the undertaking is limited to the transfer, lease, or sale of a historic property, and adequate restrictions or conditions are included to ensure preservation of the property's significant historic features.

## SUBPART C—SPECIAL PROVISIONS

### *Special agency requirements for National Historic Landmarks*

#### **800.10 Protecting National Historic Landmarks.**

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 Sections 800.4 through 800.6 and give special consideration to protecting National Historic Landmarks as follows:

(a) Any consultation conducted under Section 800.5(e) shall include the Council;

(b) The Council may request the Secretary under Section 213 of the Act to provide a report to the Council detailing the significance of the property, describing the effects of the undertaking on the property, and recommending measures to avoid, minimize, or mitigate adverse effects; and

(c) The Council shall report its comments, including Memoranda of Agreement, to the President, the Congress, the Secretary, and the head of the agency responsible for the undertaking.

### *Discovery of historic properties after a project has begun*

#### **800.11 Properties discovered during implementation of an undertaking.**

### *Prior agency planning for discoveries*

##### **(a) Planning for discoveries.**

When the Agency Official's identification efforts in accordance with Section 800.4 indicate that historic properties are likely to be discovered during implementation of an undertaking, the Agency Official is encouraged to develop a plan for the treatment of such properties if discovered and include this plan in any documentation prepared to comply with Section 800.5.

##### **(b) Federal agency responsibilities.**

(1) When an Agency Official has completed the Section 106 process and prepared a plan in accordance with Section 800.11(a), the Agency Official shall satisfy the requirements of Section 106 concerning properties discovered during implementation of an undertaking by following the plan.

(2) When an Agency Official has completed the Section 106 process without preparing a plan in accordance with Section 800.11(a) and finds after beginning to carry out the undertaking that the undertaking will affect a previously unidentified property that may be eligible for inclusion in the National Register, or affect a known historic property in an unanticipated manner, the Agency Official shall afford the Council an opportunity to comment by choosing one of the following courses of action:

(i) Comply with Section 800.6;

### *Agency responsibilities absent a plan for discoveries*

(ii) Develop and implement actions that take into account the effects of the undertaking on the property to the extent feasible and the comments from the State Historic Preservation Officer and the Council pursuant to Section 800.11(c); or

(iii) If the property is principally of archeological value and subject to the requirements of the Archeological and Historic Preservation Act, 16 U.S.C. §§ 469 (a)-(c), comply with that Act and implementing regulations instead of these regulations.

(3) Section 106 and these regulations do not require the Agency Official to stop work on the undertaking. However, depending on the nature of the property and the undertaking's apparent effects on it, the Agency Official should make reasonable efforts to avoid or minimize harm to the property until the requirements of this section are met.

*Council comments when historic properties are discovered after a project has begun*

**(c) Council Comments.**

(1) When comments are requested pursuant to Section 800.11(b)(2)(i), the Council will provide its comments in a time consistent with the Agency Official's schedule, regardless of longer time periods allowed by these regulations for Council review.

(2) When an Agency Official elects to comply with Section 800.11(b)(2)(ii), the Agency Official shall notify the State Historic Preservation Officer and the Council at the earliest possible time, describe the actions proposed to take effects into account, and request the Council's comments. The Council shall provide interim comments to the Agency Official within 48 hours of the request and final comments to the Agency Official within 30 days of the request.

(3) When an Agency Official complies with Section 800.11(b)(2)(iii), the Agency Official shall provide the State Historic Preservation Officer an opportunity to comment on the work undertaken and provide the Council with a report on the work after it is undertaken.

*Agency actions to determine National Register eligibility of newly discovered properties*

**(d) Other considerations.**

(1) When a newly discovered property has not previously been included in or determined eligible for the National Register, the Agency Official may assume the property to be eligible for purposes of Section 106.

*Discovery of properties on Indian lands*

(2) When a discovery occurs and compliance with this section is necessary on lands under the jurisdiction of an Indian tribe, the Agency Official shall consult with the Indian tribe during implementation of this section's requirements.

*Waiver of §106 requirements during disasters or declared emergencies*

## **800.12 Emergency undertakings.**

(a) When a Federal agency head proposes an emergency action and elects to waive historic preservation responsibilities in accordance with 36 CFR § 78.2, the Agency Official may comply with the requirements of 36 CFR Part 78 in lieu of these regulations. An Agency Official should develop plans for taking historic properties into account during emergency operations. At the request of the Agency Official, the Council will assist in the development of such plans.

(b) When an Agency Official proposes an emergency undertaking as an essential and immediate response to a disaster declared by the President or the appropriate Governor, and Section 800.12(a) does not apply, the Agency Official may satisfy Section 106 by notifying the Council and the appropriate State Historic Preservation Officer of the emergency undertaking and affording them an opportunity to comment within seven days if the Agency Official considers that circumstances permit.

(c) For the purposes of activities assisted under Title I of the Housing and Community Development Act of 1974, as amended, Section 800.12(b) also applies to an imminent threat to public health or safety as a result of natural disaster or emergency declared by a local government's chief executive officer or legislative body, provided that if the Council or the State Historic Preservation Officer objects, the Agency Official shall comply with Sections 800.4 through 800.6.

(d) This section does not apply to undertakings that will not be implemented within 30 days after the disaster or emergency. Such undertakings shall be reviewed in accordance with Sections 800.4 through 800.6.

*30-day timeframe for §106 waiver in disaster situations*

*Agency's use of Programmatic Agreements*

## **800.13 Programmatic Agreements.**

(a) **Application.** An Agency Official may elect to fulfill an agency's Section 106 responsibilities for a particular program, a large or complex project, or a class of undertakings that would otherwise require numerous individual requests for comments, through a Programmatic Agreement. Programmatic Agreements are appropriate for programs or projects:

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

(2) When effects on historic properties cannot be fully determined prior to approval;

(3) When non-Federal parties are delegated major decisionmaking responsibilities;

(4) That involve development of regional or land-management plans; or

(5) That involve routine management activities at Federal installations.

*Examples of projects or programs suitable for Programmatic Agreements*

*Agency/Council consultation to reach a Programmatic Agreement*

**(b) Consultation process.** The Council and the Agency Official shall consult to develop a Programmatic Agreement. When a particular State is affected, the appropriate State Historic Preservation Officer shall be a consulting party. When the agreement involves issues national in scope, the President of the National Conference of State Historic Preservation Officers or a designated representative shall be invited to be a consulting party by the Council. The Council and the Agency Official may agree to invite other Federal agencies or others to be consulting parties or to participate, as appropriate.

*Public involvement in Programmatic Agreement consultation*

**(c) Public involvement.** The Council, with the assistance of the Agency Official, shall arrange for public notice and involvement appropriate to the subject matter and the scope of the program. Views from affected units of State and local government, Indian tribes, industries, and organizations will be invited.

*Signatories of a Programmatic Agreement*

**(d) Execution of the Programmatic Agreement.** After consideration of any comments received and reaching final agreement, the Council and the Agency Official shall execute the agreement. Other consulting parties may sign the Programmatic Agreement as appropriate.

*Effect of a Programmatic Agreement*

**(e) Effect of the Programmatic Agreement.** An approved Programmatic Agreement satisfies the Agency's Section 106 responsibilities for all individual undertakings carried out in accordance with the agreement until it expires or is terminated.

*Public notification of a Programmatic Agreement*

**(f) Notice.** The Council shall publish notice of an approved Programmatic Agreement in the *Federal Register* and make copies readily available to the public.

*Failure to carry out terms of a Programmatic Agreement*

**(g) Failure to carry out a Programmatic Agreement.** If the terms of a Programmatic Agreement are not carried out or if such an agreement is terminated, the Agency Official shall comply with Sections 800.4 through 800.6 with regard to individual undertakings covered by the agreement.

*Coordination of §106 with other authorities*

#### **800.14 Coordination with other authorities.**

To the extent feasible, Agency Officials, State Historic Preservation Officers, and the Council should encourage coordination of implementation of these regulations with the steps taken to satisfy other historic preservation and environmental authorities by:

*Coordination with NEPA environmental studies*

**(a)** Integrating compliance with these regulations with the processes of environmental review carried out pursuant to the National Environmental Policy Act, and coordinating any studies needed to comply with these regulations with studies of related natural and social aspects;

*Multipurpose determinations and agreements*

**(b)** Designing determinations and agreements to satisfy the terms not only of Section 106 and these regulations, but also the requirements of such other historic preservation authorities as the Archeological and Historic Preservation Act, the Archeological Resources Protection Act, Section 110 of the National Historic Preservation Act, and Section 4(f) of the Department of Transportation Act, as applicable, so that a single document can be used for the purposes of all such authorities;

*Multipurpose studies and surveys*

(c) Designing and executing studies, surveys, and other information-gathering activities for planning and undertaking so that the resulting information and data is adequate to meet the requirements of all applicable Federal historic preservation authorities; and

*Coordinated public involvement*

(d) Using established agency public involvement processes to elicit the views of the concerned public with regard to an undertaking and its effects on historic properties.

*Agency's use of counterpart regulations to substitute for 36 CFR Part 800*

#### **800.15 Counterpart regulations.**

In consultation with the Council, agencies may develop counterpart regulations to carry out the Section 106 process. When concurred in by the Council, such counterpart regulations shall stand in place of these regulations for the purposes of the agency's compliance with Section 106.



# Advisory Council On Historic Preservation

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The Old Post Office Building  
1100 Pennsylvania Avenue, NW, #809  
Washington, DC 20004

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December 30, 1992

Memorandum

To: Federal Preservation Officers  
State Historic Preservation Officers  
Tribal Preservation Officers

From: Executive Director *Robert D. Bush*

Subject: 1992 Amendments to National Historic Preservation Act:  
Implications for Section 106 Review

On October 30, the President signed H.R. 429 into law as Public Law 102-575. This legislation included as Title XL a series of amendments to the National Historic Preservation Act (NHPA). Although Section 106 of the Act was not amended, a number of the amendments will affect the way Section 106 review is carried out under the Council's regulations (36 C.F.R. Part 800). The purpose of this memorandum is to highlight the provisions that relate to the Section 106 process and provide interim guidance on the application of the current regulations in light of these statutory amendments. The legislative text is included in most cases; section references are to the NHPA, as amended.

Certain provisions will require that the Council's regulations be amended. The Council will initiate the amendment process early in 1993 and invite your views on desirable changes to 36 C.F.R. Part 800 at that time. Meanwhile, please do not hesitate to contact the Council if you have questions about the effect of the amendments on the Section 106 process.

## Definition of the term "Undertaking"

Section 301(7) redefines the term "undertaking" as follows:

"Undertaking" means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including--

- (A) those carried out by or on behalf of the agency;
- (B) those carried out with Federal financial assistance;
- (C) those requiring a Federal permit, license, or approval; and
- (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

This definition expands the previous statutory definition and goes beyond that contained in the current regulations at 36 C.F.R. Sec. 800.2(o). In addition to encompassing all activities within the previous definition, the new language explicitly includes actions that require permits or approvals which are issued by State or local regulatory bodies pursuant to Federal law. This embraces those situations where a State or local agency is administering a regulatory program based on approval by a Federal agency or a delegation of regulatory authority made by a Federal agency. Examples include permits issued under the Surface Mining Control and Reclamation Act, the Coastal Zone Management Act and the National Pollution Discharge Elimination System established by the Clean Water Act.

In those circumstances, the amended Act obligates the Federal agency responsible for the program to comply with Section 106 for any permit that might affect historic properties. Agencies confronting such situations should contact the Council to resolve specific cases and to develop programmatic approaches for the longer term.

#### Definition of the term "State"

Section 301(2) redefines "State" for purposes of the NHPA:

"State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, the Trust Territory of the Pacific Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, and, upon termination of the Trusteeship Agreement for the Trust Territory of the Pacific Islands, the Republic of Palau.

This change makes it clear that Section 106 (which applies to undertakings in any "state") applies in the nations that were formerly U.S. trust territories and are now freely associated Micronesian states.

**Withholding Federal assistance in cases of "anticipatory demolition"**

The amendments introduce statutory language that essentially embodies the Council's stated policy regarding "anticipatory demolition," the intentional alteration or destruction of a historic property to avoid compliance with Section 106. The provision, a new Section 110(k), reads:

Each Federal agency shall ensure that the agency will not grant 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, allowed such 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.

The statutory provision places an obligation on a Federal agency to withhold Federal assistance or permission from a non-Federal applicant when a historic property has been harmed before the Section 106 process has been completed. Two preconditions are necessary: first, that the applicant intended to avoid Section 106 requirements and, second, that a significant adverse effect was intentionally caused by the applicant or allowed to happen when it was in the applicant's power to prevent it. If they are met, the section requires that the agency withhold assistance or permission unless the agency, in consultation with the Council, determines that granting it is justified.

Agencies should contact the Council when a case appears to fall under this provision. For the present, consultation with the Council will be carried out informally, but should be documented to ensure that the agency's final decision is procedurally sound, as required by the amendment.

**Native American interests and involvement**

Two new provisions affect the interests and participation of Native Americans and Native Hawaiians in the Section 106 process. The first, Section 101(d)(6)(A), clarifies the question of National Register eligibility for properties of traditional cultural or religious significance:

Properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.

This provision is quite clear in its intent. Agencies should note that the term "traditional" qualifies religious and cultural importance and are advised to consult National Park Service Bulletin 38 for further assistance in evaluating such properties.

The second provision, Section 101(d)(6)(B), is related:

In carrying out its responsibilities under section 106, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties described in subparagraph (A).

This reinforces the current provisions of 36 C.F.R. Sections 800.1(c)(iii), 800.4 and 800.5, which pertain to the involvement of Indian tribes in the Section 106 process, but also includes Native Hawaiian organizations. It should also be noted that Section 301(4) expands the definition of "Indian tribe":

"Indian tribe" or "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.

This expanded definition is taken from the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 et seq.) (NAGPRA) and means that a broader range of Native American groups are entitled to participate in the Section 106 process. Agencies should follow the guidance contained in the Council publication "Section 106 Participation by Indian Tribes and Other Native Americans" and the independent requirements of NAGPRA.

#### Adaptive use of federally-owned historic properties

Section 111(a) has been amended with the underscored language to read:

Notwithstanding any other provision of law, any Federal agency, after consultation with the Council, shall, to the extent practicable, establish and implement alternatives for historic properties, including adaptive use, that are not needed for current or projected agency purposes, and may lease an historic property owned by the agency to any person or organization, or exchange any property owned by the agency with comparable historic property, if the agency head determines that the lease or exchange will adequately insure the preservation of the historic property.

This new requirement will be considered by the Council when reviewing a Federal agency's proposal to lease, exchange or dispose of an excess historic property. The Council will request information from the agency on the alternatives considered for the property and why such alternatives, including adaptive use, were found not to be practicable. This information will be used in completing the Council's Section 106 review responsibilities.

#### **Agency responses to Council comment**

A new Section 110(1) specifies the responsibilities of Federal agencies that receive formal comment from the Council:

With respect to any undertaking subject to section 106 which adversely affects any property included in or eligible for inclusion in the National Register, and for which the Federal agency has not entered into an agreement with the Council, the head of the Federal agency shall document any decision made pursuant to section 106. The head of such agency may not delegate his or her responsibilities pursuant to such section. Where a section 106 memorandum of agreement has been executed with respect to an undertaking, such memorandum shall govern the undertaking and all its parts.

This means that the final agency decision taking into account the effects of an undertaking on historic properties must be made by the head of the Federal agency and documented for review by the Council or others. The important change is that the decision cannot be delegated by the Federal agency head when there has been a termination of consultation and the Council membership has rendered comment under 36 C.F.R. Sec. 800.6(b). For those programs such as the Community Development Block Grant program where legal responsibility for Section 106 compliance is delegated pursuant to statute to a non-Federal official, the head of the responsible unit of government must conform to this provision.

Because the response to Council comments will involve the head of the agency, the Council will notify that official whenever there is a termination of consultation. This is to provide advance notice that comments will be forthcoming to the agency head.

The last sentence of Section 110(1) also clarifies the effect of an executed memorandum of agreement, specifying that its terms are binding on the conduct of the undertaking in its entirety.

#### **Federal agency historic preservation procedures**

Section 110(a)(2) has been amended to require each Federal agency to develop a preservation program for the identification, evaluation, National Register nomination and protection of historic

properties. This provision will have a long-term effect on an agency's approach to its Section 106 responsibilities, as it requires "that the agency's procedures for compliance with Section 106...are consistent with regulations issued by the Council pursuant to Section 211" and "provide a process for the identification and evaluation of historic properties for listing in the National Register and the development and implementation of agreements, in consultation with State Historic Preservation Officers, local governments, Indian tribes, Native Hawaiian organizations, and the interested public, as appropriate, regarding the means by which adverse effects on such properties will be considered." (Section 110(a)(2)(E))

The immediate effect is twofold: first, any proposed counterpart regulations or procedures contained in programmatic agreements must be "consistent" with 36 C.F.R. Part 800; and, second, any existing agency procedures for compliance with Section 106 that are not "consistent" with 36 C.F.R. Part 800 are of questionable validity. Federal agencies should contact the Council if they believe that this amended provision currently affects them.

Over the longer term, the Council views the requirements for Federal agency preservation programs as an opportunity to better integrate historic preservation planning into agency decision-making. The Council urges agencies to consider carefully the specific provisions of Section 110(a)(2) and invites agencies to consult with it on developing those portions dealing with consideration of historic properties in the project planning process.

#### Access to information concerning historic properties

Section 304 has been amended to specify more precisely the circumstances and procedure for withholding information about historic properties:

(a) The head of a Federal agency or other public official receiving grant assistance pursuant to this Act, after consultation with the Secretary, shall withhold from disclosure to the public, information about the location, character, or ownership of a historic resource if the Secretary and the agency determine that disclosure may--

- (1) cause a significant invasion of privacy;
- (2) risk harm to the historic resource; or
- (3) impede the use of a traditional religious site by practitioners.

(b) When the head of a Federal agency or other public official has determined that information should be withheld from the public pursuant to subsection (a), the Secretary, in consultation with such Federal agency head or official, shall determine who may have access to the information for the purpose of carrying out this Act.

(c) When the information in question has been developed in the course of an agency's compliance with section 106 or 110(f), the Secretary shall consult with the Council in reaching determinations under subsections (a) and (b).

This provision operates as an exemption to disclosure under the Freedom of Information Act and governs information that is developed during the Section 106 process and pursuant to any agreements developed under 36 C.F.R. Part 800. It also applies to information that has been obtained prior to the enactment of the amendments.

#### Other provisions of the amendments

Several other sections of the amendments will have an impact on agency compliance with Section 106 as they are implemented. Briefly, they include the requirement that the actions of Federal employees and contractors, as well as the personnel themselves, meet professional standards to be prescribed by the Secretary of the Interior (Section 112(a)); authority for the creation of tribal historic preservation programs (Section 101(d)), which permits an Indian tribe to assume the responsibilities of the SHPO, including participation in the Section 106 process; substitution of tribal historic-preservation regulations for the Council's regulations to govern Section 106 compliance on tribal land (Section 101(d)(5)); and issuance of guidelines by the Secretary of the Interior to encourage owners of historic properties to protect them (Section 112(b)). Further information on these provisions will be available as the necessary steps to implement them are taken.



## ANALYSIS OF FEMA MODEL STATE PROGRAMMATIC AGREEMENT

### Step 1. Identify and Evaluate Historic Properties

Section 106		MSPA	Implications of MSPA
<b>Regulation</b>	FEMA is responsible for identifying and evaluating historic properties. FEMA seeks views of the SHPO on the eligibility of properties for the National Register.	The SHPO, in consultation with the project applicant, conducts the identification and evaluation. The SHPO recommends determinations of eligibility to FEMA.	Role of initial identification and evaluation shifts from FEMA to SHPO in the MSPA.
<b>Methodology</b>	FEMA rep. or consultant hired by FEMA completes identification and evaluation in consultation with the SHPO.	Council and the SHPO do not review projects whose activities are limited to items in Appendix 1 of the MSPA.  I.D. & evaluation is completed by either 1) a qualified professional hired by the applicant or, 2) SHPO rep. or consultant hired by SHPO. Selection of a rep/consultant by SHPO is reviewed by the State Emergency Management Agency and FEMA with disputes forwarded to the Council for resolution.  FEMA provides 100% funding to SHPO for additional eligible costs. Costs are a reimbursable expense for the applicant. Reimbursement is provided through the State Emergency Management Agency.	No review by SHPO or Council is time saving to all parties  SHPO/applicant must process the request for personnel to be reviewed by FEMA and State Emergency Management Agency.  In order to be reimbursed, the SHPO must prepare billing for work completed.
<b>Time frame</b>	SHPO has 30 days to provide views re: identification  SHPO has 30 days to comment on FEMA's determination of eligibility.	SHPO completes identification efforts and makes recommendation for further research to identify properties within 10 calendar days of receipt of project information from FEMA.  FEMA has 5 calendar days to review and comment on SHPO's identification efforts and any further research.  SHPO has 30 days following receipt of project information from FEMA to make eligibility recommendation to FEMA.  FEMA completes review of SHPO recommendation within 10 days.	Puts SHPO on a time frame to complete identification. Time frame keeps efforts moving forward.  FEMA has 5 calendar days as opposed to 30 days for review by SHPO in the 106 process. Introduces time frame on a Federal agency.  Sets up time frame for SHPO to make recommendations.  Overall, the process is shortened from over 60 days to 55 days.

**Step 2: Assess Effect**

	<b>Section 106</b>	<b>MSPA</b>	<b>Implications of MSPA</b>
<b>Regulation</b>	Determine whether proposed activity could affect historic properties. FEMA in consultation with SHPO, applies the Criteria of Effect and Adverse Effect to historic properties	FEMA applies the Criteria of Effect and Adverse Effect to historic properties and makes a determination of effect.	No new regulatory or administrative implications under the MSPA.
<b>Methodology</b>	Although not stated in the regulations, FEMA can request project applicant work with FEMA and SHPO to comply with Secretary of the Interior's Standards. FEMA submits finding of effect to SHPO for comment.	FEMA may require the project applicant to review the eligible scope of work in consultation with the SHPO to suggest modifications in the scope of work as necessary. FEMA reviews suggestions and forwards a determination of effect to SHPO for comment.	No new regulatory or administrative implications under the MSPA.
<b>Time frame</b>	SHPO has 15 days to object to FEMA's finding of no effect. Council has 30 days to review findings of effect	FEMA makes a determination of effect within 30 days of receipt of adequate information from SHPO. SHPO has 30 days to object to FEMA's determination.	Places a time frame on FEMA that is otherwise not required under Standard Section 106 process. The MSPA provides SHPO with twice as much time as in Section 106 process to object to FEMA's determination.

**Step 4: Council Comment**

	<b>Section 106 Process</b>	<b>MSPA</b>	<b>Implications of MSPA</b>
<b>Regulation</b>	<p>Council executes MOA as one of the consulting parties; Council reviews and accepts an MOA submitted by FEMA; or absent an MOA, Council issues written comments</p>	<p>Same for 36 CFR Section 800 consultation process. No Council comment is required with an SMMA.</p>	
<b>Methodology</b>	<p>When Council has not been a consulting party, FEMA submits MOA signed by all consulting parties, to the Council for review along with other documentation described in 36 CFR 800.8(b) and 8(c). Absent an MOA, FEMA requests Council comments directly.</p>	<p>Same for 36 CFR Section 800 consultation process. No Council comment is required with an SMMA.</p>	
<b>Time frame</b>	<p>Council has 30 days to accept an MOA, advise FEMA of changes to make MOA acceptable, or advise FEMA that it has decided to comment directly on the undertaking rather than accepting or seeking to modify the agreement. Generally the Council issues written comments within 60 days after receipt of the complete MOA submission.</p>	<p>Same for 36 CFR Section 800 consultation process. No time frame for SMMA</p>	<p>FEMA and applicant save 30 - 60 days Council review time when using an SMMA</p>

### Step 3. Consultation to Resolve Adverse Effect

	Section 106	MSPA	Implications of MSPA
<b>Regulation</b>	FEMA consults with SHPO and others to find ways to make mitigation less harmful and if agreement is reached produce a Memorandum of Agreement (MOA).	FEMA considers mitigation alternatives that limit or compensate for the damage an undertaking does to historic properties. FEMA can resolve adverse effects by either developing a Standard Mitigation Measures Agreement (SMMA) or following the consultation process set out in 36 CFR Part 800.5(e) resulting in an MOA.	Introduces SMMA.
<b>Methodology</b>	FEMA initiates consultation with SHPO and notifies Council that consultation is beginning. Council may participate and must be consulted if the SHPO declines to participate. Interested persons must be invited to join the consultation under some circumstances, and may be invited to do so in other cases.	FEMA notifies the SHPO in writing as to whether it will pursue an SMMA or the consultation process. SHPO can object to FEMA pursuing an SMMA.  For SMMA, FEMA consults with the State Emergency Management Agency and the project applicant to develop a written agreement that establishes mitigation and recordation measures. FEMA can consult informally with the SHPO and other parties. SHPO joins consultation if SHPO requests participation, FEMA requests SHPO's participation, or if SHPO does not accept the SMMA as developed.  Interested persons are invited to participate as consulting parties in adverse effect consultations as required in 36 CFR Section 800.5(e)(1) with the concurrence of the SHPO and Council.	When an SMMA is pursued, the Council and SHPO are not consulted. Parties know ahead of time the measures that may be required.
<b>Time frame</b>	Should the SHPO decline to sign an MOA, or fail to respond within 30 days to FEMA's request for the SHPO's participation, the MOA may be signed by the agency and the Council, without the SHPO.	The SHPO has 14 calendar days to object to FEMA's decision to treat the adverse effect according to an SMMA.	Time frame is established for the SHPO to object to FEMA's decision to treat the adverse effect according to SMMA.  No time frame change in 36 CFR consultation process.

**Step 5: Proceed**

	<b>Section 106</b>	<b>MSPA</b>	<b>MSPA</b>
<b>Regulation</b>	<p>Proceed with undertaking in accordance with terms of the MOA, or absent an MOA agency takes into account the Council's written comments and makes a final decision about whether and how to proceed with its undertaking.</p>	<p>Proceed with undertaking in accordance with terms of the MOA or the SMMA.</p>	
<b>Methodology</b>	<p>With an MOA, proceed as document directs.</p> <p>Without an MOA, FEMA notifies the Council of its decisions, if possible before work on the undertaking begins.</p>	<p>SHPO and Council may monitor any activities carried out pursuant to the MSPA. Council will review any activities if requested. FEMA and the State Emergency Management Agency cooperate with SHPO and Council in carrying out monitoring and review responsibilities. FEMA maintains records to document compliance with the terms of the MSPA.</p>	<p>The model MSPA establishes a joint effort to monitor projects.</p>
<b>Time frame</b>			

## Emergency Undertakings

	Section 106	MSPA	MSPA
<b>Regulation</b>	Special provisions are granted to Federal agency for actions undertaken in response to an emergency situation.	Actions are undertaken by FEMA and SHIPO in response to an emergency situation.	Overall, the emergency process in the model MSPA is a fully defined process in terms of roles, responsibilities, and time frames.
<b>Methodology</b>	FEMA notifies the Council and SHIPO of the emergency undertaking and affords them an opportunity to comment (Section 800.12(b)).	<ol style="list-style-type: none"> <li>1. FEMA notifies SHIPO of intent to review an emergency action and shares all information upon which the decision was made with the SHIPO. If SHIPO does not object, FEMA may fund the action after completing the expedited review;</li> <li>2. FEMA requests that the SHIPO determine if a property is listed on or determined eligible for inclusion in the NR or to determine if a previously unevaluated property appears to meet the NR criteria.</li> <li>3. FEMA accepts or rejects SHIPO recommendation regarding NR eligibility in writing.</li> <li>4. In the event FEMA makes a finding of adverse effect, FEMA provides SHIPO with available inf. about the property, proposed action and measures that take the adverse effect into account, and request the SHIPO's comments.</li> <li>5. If FEMA does not accept SHIPO's recommendations or SHIPO objects to FEMA's proposed use of expedited review procedure, FEMA requests Council comments.</li> </ol>	<p>SHPO has opportunity to object to FEMA's use of emergency action</p> <p>SHPO recommends eligibility as opposed to FEMA first recommending eligibility. SHPO must have resources at hand to complete evaluation.</p> <p>No change</p> <p>No Council review unless #5 occurs</p>
<b>Time frame</b>	Council and SHIPO have 7 days to comment if circumstances permit.	<ol style="list-style-type: none"> <li>1. SHIPO has 2 business days to object to initial intent.</li> <li>2. SHPO has no more than 5 days to evaluate NR eligibility</li> <li>4. SHPO responds within 5 days to proposed mitigation</li> </ol>	Overall emergency review is lengthened from 7 days if circumstances permit in Section 106 process, to up to 12 days under the MSPA.

**Department of Natural Disaster Mitigation  
Response Programs for Historic Sites**

# Memorandum of Agreement and Programmatic Agreements in the disaster context

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## Introduction

As two of the Federal Emergency Management Agency's main program objectives include recovery efforts for victims of a disaster, it is important that Federal Emergency Management Agency (FEMA) actions be allowed to proceed in as timely a manner as possible. With respect to fulfilling our responsibilities under Section 106 of the National Historic Preservation Act (NHPA), FEMA's Historic Preservation Officer has worked closely with the Advisory Council on Historic Preservation (ACHP) to streamline the standard review process.

## General

The programmatic agreement allows for the requirements of the NHPA to be carried out in a manner tailored to the program requirements, time line and resources of FEMA. There are a number of ways in which the programmatic agreement has simplified the Section 106 review process:

1. Firstly, at the earliest moments of disaster response, the PA assigns various responsibilities of historic preservation review to certain agencies or entities:
  - the programmatic agreement establishes partnerships among FEMA, the State, the State Historic Preservation Officer (SHPO) and the ACHP and
  - the programmatic agreement delegates responsibilities to the SHPO to assure that effects on historic and archaeological resources are considered; and delays to FEMA's delivery of assistance will be minimal. The programmatic agreement also can provide for a mechanism of reimbursement to SHPO for

identification, evaluation and review activities not required of the SHPO under the standard Section 106 review process.

2. Secondly, the programmatic agreement spells out specific procedures which short cut the process otherwise outlined in part 800:
  - excludes from SHPO and ACHP review routine activities with little potential to adversely affect historic properties (plumbing and electrical modifications, etc.),
  - abbreviates the timeframes for SHPO and Council reviews still required by the programmatic agreement, and
  - provides standard treatment measures for adverse effects.

### **First Midwest Floods Programmatic Agreement**

The first programmatic agreement which was fully co-ordinated between FEMA and the ACHP to address historic preservation efforts was developed in the aftermath of the Midwest Floods of 1993. The 1993 Floods were particularly suited to the PA concept, since the floods had affected a large area across a number of states, resulting in similar damages to homes and public buildings.

1. To address all of these projects, essentially simultaneously, through the full 106 process, would have taxed FEMA resources beyond our capabilities; the PA simplified the process greatly, reducing the steps and obligations required by FEMA;
2. The programmatic agreement also provided a means to assure a somewhat standardised process by which all of the midwestern states would handle historic review, as the identical agreement was used in each state; and
3. The process of developing the programmatic agreement provided an opportunity for the ACHP and FEMA to make the Regional offices, the States and even the SHPOs more aware of the requirements of the NHPA and their respective roles in conducting historic review.

Since then, the programmatic agreement used for the Midwest agreements has gone through a number of changes and become more refined with each subsequent agreement - used in Georgia, Texas and in California for both the earthquakes and the flooding here in the north.

### **Nationwide Programmatic Agreement**

The concept of the programmatic agreement continues to evolve with each draft that is developed for a new disaster. As FEMA has responded to more types of disasters with programmatic agreements, has encountered a greater

variety of historic and cultural resources to be covered by the agreements (historic churches or city halls damaged by flood or earthquake, petroglyphs on quarry walls from which stone may be taken for a FEMA action, archaeological artefacts or Indian burial grounds at project sites), and as we have grown familiar with the types of FEMA activities which are *not* likely to adversely affect such resources, the programmatic agreement has evolved into a more comprehensive document.

Consequently, FEMA has initiated a project to develop a "Nationwide Programmatic Agreement" which would act as an umbrella agreement which would apply to any disaster occurring anywhere in the country, and would further expedite FEMA's ability to react quickly in initiating disaster recovery and mitigation projects, as FEMA and the Council would not have to negotiate a new programmatic agreement each time there was a disaster. The development of the Nationwide programmatic agreement is an ideal opportunity to co-ordinate with the Council, other agencies and the states to arrive at a thoughtful and workable document, based on the input of a range of experiences and interests. This agreement, currently in draft form, will be circulated to the states through the National Emergency Management Association and to the SHPOs through the National Conference of State Historic Preservation Officers.

### **Memoranda of Agreements**

Last thing I want to touch on are memoranda of agreement. Although the programmatic agreement is intended to cover the bulk of all projects which are likely to arise in the course of disaster recovery or mitigation efforts with respect to any given disaster, there are sometimes projects arising from a disaster not covered by a programmatic agreement, or projects which are so large in scope and potential adverse effect that the increased surveying, review, consultation, treatment, documentation or controversy warrants a special agreement to address just the procedures for fulfilling 106 requirements for that project.

Whereas the key to an effective programmatic agreement seems to be to anticipate the issues which may arise in order to provide for treatment and co-ordination which will speed the 106 process along, the key to an effective memoranda of agreement seems to be the pre-agreement coordination of the Agency with interested parties.

There are several examples of where historic preservation groups provided input into the memoranda of agreement process with respect to a number of

historic structures in California, such as San Francisco City Hall of the Los Angeles Coliseum. Probably the ultimate example of public participation from FEMA experience (with which many of you may be familiar) was the proposal to rebuild a marine laboratory at a new site - happened to contain a number of archaeological resources including, for example, Native American artefacts, midden, lithic workshop and remnants of human remains suggesting a possible Native American burial ground. In this case, an interest group sprang up to oppose the project and, of course, there were Native American interests to be considered. The result was a very lengthy memoranda of agreement process, which it seemed would not end even when the signatures were collected, and that entailed more than giving the interested parties a chance to review the draft memoranda of agreement. It was not even clear who was entitled to be an interested party, as individual claims of tribal descent were not coming just from individuals recognised officially by the United States to be legal descendants. The memoranda of agreement eventually included a number of innovative ways of retaining the Native American input throughout the project implementation, involving them in plan review, treatment and data recovery review, etc. In addition, the applicant agreed to implement an educational exhibit dealing with Native American culture, lifestyles and archaeology in co-operation with the Native Americans concurring in the memoranda of agreement. With the co-operation of the California SHPO and the Advisory Council, the memoranda of agreement seems now to have had a happy ending.

## End

I want to end by pointing out that through all of the Agreements, programmatic agreements or memoranda of agreements, the ACHP, the SHPOs and the State Emergency offices and FEMA co-ordinated throughout on process and shared responsibilities, as well as on determining the language to be used to reflect those agreements. I expect that the same co-ordination will result in a useful Nationwide programmatic agreement in the coming months.

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# Connecticut Historical Commission



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The *Connecticut Historical Commission* is charged by state statute (Section 10-321 et seq.) with, among other tasks, the identification, investigation, and preservation of Connecticut's historic, architectural, and archaeological resources. Major statutory responsibilities of the Commission include the establishment of standards and criteria to guide municipalities in the establishment of local historic districts, the administration of the Department of the Interior's National Register of Historic Places programs, and the administration of the *State Register of Historic Places*. The State Register is the official listing of those sites important to the historical development of the state and uses the same guidelines as the National Register.

The Director of the Connecticut Historical Commission serves as the State Historic Preservation Officer in carrying out the responsibilities of the National Register program. In compliance with federal regulations, the *State Historic Preservation Office* consists of professionals from the disciplines of history, architectural history, architecture, and archaeology.

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## Resources for Connecticut Preservation

- Office of Connecticut State Archaeology
- National Register of Historic Places -- Connecticut

## Office of Connecticut State Archaeology Services for Local Officials

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### Protect the Past - Plan for the Future.

Connecticut's archaeological sites tell the state's 10,000 year human history. From the artifacts and stains in the soil, archaeologists learn about the earliest ancestors of Connecticut's Native Americans, European settlements, mills during the industrial revolution, and the day-to-day lives of people who lived in our towns before us.



Archaeological sites are irreplaceable and nonrenewable. Yet 65 percent of them are in **immediate** danger of destruction due to construction, erosion, and vandalism. Each year over 120 sites are lost in the state because of private and public construction projects.

The Office of State Archaeology assists local citizens and officials to protect the cultural heritage of their communities.

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### What is the Office of the State Archaeologist?

The Office of State Archaeologist for the State of Connecticut was created in 1987 to:

- **Preserve the state's archaeological sites;**
- **Educate the public about Connecticut's archaeological heritage;**
- **Assist the efforts of the general public, Native Americans, archaeologists, and town officials in preserving archaeological resources.**

The Office is affiliated with The Connecticut State Museum of Natural History at the University of Connecticut in Storrs.

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### The Office of State Archaeologist:

1. Maintains comprehensive site files and maps;
2. Serves as the primary source for information about the archaeological

heritage of Connecticut;

3. Provides technical assistance for evaluating and salvaging Connecticut's archaeological sites to town officials, landowners, state and federal agencies, private developers and others;

4. Advises local and state officials about regulations that are needed to protect historic and prehistoric archaeological sites;

5. Coordinates archaeological preservation efforts.

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## **How Can Towns Protect Their Cultural Heritage?**

Each town can act to protect its irreplaceable archaeological resources. Towns can preserve their heritage through:

- **conservation easements**
- **deed restrictions**
- **building and zoning permit controls**
- **municipal or state ownership**
- **and other actions**



The State Archaeologist is available to assist town officials by identifying important sites or helping to create new regulations that protect local sites. Since December 1987, the State Archaeologist has recorded 300 sites and consulted with over 90 towns.

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### ***Target Audience***

**Mayors and Town Planners**  
**Members of Town Wetlands Commissions**  
**Members of Conservation Commissions**  
**Planning and Zoning Commissions**  
**Zoning Enforcement Officers**

# A Summary Guide to Connecticut CRM Legislation

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This list provides a summary reference of CRM legislation for Connecticut. Each item includes a Connecticut General Statute (C.G.S.) citation and a brief description of the agency involved.

This list was originally published in the Digging In series.

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## State Archaeologist

*Connecticut General Statutes (C.G.S.) Section 10a-112*: Establishes the Office of State Archaeology at the University of Connecticut's Museum of Natural History to identify, protect, and preserve the state's archaeological heritage, in coordination with the Connecticut Historical Commission.

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## Connecticut Historical Commission

*C.G.S. Sec. 10-321 et seq*: Establishes the Connecticut Historical Commission to identify and protect state's cultural heritage; establishes Connecticut Historical Commission as the State Historic Preservation Office for Connecticut; authorizes State Register and National Register of Historic Places; authorizes Commission to withhold disclosure of specific site location data in order to preserve archaeological site integrity.

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## Archaeological Artifacts

*C.G.S. Sec. 10-383*: Designates the Connecticut State Museum of Natural History as state repository for all artifacts found on state lands. Directs museum to establish collections policy on acquisitions, preservation, loan and transfer of artifacts.

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## State Archaeological Preserves

*C.G.S. Sec. 10-384*: With coordination of Office of State Archaeology, authorizes Connecticut Historical Commission to designate eligible sites as state archaeological preserves following notification, as applicable, to private owner, state agency, and Native American Heritage Advisory Council.

## **Native American Heritage Advisory Council**

*C.G.S. Sec. 10-382:* Establishes Native American Heritage Advisory Council to provide guidance and recommendations on Native American heritage to the Office of State Archaeology and the Connecticut Historical Commission.

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## **Archaeological Investigations on State Lands**

*C.G.S. Sec. 10-386:* Authorizes permit process for archaeological investigations on state lands or state archaeological preserves; applications are reviewed by the Connecticut Historical Commission in coordination with Office of State Archaeology and Native American Heritage Advisory Council.

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## **Archaeological Preservation**

*C.G.S. Sec 10-387:* Direct state agencies to review their policies and practices for consistency with the preservation of archaeological sites.

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## **Native American Burials**

*C.G.S. Sec. 10-388 et seq:* Provides for in situ preservation or archaeological excavation and reburial of human remains encountered during construction, agricultural, archaeological or other ground disturbance. Defines roles and responsibilities of the Medical Examiner, State Archaeologist, Connecticut Historical Commission and Native American Heritage Advisory Council.

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## **Ancient Burial Ground and Gravestone Preservation**

*C.G.S. Sec. 19a-315b:* Protects ancient burial grounds and gravestones. Requires notification to the Connecticut Historical Commission for any gravestone removal or cemetery renovation; Commission makes recommendation to Connecticut Probate Court on such requests.

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## **Connecticut Environmental Protection Act**

*C.G.S. Sec. 22a-15 through 22a-19:* Creates legal recourse to examine unreasonable destruction of historic resources listed, or under consideration for listing, on the National Register of Historic Places.

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## **Connecticut Environmental Policy Act**

***C.G.S. Sec. 22a-1 et seq:*** Directs state agencies to consider historic, architectural and archaeological resources are properly considered in the planning and development of state projects.

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### **Local Historic Districts and Historic Properties**

***C.G.S. Sec. 7-147:*** Enabling statute which provides for establishing local historic districts and historic properties (including archaeological sites) governed by local ordinances and a local historic district commission.

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### **Municipal Historians**

***C.G.S. Sec. 7-148(c)(5)(D):*** Authorizes appointment of municipal historians.

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*1836 Charles Codman painting of the Maine State House in Augusta.*

Established through a legislative act in 1971, the Maine Historic Preservation Commission is the state agency which functions as the State Historic Preservation Office in Maine. As such, the Commission is responsible for the identification, evaluation, and protection of the states's significant cultural resources as directed by the National Historic Preservation Act of 1966. The Commission oversees the statewide survey program, nominates properties to the National Register of Historic Places, reviews development activities for their effect on cultural resources, co-ordinates rehabilitation projects under the Preservation Tax Incentives Program, assists local governments in survey work and the design of preservation guidelines, and is involved in a variety of public education activities.

**Choose one of the following for more information on the Maine Historic Preservation Commission's activities:**

<u>National</u>		<u>Historic</u>	<u>Certified</u>		
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<b>Survey</b>	<b>National Register Program</b>	<b>Resource Protection</b>	<b>Preservation Tax Incentives</b>	<b>Local Government Program</b>	<b>Planning</b>	<b>Public Education</b>

**Commission Staff Members:**

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 Sharon Morang, Secretary  
 Elizabeth Trautman, Archaeology Lab Supervisor  
 Dana Vaillancourt, Architectural Historian

**State of Maine Homepage**

**Send comments/questions to: [webmaster\\_mhpc@state.me.us](mailto:webmaster_mhpc@state.me.us)**

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## Resource Protection



*Shaker Village, Sabbathday Lake, Maine.*

Little can be done to prevent the damage to our historic and archaeological resources by acts of nature such as floods, fires, and storms. However, steps can be taken to minimize the damage caused by human action in the form of construction and development.

As a result of the National Historic Preservation Act of 1966, the Maine Historic Preservation Commission has the responsibility to review all federal, federally funded, or licensed projects to determine their effect on cultural resources listed in or eligible for listing in the National Register of Historic Places. Known as the Section 106 Review, examples of projects reviewed include construction undertaken by the Maine

**Department of Transportation with federal highway and/or bridge funds, work in communities where federal grants are used for the rehabilitation of historic properties, and Department of Defense base closure or military projects. The protection of cultural resources on the state level is achieved under the Maine Department of Environmental Protection Site Location Law which requires the review of many developments and subdivisions. If a project poses a threat to historic or archaeological resources, the Commission works with appropriate parties to minimize the impact.**

**In order to effectively deal with threats to particular resources in certain areas, the Commission works to identify endangered resources and plan accordingly. An example of this is the the statewide historic bridge survey which is presently being undertaken by the Maine Department of Transportation in cooperation with the Commission. The identification and evaluation of cultural resources through the Commission's survey program is key to ensuring the survival of Maine's significant historic and cultural resources.**

**For more information about resource protection, contact Dana Vaillancourt at 207.287.2132 or e-mail to: [dana.vaillancourt@state.me.us](mailto:dana.vaillancourt@state.me.us)**



**MASSACHUSETTS HISTORICAL COMMISSION**

The Massachusetts Historical Commission (MHC) is the State Historic Preservation Office and is authorized by M.G.L. Chapter 9, Section 26-27C to identify, evaluate and protect the Commonwealth's important historic and archaeological resources. The MHC administers state and federal preservation programs, including historic preservation planning (such as assisting communities with listing properties in the National Register of Historic Places and establishing local historic districts), review and compliance (including implementation of Section 106 of the National Historic Preservation Act as amended), grant assistance, and public information activities. The MHC is also the office of the State Archaeologist. (617) 727-8470; TDD: 1-800-392-6090

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## Attention Old House Owners Upcoming Event!

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Historic Preservation Programs

Massachusetts Archaeology Week

Mass. Preservation Projects Fund Overview

National Register of Historic Places Overview

New! Preservation Advocate Newsletter

Local Preservation Update Newsletter

Preservation Awards Information

Historic Places for Historic Parties

Publications Available

Cultural Tourism Seminars

Legislative Citations

MHC's Location and Hours

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Comments



# Historic Preservation Programs

The continuing presence of historic properties in Massachusetts immeasurably enhances the quality of our lives; they help to establish our sense of place and to define the very character of our communities. To meet the challenge of preserving this important heritage, the Massachusetts Historical Commission (MHC) was established by the legislature in 1963\* to identify, evaluate, and protect important historical and archaeological assets of the Commonwealth.

The Commission consists of 18 members appointed from various disciplines who serve as the State Review Board for state and federal preservation programs.

The professional staff of the Commission includes historians, architects, archaeologists, geographers, and preservation planners. The state's preservation programs are administered through MHC's Preservation Planning, Grants, Public Information, and Technical Services Divisions.

The MHC is the office of the State Historic Preservation Officer, as well as the office of the State Archaeologist.

*\*(MGL Ch. 9 Sections 27-32 enabling legislation)*

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Public Information Division

Technical Services Division

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# Technical Services Division

## Historic Preservation Programs

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### Historic Preservation Certification

The federal tax incentive program\* has encouraged private investment and rehabilitation of historic properties and has been particularly valuable to Massachusetts. This program allows owners of National Register buildings in commercial, industrial, or rental residential uses to qualify for a 20 percent Investment Tax Credit, in effect a 20 percent rebate, based on rehabilitation costs. These credits help pay for the unique costs associated with rehabilitations of historic properties and have convinced otherwise skeptical investors of the value of historic buildings.

The National Park Service certifies rehabilitation, and the MHC Technical Services staff advises and assists owners during the application and review process. This assistance has inspired tremendous interest in the program in Massachusetts and has ensured a consistently high rate of approvals.

Applications should be submitted to MHC before rehabilitation work begins in order to receive the most useful advice and best results. *\*(Tax Reform Act of 1986)*

### Environmental Review and Public Planning

As the State Historic Preservation Office, the MHC acts as liaison to federal, state, and local development agencies such as the Federal Highway Administration, the Department of Housing and Urban Development, and the Massachusetts Industrial Finance Agency. The MHC is authorized by state and federal law\* to review and comment on certain state and federally licensed, permitted, or funded projects to determine whether or not the proposed project will have an impact on historic or prehistoric properties. This review process generally begins during the early stage of the planning process when the federal or state agency contacts the MHC. If it is determined that the project poses a threat to a historic property within the proposed project impact area, then project proponents and the MHC jointly explore alternatives to eliminate, minimize, or mitigate any damaging effects. MHC's environmental review programs have been successful in resolving historic preservation disputes.

Archaeological excavations on public lands are overseen by the State

Archaeologist\*\*, whose permits ensure that these important resources are properly conserved. The State Archaeologist also reviews development projects that affect archaeological properties and negotiates solutions to protect the sites.

*\*(NHPA Section 106; 36 CFR 800)*

*\*\* (MGL Ch. 9 Sections 26-27C, as amended; 950 CMR 71.00, 950 CMR 70.00)*

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# Preservation Planning Division

## Historic Preservation Programs

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### Survey

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#### Certified Local Government Program

#### Local Historic Districts

#### National Register of Historic Places

#### State Register of Historic Places

### Survey

The first step in a community's preservation planning process is to identify, describe and locate buildings, structures, objects, areas, burial grounds, landscape features, and sites that are of historical, architectural, or archaeological importance to the community, the state, or the nation. A comprehensive inventory of a town's historical assets serves as the basis for all future preservation activities. This inventory becomes part of a statewide inventory and enables MHC staff and local preservationists to make consistent and informed preservation decisions. MHC maintains a statewide survey at the reconnaissance level in order to formulate a broad context for evaluating the significance of historic and prehistoric properties.

Presently the MHC is entering the statewide inventory into the Massachusetts Cultural Resource Information System (MACRIS), an interactive computerized database. MACRIS provides better access to the information on these files.

### Local Historical Commissions

Established by a vote of the town or city government, a Local Historical Commission\* (LHC) is the municipal agency responsible for ensuring that preservation concerns are considered in community planning and development decisions. Over 340 LHCs across Massachusetts are already established and working closely with the MHC. They serve as local preservation advocates and as an important resource for information about their community's cultural resources and preservation activities.

*\*(MGL Ch. 40 Section 8d)*

# Preservation Planning Division

## Historic Preservation Programs

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### Survey

#### Local Historical Commissions

#### Certified Local Government Program

#### Local Historic Districts

#### National Register of Historic Places

#### State Register of Historic Places

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*\*(MGL Ch. 40 Section 8d)*

## **Certified Local Government Program**

The Certified Local Government Program\* (CLG) is a unique partnership that provides a close integration of federal, state, and local preservation activities. Communities that have enacted historic preservation legislation are eligible to apply to MHC for certification. By extending state and federal programs at the local level, the CLG program allows communities to participate directly in the review and approval of National Register nominations. CLGs are eligible to compete for at least 10 percent of the federal funds allocated to MHC.

*\*(National Historic Preservation Act of 1980, 36 CFR Part 61)*

## **Local Historic Districts**

A Local Historic District\* (LHD) is established and administered by a community to protect the distinctive characteristics of important areas, and to encourage new structural designs that are compatible with the area's historic setting. A District Study Committee is appointed to conduct a survey of the area and to prepare a preliminary report for local and state review. A final report is then submitted to the local governing body for approval of the local historic district ordinance or by-law. Once a LHD is established, a Local Historic District Commission (LHDC) is appointed to review all applications for exterior changes to properties within the district. This design review process assures that changes to properties will not detract from the district's historic character. Review criteria are determined by each city and town and vary for each local district.

*\*(MGL Ch. 40C)*

## **National Register of Historic Places**

The National Register of Historic Places\* (NRHP) documents and records the nation's important and irreplaceable buildings, sites, structures, objects, and districts worthy of protection. Based on local and state surveys, nominations to the NRHP are generally initiated by the local historical commission, which works with MHC staff to prepare the form.

Nominations are then reviewed by the MHC State Review Board at a public meeting and forwarded to the Keeper of the National Register for approval.

Listing on the NRHP recognizes the value of our nation's historical and cultural heritage and provides a basis for making informed planning and development decisions. NRHP status places no constraints on what owners

may do with their property when using private funding. While the NRHP is not a design review program, it does provide limited protection from state and federal actions, as well as eligibility for matching state and federal restoration and research grants (when available) and certain federal tax benefits for certified rehabilitation projects.

*\*(National Historic Preservation Act , 36 CFR Part 60)*

## **State Register of Historic Places**

The State Register of Historic Places\* (SRHP) was created to serve as a master list of designated historic properties in the Commonwealth and to provide an added measure of protection to these properties. Properties are included on the State Register if they are: listed in or determined eligible for listing in the NRHP; within local historic districts; local, state, and national landmarks; state archaeological landmarks; or properties with preservation restrictions. The SRHP serves as a guide for developers and state agencies in order to determine whether a state funded, permitted, or licensed project will affect historic properties. The State Register review process was modeled closely after the federal review process (outlined under the Technical Services Division section of this brochure), and ensures that State Register properties will not inadvertently be harmed by activities supported by state agencies.

*\*(MGL Ch. 9 Sections 26-27C, as amended)*

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# Massachusetts State Legislation Related to the Massachusetts Historical Commission

Order of information listed below: **Program Area/Title; Citation; Date Enacted**

MHC enabling Legislation with amendments through 1989: M.G.L. Ch. 9 ss.26-27C as amended; 1963

## Legislative Citations from 1989 Report

**Archeology:** M.G.L. Ch. 9 ss.26-27C; 1971

**Archeology:** 950 CMR 70.00 (most recent amendment); 1989

**Shipwrecks/Salvage (Underwater Act):** M.G.L. Ch. 6 ss.179-180; 1973

**Shipwrecks/Salvage (Underwater Act):** M.G.L. Ch. 91 s.63

**Shipwrecks/Salvage (Underwater Act):** 312 CMR 2.00

**Native American Burials:** M.G.L. Ch. 7 s.38A

**Native American Burials:** M.G.L. Ch. 9 s.26A & 27

**Native American Burials:** M.G.L. Ch. 38 ss.6B-6C; (1983) 1989

**Native American Burials:** M.G.L. Ch. 114 s.17

**Native American Burials:** M.G.L. Ch. 38 ss.6B-6C; 1989

**Burials:** M.G.L. Ch. 9 s.26A and 27C

-**Care of Neglected Burial Places:** M.G.L. Ch. 114 ss.17-18; (1980) 1983

-**Care of Neglected Burial Places:** M.G.L. Ch. 273 s.7

-**Injuring or Removing Tombs, Graves, Memorials:** M.G.L. Ch. 272, s.73; 1834

-**Rules and Regulations for Gravestone Repair/Reproduction:** 950 CMR 41; N/A

-**Violation of Sepulchre:** M.G.L. Ch. 272 s.71; 1931

**Historic Structures/Sites:** M.G.L. Ch. 9 s.26-27C; N/A  
**State Review and Compliance:** M.G.L. Ch. 9 ss.26-27C; 1988  
**State Review and Compliance:** 950 CMR 71.00  
**State Funded Grant/Loan Program:** M.G.L. Ch. 9 ss.26-27C; N/A  
**State Register Program:** M.G.L. Ch. 9 ss.26-27C; 1988  
**State Register Program:** 950 CMR 41  
**State Fund to Purchase Endangered Properties:** M.G.L. Ch. 9  
ss.26-27C  
**Historic Building/Fire Code:** 780 CMR 1-22  
**Historic Building/Fire Code:** M.G.L. Ch. 802; 1972  
**State Funded Main Street Program:** Executive decision, not legal  
authority  
**Preservation Restrictions:** M.G.L. Ch. 184 ss.31-33; 1969  
**Local Historic Districts:** M.G.L. Ch. 40C; 1960  
**Local Historical Commissions:** M.G.L. Ch. 40 s.8D; 1963  
**Historic Homesteads:** M.G.L. Ch. 9 s.27D; 1978

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*New Hampshire Department of  
Cultural Affairs*

**New Hampshire  
Division of Historical Resources**

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The Division of Historical Resources (DHR), also known as the State Historic Preservation Office, assists the people and communities of New Hampshire in recognizing and protecting the tangible evidence of their heritage. The DHR is dedicated to identifying the most important reminders of New Hampshire's past, and to helping our fellow citizens use these powerful cultural symbols to chart a productive course into the future. Established in New Hampshire in 1974 and operating with federal and state authority, the program is funded on a matching basis by the National Park Service of the Department of the Interior and the State of New Hampshire.

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► Department of  
Cultural Affairs ◀

*New Hampshire Division of Historical Resources  
19 Pillsbury Street  
Concord, NH 03301  
(603) 271-3483  
(603) 271-3433 (fax)*

*December 1996*



## NEW HAMPSHIRE DIVISION OF HISTORICAL RESOURCES

State of New Hampshire, Department of Cultural  
Affairs

603-271-3483 or 271-3558

19 Pillsbury Street, Box 2043, Concord, NH  
03301-2043

FAX 603-271-3433

Voice/TDD RELAY ACCESS 1-800-735-2964

[NHDHR@lilac.nhsl.lib.nh.us](mailto:NHDHR@lilac.nhsl.lib.nh.us)

The Division of Historical Resources was established in 1974 as the "State Historic Preservation Office". The historical, archaeological, architectural and cultural heritage of New Hampshire is among the most important environmental assets of the state. Historic preservation promotes the use, understanding, and conservation of such properties for the education, inspiration, pleasure, and enrichment of New Hampshire's citizens.

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### ● Staff Listing

### ● National Register of Historical Resources

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New Hampshire Department of Cultural Affairs

Webster - New Hampshire State Government Online

January 1998



## NEW HAMPSHIRE DIVISION OF HISTORICAL RESOURCES

State of New Hampshire, Department of Cultural Affairs

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Rusty Bastedo  
State Curator

James Garvin  
Architectural Historian

Nancy Bibbins  
CLG Coordinator  
Grants Manager

Christine E. Fonda  
Architectural Historian  
National Register Coordinator  
Preservation Tax Incentives  
Coordinator

Robin Gould  
Executive Secretary

Deborah J. Gagne  
Clerk IV

Gary W. Hume  
State Archaeologist  
Review & Compliance  
Coordinator

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Division of Historical Resources



# Vermont Division for Historic Preservation

Department of Housing and Community Affairs  
Agency of Commerce and Community Development



- Guide to Division for Historic Preservation Services
- Community Services and Certified Local Government Program
- Vermont Downtown Program
- Historic Site Information: State and National Registers of Historic Places
- Financial Incentives and Funding Sources
- Vermont State-Owned Historic Sites
- Other Resources: History, Architecture, Doing Research, Technical Information, Preservation Planning

**Vermont Division for Historic Preservation**  
**National Life Building, Drawer 20, Montpelier, VT 05602-0501**  
**(802) 828-3226**

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# Guide to Division for Historic Preservation Services

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## **Vermont Downtown Program**

To encourage the economic health and vitality of our downtowns, the Vermont Downtown Program, a program of the Division and the Department of Housing and Community Affairs, provides technical assistance and training to communities. Over 100 publications and audio visual materials addressing a wide variety of revitalization topics are available on loan. Call: 828-3042 or 828-5212.

## **Public Education and Information**

The Division is a clearinghouse for information on historic buildings and villages, urban neighborhoods and downtowns, rural landscapes, and archeological sites. Among the materials available are handouts on building preservation techniques, a booklet on architectural styles in Vermont, pamphlets on Vermont archeology and historic buildings, and a series of videotapes on Vermont's architectural and archeological heritage. Call 828-3050 for archeology and 828-3045 for buildings.

## **Planning Assistance**

The Division can provide inventories and/or maps of historic resources and archeologically sensitive areas to local planners who are developing town plans. Staff also work with municipalities to protect identified sites through local planning, zoning, and public education activities. Call 828-3045.

## **Survey, Inventory, and National Register**

The Vermont Historic Sites and Structures Survey and the Vermont Archeological Inventory are major Division programs to identify historic buildings and archeological sites in the state. The Division has already identified and evaluated over 30,000 buildings and 1,500 archeological sites throughout Vermont that are worthy of preservation. Properties of special merit may be nominated to the National Register of Historic Places. More detailed research and documentation of these resources lead to eligibility for special financial assistance and some legal protection. Call 828-3046 for buildings and 828-3050 for archeological sites.

## **Investment Tax Credits**

Income-producing historic buildings on the National Register of Historic Places may qualify for a federal tax credit when they undergo a substantial rehabilitation. The project must preserve the existing important historic features of a building, but can also include modern improvements such as plumbing and electrical repairs. The tax credit granted to approved projects is 20% of the project cost. Division staff review applications, maintain a list of qualified consultants, and provide general technical assistance to developers of tax credit projects. Call 828-3047.

## **State Historic Preservation Grants**

The Division currently offers two 50/50 matching grant programs on a competitive basis to repair historic buildings that meet the criteria for listing on the National Register. The State Historic Preservation Grant Program offers grants to non-profit groups and municipalities. The Barn Grant Program provides matching grants to individuals, as well as non-profits and municipalities. Call 828-3044.

## **Vermont Historic Preservation Plan**

The Vermont Historic Preservation Plan summarizes important themes in Vermont's history, such as agriculture, transportation, and industry, and describes the types of buildings, structures, and sites related to those themes. The Vermont Heritage Series presents this information in video cassette form. Call 828-3045.

## **Act 250 and Federal Project Review**

The Division is legally required to evaluate the more than 1,000 Vermont projects yearly that require a state Act 250 permit and that are funded,

licensed, or require a permit from the federal government. The Division maintains a list of consultants who can assist project developers in meeting preservation guidelines. Call 828-3049.

**Certified Local Governments**

This program engages local governments in a stronger partnership with the Division in carrying out survey, National Register, and preservation planning and education activities in their towns. The municipalities may receive special funds for their projects, which are administered by a local preservation commission. Call 828-3042.

**State-Owned Historic Sites**

The Division owns and maintains a comprehensive statewide system of historic sites illustrating the full range of Vermont's history and heritage. Interpretive exhibits and programs in archeology, architecture, and historic events enhance the understanding and enjoyment of these sites, which are staffed and open to the public from mid-May through mid-October. Call 828-3051.

NOTE: If you are coming to the office to discuss a particular program, please call ahead to make sure an appropriate staff person is available.

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# A Practical Guide To Cultural Resource Compliance

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- Introduction
- The Section 106 Process
- Phase I - The Cultural Resources Survey
- Phase II Assessment of Specific Sites
- Phase III - Mitigation of Adverse Effect
- The Parts of a Project
- The Proposal
- Background Research
- Field Work
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- Report Preparation
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- A Few Do's
- And a Few Don'ts
- A Glossary of Useful Terms

## INTRODUCTION

The nation's cultural resources are its historic and prehistoric remains, historic structures and archaeological sites. Within the next decade, enforcement of cultural resource laws and regulations will become increasingly stringent as the nation's infrastructure is repaired and rebuilt. Over the past ten to fifteen years, certain sectors of the construction and engineering fields have come to grips with these laws. These firms now realize that it is less costly to address cultural resources early in a project.

Today, local governments and others who have not previously been required to comply with the federal regulations are being introduced to them. This pamphlet provides these newcomers with a practical overview of the federal compliance process.

The pamphlet addresses the three main phases of cultural resource projects and generally what to expect when confronted with a letter from a federal agency or the State Historic Preservation Officer (SHPO). The pamphlet also suggests ways to make the process easier and less costly for all concerned. A glossary provides some help interpreting cultural resources jargon.

Not all states in the southeast enforce the various mandates in the same way, and some states have their own cultural resource regulations to supplement the federal laws. This pamphlet does not pretend to cover every situation and is not an infallible guide. However, we hope it provides you with some of the practical information you need to get the best results for the least cost. We encourage you to contact your SHPO and ask questions about the compliance process in your state.

## THE SECTION 106 PROCESS

Section 106 of the National Historic Preservation Act (NHPA) is the reason for most of the cultural resource work being conducted in the United States today. The purpose of Section 106 is to insure that federal agencies consult with state and local groups before non-renewable cultural resources, such as archaeological sites and historic structures, are destroyed. Archaeologists make it a point that archaeological sites, once destroyed, are gone forever.

Section 106 requires that federal agencies review the effects on cultural resources of projects that they finance, permit or license. The President's Advisory Council on Historic Preservation (ACHP) is responsible for developing regulations to

enforce Section 106 compliance. Some of the agencies which issue permits or financially assist projects that often fall under Section 106 review include: the Corps of Engineers; the Federal Energy Regulatory Commission; the Federal Aviation Administration; the Department of Housing and Urban Development; the Federal Highway Administration; the Soil Conservation Service; the U.S. Forest Service; and even the Federal Deposit Insurance Corporation.

The primary federal agency becomes the lead agency with respect to cultural resources and Section 106. This agency is responsible for making sure that your project does not adversely affect cultural resources until the ACHP, the State Historic Preservation Officer (SHPO), and other interested parties have had a chance to comment. Each agency also has its own rules and regulations for compliance with Section 106. One of the more well known is the 4f process of the Federal Highway Administration. This states that construction cannot disturb a significant historic structure or site if there is an alternative to doing so.

Section 106 covers significant cultural properties. Significant properties are sites that are listed on the National Register of Historic Places (NRHP), have been determined to be eligible for such listing, or that are eligible for listing but have not yet been evaluated, or perhaps even identified. The following paragraphs discuss the practicalities of how such sites are found and evaluated for significance, and how to mitigate the impacts of construction projects on such sites.

To the uninitiated, and even to the experienced, getting through the compliance process can be complex and frustrating. The following presents the major steps in the cultural resource process. It will also show how the process brings together the four actors in the process: you, the lead federal agency, the (SHPO), and your consultant. While the following generally holds true most of the time in most states, you may have a project that does not follow the norm. If you feel that you have special circumstances, consult with the lead federal agency or your SHPO and ask questions.

Initially, you apply for a federal permit or have entered into a contract involving federal moneys or federal land. The lead agency then submits the proposed project to the SHPO as part of the review process. Once the SHPO has determined that a project may have an adverse impact on archaeological or historical sites, the agency or company conducting the work is advised that these cultural resources must be considered. Sometimes in this initial letter the SHPO requires that a survey be conducted. Often the SHPO does not describe the process or what you can expect down the road. However, in the back of the SHPO's mind you may be required to complete three phases before you have properly "considered" the cultural resources.

The first phase is usually an intensive survey, the second is the assessment or evaluative testing of specific sites or structures, and the third is mitigation of adverse impact or effect on significant sites or structures. These are normally called Phase I, II, and III. These terms sometimes cause confusion, because in some regions a reconnaissance is called Phase I, and the intensive survey and testing are combined into a single phase and called Phase II. In nearly all cases, however, mitigation of adverse impact is called Phase III.

## Phase I - The Cultural Resources Survey

The purpose of a survey is to gain an understanding of what is present within the project area and whether any of the archaeological sites or historic structures may be potentially eligible resources. Most states require that archaeological resources be examined by an archaeologist and that structures be examined by an architectural historian. A survey is designed to find all such properties that will be affected by a project.

The survey usually consists of various parts that are sometimes accomplished separately, usually at a higher cost to the client, or accomplished together as a single survey project. The first step in a survey is background research into what is already known and recorded about the sites in the project area. Such research normally includes: examination of the state archaeological site and historic structure files, which contain a list of previously recorded archaeological and historic sites in the state; general background research on the prehistory, history, and environment of the project area to provide a context within which to evaluate any newly discovered sites; and informal interviews with other archaeologists and historians who may have worked near the project area.

Once this is completed, a brief inspection of the project area may be made separately or incorporated into a more intensive field survey. This brief inspection, sometimes called a reconnaissance, is usually not sufficient to satisfy federal regulations. These require that all significant sites and structures affected by a project be identified. However, a reconnaissance can be useful in certain cases. It may be advantageous to conduct a brief reconnaissance of all the alternative locations for a project

to see which may have the least impact on cultural resources. This, when considered with other environmental variables such as wetlands and endangered species, provides a more objective basis for selecting the final alternative.

The intensive survey must be of sufficient intensity to locate all significant sites in the project area. Archaeological sites are located in several ways. The most commonly used method is surface survey, but this is only acceptable in areas where the ground surface (i.e., bare earth) is visible. The survey crew lines up at evenly spaced distances and walks transects, closely inspecting the ground surface for artifacts or topographic anomalies. In areas of heavy ground cover, such as is commonly found in the eastern United States, shovel tests are usually required to examine the soil beneath the surface. The number, depth and interval between shovel tests vary depending upon the situation, but shovel tests are usually dug at 30 meter (90 foot) intervals along transects spaced 30 meters apart. Occasionally, remote sensing techniques, such as ground penetrating radar and metal detectors, supplement the more common methods. In urban areas heavy equipment may be used during the survey phase to remove modern fill and debris. As sites are located, the field crew records them on project maps, and enters appropriate information on site forms. The archaeologists may also collect artifacts at this time to determine the age and function of an archaeological site.

Normally, it is not possible, nor is it the intent of a survey, to completely define the horizontal extent, the depth, the period of occupation, the state of preservation, and therefore the significance of a site during an intensive survey. In such cases, assessment or testing of specific sites found during the survey may be recommended to provide sufficient information for the regulatory agency to determine their significance.

At the conclusion of the survey you should receive a survey report with recommendations for any Phase II work. You should submit this report to the SHPO for approval of the recommendations before doing any more work. It is possible that the SHPO will require more or less Phase II work than is recommended by your consultant.

## Phase II -Assessment of Specific Sites

This phase usually requires a separate proposal and contract. For subsurface sites, evaluative testing usually means digging more, and more closely spaced, shovel tests to define the length and width of the site. It will also usually include transit mapping of the site and excavating several square test units. The test units examine the soil stratigraphy, gather artifacts for dating and functional analysis, and determine the site's state of preservation. With these data, the significance of an archaeological site can be judged, and if the site is significant, data are readily available upon which to base a research design for mitigation.

Historic archaeological sites frequently require additional research. A qualified historian should conduct this work, normally consisting of researching a chain-of-title on the property to discover who owned and occupied the site, and when. The researcher will also determine what records would be available if data recovery were to be conducted. On urban sites it is critical that extensive historic map research be conducted to determine how the area developed. The presence of a good chain-of-title, census, probate, and tax records will add greatly to understanding the site's potential significance.

To assess historic structures the architectural historian must collect detailed information about the property, its ownership and its history; photograph it; describe the structure, any additions and outbuildings; map the structures and surrounding landscape; and discuss the site's significance.

At the conclusion of testing, you should receive a report with conclusions on the eligibility of each site tested and recommendations for any further work. Avoidance of significant sites should be one of the recommendations. You should submit this report to the SHPO for approval of the recommendations before doing any more work.

If the SHPO determines that a site is eligible for the National Register of Historic Places (NRHP), you will need to mitigate any adverse impacts to the site. It is possible that the SHPO will require more or less work than is recommended by your consultant. If the SHPO determines that Phase III work is required, you should obtain a memorandum of agreement in consultation with the SHPO and the ACHP. The memorandum of agreement should spell out what is required of you during Phase III.

## Phase III - Mitigation of Adverse Effect

"Mitigation of adverse effect" means to alleviate any destructive impacts your project may have on the resource. This may take various forms. Some are relatively inexpensive and take little time, while others are not. If you can find a way to avoid

the site and not affect it at all, this may be best. But you must also convince the SHPO that you will not affect the site in the future. This is, of course, the least expensive form of mitigation.

If you cannot avoid the site, then the SHPO will probably require data recovery. If the site consists of architecturally or historically significant standing structures, you may be able to have them properly recorded to the Historic American Building Survey or Historic American Engineering Record (HABS/HAER) standards (i.e., measured drawings, floor plans, and large format photographs) before moving or demolishing them.

Archaeological data recovery means digging large areas by hand or by a combination of hand- and machine-assisted excavation. If the site is historic then the historic documents consulted during the testing phase will need to be obtained and analyzed by a qualified historian. The final report of the Phase III work is more extensive than of the other phases since this report is the only record of the site once it has been destroyed by construction.

Consultants and even SHPOs sometimes propose one other form of Phase III work. This is monitoring. Monitoring usually involves the presence of a single archaeologist during the earth moving portions of construction, who watches for significant cultural resources. Initially, this may seem to be an inexpensive alternative to avoidance or data recovery. In reality, it rarely is. In the few states where monitoring is acceptable to the SHPO, the archaeologist has the duty to stop construction if a potentially significant resource is found. The SHPO then determines whether the resource is significant. If the resource is determined to be significant, data recovery may delay a project for months. This is obviously more costly than simple avoidance or data recovery alone, since there are unknown construction delay costs involved.

## The Parts of a Project

This discussion has so far concentrated on the field portion of the three phases of work. In the following, we will discuss the parts of projects that are the same for all three phases.

## The Proposal

Whether you use a single consultant, or put a project out for bids, you should always ask for a written proposal. A proposal normally describes what the potential consultant understands to be the tasks involved and the general limits of the project. It should clearly state what the consultant will do and why. It should also contain a schedule showing project milestones. The main project milestones are: completion of field work; completion of laboratory work; completion of the draft report; and completion of the final report. The proposal should indicate the qualifications of the individuals assigned to the project. It should also describe the qualifications and facilities of the consultant, whether these are a garage or a formal office and laboratory.

Once you have chosen your consultant, you should include the proposal as a part of the signed contract. The contract should also clearly state how and when the agreed upon fee is to be paid. A single payment may be reasonable for projects of less than a month. For larger projects, it is customary to pay by milestones met or by work accomplished on a monthly or bi-monthly basis.

## Background Research

This research varies in intensity depending on the type of project conducted, as noted above. Failure to conduct such research may mean that work will be duplicated, or previously recorded information will not be considered early enough in the project. This may end up causing cost overruns; or even worse, the SHPO may not accept the consultant's report.

## Field Work

This is usually the easiest phase to budget and schedule, but it is relatively labor-intensive. However, as far as overall project scheduling, the field work is usually about one third of the total project. Archaeologists do most of their work in the laboratory and at the word processor.

## Laboratory Analysis

To be able to write a final report, the consultant must analyze the artifacts, drawings, maps, photographs, and other data collected during the background research and field work. While more artifacts and data will be collected during a Phase III

project than a Phase I, all the artifacts have to be washed, cataloged, labelled, analyzed and eventually curated. The analysis answers such questions as: where do the different types of artifacts come from within the site? how old are they? how did they function? and what does all of this tell us about who used and discarded the artifacts? This work is slow and painstaking, and indeed, often takes longer than the field work.

## Report Preparation

The archaeologist normally begins the project report toward the end of the analysis phase. This report is ultimately the product that you are purchasing from the consultant. A report usually consists of the following parts: a cover; a title page; an abstract; acknowledgments; a table of contents; an introduction; a discussion of the cultural and environmental setting of the project area; a discussion of the methods employed; a discussion of the results; a set of conclusions and recommendations; a list of references cited; appendices; and all pertinent photographs, maps, and drawings.

The introduction should include the reasons for conducting the work and the objective of the project, against which the remaining chapters can be placed in perspective. The project setting will include the data gathered during the background research and will frame the research criteria by which the significance of sites can be determined. The discussion of methods and results should clearly state what was done and how, so that the validity of the results can be judged. The report must discuss the results in sufficient detail so that the reader (i.e., the regulatory agency and the client) can independently come to the conclusions reached at the end of the report. This includes sufficient photographs, maps and drawings so that the reader has a complete understanding of what was accomplished. The report must present conclusions that clearly follow from the supporting data.

Of most importance to you are the recommendations. The background research, the project results, and the conclusions must fully support the recommendations. Recommendations will normally concern the significance of sites relative to the National Register, and what further steps are necessary to comply with regulations. If a Phase II or III is recommended, it must be justified, and the steps to accomplish the recommended work should be stated clearly. You should be able to use such recommendations as the basis of a request for proposals for the additional work.

The appendices should include, in most cases, a complete inventory of the artifacts found by the project and where they were found. Many states also require that the proposal, resumes of key project personnel, and any state site forms be submitted either as appendices or separately.

Draft and final versions of the final report are common on most large projects and on virtually all Phase II and III projects. On most large projects you must submit the draft to the lead federal agency and the SHPO for comments before producing the final version, which should incorporate or address these comments. Artifacts should not be curated and the project is not complete until the final report is accepted by you, the lead agency and the SHPO.

You may require a management summary at the end of the field work, especially for testing and data recovery projects. This report is written after the field work is completed and before the analysis is well underway. The purpose of this short report is to provide you with the preliminary conclusions about the project to aid you in planning for future work. It may also allow the SHPO to determine that the field work was sufficient to grant clearance of a site before the final report is submitted. This does not waive the laboratory analysis and final report, however. Such clearance should allow construction to proceed. The possibility of obtaining clearance after the data recovery field phase and before a completed final report also requires a close relationship with the SHPO during the project, along with adequate field work.

## Curation of Artifacts and Data

The last thing to do on a project is to permanently curate the artifacts and project notes and data. These must be curated in perpetuity, which is usually taken to mean that they be stored by a university or state agency. The proposal should discuss the responsibility for curation and identify the curation facility.

## Acceptance by the Federal Agency

Once you have been able to show that you have completed an adequate survey of archaeological and historical sites in your project area, assessed their significance, and mitigated any adverse impacts to them, the lead federal agency should officially notify you that you have satisfied the Section 106 process and may continue with your project.

## SOME SUGGESTIONS TO EASE THE PROCESS

### -A FEW DO'S-

- **DO - Start Early in the Process.** By taking cultural resources into account early in the process, it may be possible to avoid problems down the road. With planning, you may be able to creatively interface cultural resources with construction plans.
- **DO - Contact the SHPO Early and Often.** Do not hesitate to talk to your State Historic Preservation Officer representative. This person is knowledgeable about the applicable laws and procedures in your state. The SHPO staff are more than willing to work with you to understand the process, provide advice, and in some states, provide you with a list of consultants. They may even help you select the proposals that appear to minimally satisfy their requirements.
- **DO - Put Projects Out for Bid.** If there is time for a formal bid procedure, do so. You will gain the best results and prices if you submit your work to competitive bid. Let your consultants know that all phases of the project may be competitive. Unfortunately, some consultants will offer unreasonably low estimates for Phase I, expecting to make up for their losses by charging higher fees for subsequent phases. Such consultants are more likely than a reputable firm to recommend marginally significant sites for more study in Phases II or III. If you are comfortable with your consultant's prior work and ability to meet SHPO review, you should use a non-competitive process. If you are new to cultural resources, it is definitely to your advantage to submit your work to competitive bids.
- **DO - Select a Reputable Firm.** Some firms are too small or inexperienced to bid or respond properly to the needs of their clients, or even to have their reports pass SHPO review. Other firms put their needs or the perceived needs of archaeology ahead of their client and are not willing to talk about ways to trim costs while doing an acceptable job. Consideration should be given to a firm that maintains good relations with the SHPO and yet understands budgets, schedules, and working with you and your special circumstances. A minimum requirement you might consider when selecting your consultant might be Society of Professional Archaeology (SOPA) certification for the principals in the consultant firm. Some states now require such certification or its equivalent.
- **DO - Expect to Understand.** You should require that you receive an understandable proposal and report of the project. Do not accept unintelligible jargon. The basic concepts and procedures of archaeology and history are not difficult to understand. If you do not understand your consultant or the SHPO, ask for a response in plain English. You need to know in a proposal what will be done, why, when, and for how much. You do not need a degree in archaeology to understand these things if they are clearly stated. Make sure you understand the goals of the project, how they will be achieved, and what could happen next.
- **DO - Provide As Much Information As Possible.** The more information you supply to prospective bidders about the circumstances of the project and the project area (maps, notes, letters from the SHPO, other reports, etc.) the better. The consultant will be able to respond to your request for proposals in a cost-effective manner with such information. Keeping potential consultants in the dark is ultimately self-defeating. Encourage questions from consultants to maintain the best communications possible about your needs.
- **DO - Require Regular Contact.** On large projects you might consider requiring written monthly progress reports. Weekly telephoned reports might supplement the formal monthly reports. These reports should give you a good idea of how the work is progressing, whether the project is on schedule, and prepare you early in the project for any unforeseen problems or delays.
- **DO - Require an Executed Contract.** Before commencing any work you should have a contract that clearly states what the goals of the project are, and how these are to be achieved. You should also have a schedule, a budget, and the names of the principal personnel assigned to the project. This is to protect you and the consultant. On projects with a potential public liability, you might consider having your contract require a current liability insurance certificate.
- **DO - Consider Cost-Plus Contracts.** If the scope of work is clearly defined, a lump-sum contract may be cost-effective. When there are significant unknowns in a project, which is often the case in archaeology, consider a cost-plus contract with a not-to-exceed amount. Base this amount on clearly understood quantities of fieldwork (person days, the number of excavations, or the collection of certain types or amounts of data, etc.) With lump sum contracts two things usually happen. First, reputable firms make their best cost estimate and add a little to cover unforeseen contingencies. They expect to stick to the agreed upon price. Other firms come in too low, just to get the project. Sooner or later they demand more money or produce work that does not pass muster with the SHPO.
- **DO - Work Closely with Your Consultant.** A reputable firm encourages questions and is willing to explain what is

happening and why. Archaeologists are naturally hesitant about making hard conclusions about the archaeology until the laboratory work is completed. On the other hand, they should be willing to work with you to give you the best service for the money.

- **DO - Request a Management Summary after Data Recovery.** In situations where you are required to conduct a data recovery project (often a large scale excavation), explore the possibility of having your consultant work closely with the SHPO during the field work. The SHPO may be able to grant you clearance at the conclusion of the field work, and before a final report is submitted and approved. This will not negate the need for laboratory analysis or a final report, but will allow you to begin construction much more quickly.
- **DO - Consider the Judicious Use of Heavy Equipment.** Some archaeologists have an unfounded fear of using heavy equipment on archaeological sites. In many cases, the use of such equipment is not only less expensive and quicker, but will actually produce more and better archaeological information.
- **DO - Provide No or Low-Cost Items.** If you have low-cost housing available for field crews or have access to heavy equipment or transportation, consider providing these to the consultant at no cost. Since housing and heavy equipment are usually pass-through costs for consultants, this will not change their balance sheets, but could save you thousands of dollars.
- **DO - Use the Project for Publicity.** Archaeological sites and projects, particularly in urban settings, bring out the curiosity in many people. Since you are required to do the project anyway, obtaining some good public relations at the same time is a bonus. You might consider contacting local television stations and newspapers, as well as local archaeological and historical societies. You might also consider some form of public involvement on larger data recovery projects, tied in with the local school system. On larger more interesting projects, it is possible to produce an inexpensive brochure, or perhaps even a video, for the public summarizing the project. Artifacts displayed in local museums or, perhaps, in a lobby of a newly constructed building, frequently go a long way toward maintaining good public relations. Your consultant can do many of these things for little additional cost to the project.
- **DO - Get Involved.** By asking questions and periodically visiting the site, you may learn a lot about local prehistory and history. At the same time you may learn enough to make your next project more cost effective. Believe it or not, archaeology can be interesting.
- **DO - Consider the Possibility of Tax Savings.** In some areas certain types of repairs to structures, listed on the National Register, can be deducted from federal taxes. It may also be possible to donate the artifacts and project data to a non-profit organization for a tax deduction. See your tax attorney.

#### -AND A FEW DON'TS-

- **DO NOT - Select a Consultant By Price Alone.** You will probably get what you pay for.
- **DO NOT - Make Arbitrary Demands.** Archaeologists in some government agencies think that by being very explicit about the field work (the numbers of holes, exact locations of excavations, etc.) they will receive superior proposals. However, this is not often the case. Such arbitrary limits set by a single archaeologist usually do not allow for a creative approach to your situation. A creative approach might be cheaper and faster, and still address the concerns of the SHPO.

#### A GLOSSARY OF USEFUL TERMS

- **Analysis:** The archaeological study of the properties of artifacts and other objects (e.g., bones and seeds), their associations, and their provenience. This involves the cataloging and labelling of the artifacts, as well as special studies such as floral and faunal analyzes.
- **Archaic:** A cultural period in the Eastern United States dating from about 8,000 B.C. to about 1,000 B.C.
- **Archaeological Technician or Research Assistant:** A person, usually with a B.A. degree in anthropology, or equivalent experience, who does the archaeological field and laboratory work.
- **Archaeology/Archeology:** The study of the undocumented remains of the past, also the techniques used in such studies. Among American archaeologists, archaeology is commonly divided into prehistoric and historic (after the arrival of Europeans in the New World) periods.
- **Architectural Historian:** An individual with a degree in the history of architecture capable of identifying the age, style, and social context of historic structures.
- **Artifact:** Any object made or modified by man.
- **Assessment:** The process of determining whether a site or structure is significant. Also called Phase II. (See Testing.)

- **Background Research:** The first step on a project wherein previously recorded information (whether archaeological, historical, cartographic, etc.) is sought about the project area.
- **Cataloging:** Making a list or catalog of the artifacts found during a project.
- **Contact Period:** The period in the New World just after the first arrival of Europeans. In the southeast this period varies depending on who and when the first contact was made, but it usually dates after the mid-sixteenth century and later.
- **Crew Chief:** An archaeological technician with considerable field experience and usually a B.A. degree who supervises a crew (generally 2 or more technicians) in the field.
- **Cultural Period:** A period of time that has similar artifacts, social organization, and other factors, and is located within a defined geographic area. The major Cultural Periods of the Eastern United States are the Paleoindian, the Archaic, the Woodland, the Mississippian and the Historic.
- **Cultural Resources:** A term coined with the appearance of historic preservation laws in the 1960s and 1970s, and intended to mean all archaeological and historical properties and data in a given area.
- **Data Recovery:** Term meaning a large scale excavation of an archaeological site; the detailed recording of structures; or the gathering of extensive historic data on a site. Data Recovery is conducted during Phase III.
- **Eligible for the NRHP:** Term meaning that a site or structure is intact, significant, and appears to meet one or more of the National Register of Historic Places criteria.
- **Excavation Block:** Term meaning a large square or rectangular area of ground, usually excavated by hand in smaller sections, or squares, called units.
- **Feature:** Soil discoloration or arrangement of artifacts in the soil that represents past human activity. Examples are postmolds, privies, trash pits, building foundations, builders' trenches, and burials.
- **Field Director/Supervisor:** A person usually with an M.A. degree in anthropology, or equivalent experience, who is capable of the day-to-day supervision of a project under the overall direction of a Principal Investigator.
- **Floral or Ethnobotanical Analysis:** The study of seeds, and sometimes pollen (palynology) and larger plant remains.
- **Faunal or Zooarchaeological Analysis:** the study of non-human bones and animal remains from archaeological sites.
- **HABS/HAER:** Historic American Building Survey and Historic American Engineering Record. Two national agencies that set the standards for recording standing architecture and historic structures such as bridges and canals.
- **Integrity/Intact:** Terms used to mean that all parts or major portions of a site are undisturbed.
- **In situ:** A term that refers to an artifact that is still in the location where it was discarded or left by an occupant of a site.
- **Labelling:** Writing numbers on artifacts, which identify the provenience of the artifact and occasionally the type of artifact.
- **Level:** A horizontal layer of soil in a unit that is usually excavated together, although it may be excavated in sub-levels. A level may be arbitrary (10 cm deep, for example) or natural (yellow sandy clay, for example).
- **Listed on the NRHP:** A site that has been nominated to the National Register of Historic Places and has been officially accepted.
- **Mississippian:** A cultural period in the southeastern United States following the Woodland Period that dates from about A.D. 900 to European contact.
- **Mitigation:** Term meaning to alleviate the adverse effects of project construction. Mitigation may take the form of data recovery (thereby obtaining the data contained in the site) or avoidance (thereby not affecting the site at all). Also referred to as Phase III.
- **NHPA (National Historic Preservation Act):** An act passed in 1968 to govern federal involvement in cultural resource management. NHPA includes Section 106.
- **Nominated to the NRHP:** a site that appears eligible for nomination and which has been formally nominated, but not yet accepted.
- **NRHP (National Register of Historic Places):** A listing of historically or archaeologically significant sites maintained by each state. The NRHP does not contain all significant sites. It only lists those currently identified and that the owner has allowed to be listed. There are many eligible sites that have not been registered, either because they have not been found or the owner is unwilling or has not had the chance to nominate them.
- **Phases I, II, and III:** Terms corresponding to the normal phases of a cultural resource project. Phase I is survey (to

- locate sites in a project area); Phase II is evaluative assessment or testing (to determine significance of sites in a project area); and Phase III is mitigation (to mitigate the adverse effects of construction on significant sites).
- *Potentially Eligible for NRHP*: An informal designation for sites found during survey that appear to be significant and therefore eligible, but which require evaluation to be certain.
  - *Prehistory*: Term dealing with the archaeology of preliterate peoples.
  - *Principal Investigator*: A person, usually with an M.A. or Ph.D. degree or extensive experience, who designs research projects and oversees the field and laboratory tasks, and has the principal responsibility for preparing the report.
  - *Profile*: The drawing of the stratigraphy or vertical wall of an excavation unit.
  - *Projectile Point*: Jargon for arrowhead. Archaeologists like to point out that such objects may have been used on darts and lances, etc., and that a particular artifact may not have been used on an arrow.
  - *Preservation*: The degree to which the environmental conditions of a site have preserved bone, seeds, shell and other organic material.
  - *Provenience*: An individual location at an archaeological site.
  - *Reconnaissance*: A very preliminary walkover of a site to see if it requires more intensive survey. It sometimes includes background research and a written report of findings.
  - *Remote Sensing*: A set of field techniques that permit the location of underground features and/or concentrations of artifacts without excavation. To date, remote sensing techniques have limited usefulness since excavation is still required to obtain artifacts for analysis purposes. Remote sensing techniques often represent an unnecessary added cost to a project where excavation will be required anyway. However, these techniques are often useful in locating burials in cemeteries or on sites where virtually nothing is known of the occupation.
  - *Screen*: Term used to describe the equipment and procedures used to sift (a term rarely used by archaeologists) soil to provide for uniform recovery.
  - *Section 106*: The section of the NHPA dealing with the enforcement of federal preservation activities. Ground-disturbing activities that involve a federal permit, land, funding or other assistance fall under Section 106.
  - *Sherd*: A broken piece of pottery or glass. Infrequently termed shard.
  - *Shovel Test (Shovel Test Pit, ST, STP, etc.)*: a survey and testing method used to determine the horizontal limits of a site where ground cover prevents examination of the ground surface. These are usually the size of a shovel and are dug to sterile (no artifacts) soil. Soil is usually screened to find artifacts.
  - *SHPO (State Historic Preservation Officer)*: The federally mandated person and office responsible for federal cultural resource compliance at the state level. Every state has one, with a staff that varies in size and specialities. There is usually at least one archaeologist and one architectural historian on the SHPO's staff. The SHPO plays a crucial role mediating between the federal agency, you, and your consultant.
  - *Significance Criteria*: The criteria listed in NHPA, which, if answered affirmatively, indicate that a site is significant and eligible for the NRHP. Also called eligibility criteria.
  - *Significant*: Term used to refer to a cultural resource that is important in local, regional, and national prehistory or history, or which is likely to yield answers to current research questions in archaeology and history.
  - *Site or Archaeological Site*: A frequently vague term used to describe a horizontal and vertical area of ground that has been used intensively by people in the past and which contains or is likely to contain artifacts and features associated with that past activity. The actual boundaries of sites may be based on the density of features and artifacts or on other criteria.
  - *Soil Sample*: Soil retained by the archaeologist during excavation for further study in the laboratory. Soil samples are studied for floral and faunal analysis, as well as other types of analysis.
  - *SOPA (Society of Professional Archaeologists)*: A national certification society for professional archaeologists. Some states are currently requiring that cultural resource projects be conducted by SOPA-certified archaeologists to help insure that research is conducted satisfactorily.
  - *State Archaeologist*: In some states, an archaeologist employed by the state to run the state archaeological program, and represent the state in archaeological matters. May or may not be in the SHPO.
  - *State Site Files*: The state repository where completed state site forms are kept. This is sometimes at the SHPO, and sometimes elsewhere.
  - *State Site Form*: Forms filled out by archaeologists on archaeological sites. Most states have an accepted statewide

- form, and most SHPOs are presently requiring that these be filled out at the completion of cultural resource projects.
- *Stratigraphy*: The soil levels and strata at a site and how these are associated with each other and the cultural aspects of the site (artifacts and features, etc.).
  - *Survey*: A phase of archaeological investigation during which surface collection and limited subsurface techniques are employed to identify archaeological sites or their absence. Also referred to as Phase I.
  - *Temporal*: archaeological jargon, adjectival form of "time". *Temporal*: Archeological jargon, adjectival form of "time".
  - *Testing*: A phase of archeological investigation that assesses the horizontal and vertical extent of a particular site, its degree of preservation, and its potential for containing significant data. It usually involves STPs and Test Units. Also referred to as Phase II.
  - *Transect*: Term used to define the location of a line followed by archeologists during survey and testing.
  - *Unit or Test Unit*: a formal hand excavation, usually one or two meters square or three, five, or ten feet square. When combined, units are referred to as an excavation block.
  - *Urban Archeology*: Refers to the special problems and solutions to conducting archeology in an urban development. This sub-specialty relies heavily on extensive historic research and innovative field methods.
  - *Woodland*: A cultural period falling between the Archaic and the Mississippian from about 1,000 B.C. to about A.D. 900 in the eastern United States. This period saw the widespread use of pottery, agriculture and village life.