

## **36 C.F.R. PART 800—PROTECTION OF HISTORIC PROPERTIES**

### **Subpart A—Purposes and Participants**

#### **§ 800.1 Purposes.**

- (a) ***Purposes of the section 106 process.*** Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings. The procedures in this part ~~define-establish~~ how Federal agencies ~~meet-will fulfill~~ these statutory responsibilities. The section 106 process ~~seeks-to-accommodate-historic-preservation-concerns-with-the-needs-of-Federal-undertakings-through~~facilitates consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, ~~commencing-at-the-early-stages-of-project-planning~~. The consultation process must be conducted reasonably, bearing in mind the purpose and need of the undertaking and, where relevant, the goals of the project applicant. The goal of ~~consultation~~ the section 106 process is to identify historic properties potentially affected by the undertaking, assess ~~its-the undertaking's~~ effects, ~~and seek ways to identify reasonable mitigation measures to avoid, minimize or mitigate any address~~ adverse effects on historic properties to achieve the goals of the agency or project applicant, and to memorialize the measures adopted to address adverse effects or the agency official's determination that other considerations outweigh effects on historic preservation.
- (b) ***Relation to other provisions of the act.*** Section 106 is related to other provisions of the Aact designed to further the national policy of historic preservation. References to those provisions are included in this part to identify circumstances where they may affect actions taken to meet section 106 requirements. Such provisions may have their own implementing regulations or guidelines and are not intended to be implemented by the procedures in this part except insofar as they relate to the section 106 process. Guidelines, policies, and procedures issued by other agencies, including the Secretary of Interior, have been cited in this part for ease of access and are not incorporated by reference.
- (c) ***Timing.***
- (1) ***In general.*** The agency official must complete the section 106 process “prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license.” This does not prohibit the agency official from conducting or authorizing nondestructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of reasonable mitigation to address alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties. The agency official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that ~~a-broad range-of-alternatives-mitigation~~ may be considered during the planning process for the undertaking.

**(2) Default timelines and agency control.**

- (i) **In general.** Section 106 charges the agency official with “tak[ing] into account the effect of the undertaking on any historic property.” The agency official will consider the comments of other parties, as provided for in this part, to inform the decision related to the undertaking and to fulfill its Section 106 responsibility. Section 106 is procedural and does not impose any substantive historic preservation outcomes or obligations, nor does it restrict the scope of permissible decisions available to the agency official. The agency official must consider an undertaking’s effects to historic properties, while balancing the nation’s interest in historic preservation with its other interests, such as economic development.
- (ii) **Agency control over deadlines.** The agency official may alter any deadline in this part, to be shorter or longer, by:
- (A) Notifying an individual or entity regulated by that timeline by letter; or
  - (B) Where such deadline affects the public at large, publishing such alteration, e.g., on the agency’s website.
  - (C) As part of the agency’s obligation to engage in reasoned decisionmaking, such letter or publication shall briefly explain the reason for such alteration of the deadlines. Such reasons may include any factors or considerations that detail the outweighing of any interests to protect historic properties that may be affected by the undertaking.
- (iii) Whenever the agency official shortens a deadline that applies to the Council, it shall explain in such letter the reasons for doing so and how the resulting timeline fulfills the agency official’s statutory obligation to “afford the Council a reasonable opportunity to comment with regard to the undertaking.”

## **§ 800.2 Participants in the Section 106 process.**

- (a) **Agency official.** The federal official responsible for meeting the statutory obligations of “tak[ing] into account the effect of the undertaking on any historic property” and “afford[ing] the Council a reasonable opportunity to comment with regard to the undertaking,” consistent with the procedures in ~~It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part.~~ The agency official has approval authority for the undertaking and can commit the Federal agency to take all necessary actions to ensure section 106 compliance as it relates to ~~appropriate action for a specific undertaking as a result of section 106 compliance.~~ For the purposes of subpart DC of this part, the agency official has the authority to commit the Federal agency to any obligation it may assume in the implementation of a program alternative. The agency official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law.
- (1) **Professional standards.** Section 112(a)(1)(A) of the Aact requires each Federal agency responsible for the protection of historic resources, including archeological

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resources, to ensure that all actions taken by employees or contractors of the agency shall meet professional standards under regulations developed by the Secretary.

- (2) **Lead Federal agency.** If more than one Federal agency is involved in an undertaking, ~~some or all~~ the agencies ~~may~~ shall designate a lead Federal agency, by e-mail, letter, or other means, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under section 106. If such agencies cannot agree on a lead Federal agency within 15 days of an applicant providing notice of the proposed undertaking, then any affected person can submit in writing a request that the Council designate a lead Federal agency. If an undertaking is initiated by the federal government, any agency involved may submit such a request to the Council at any time. Upon receipt of any such request, the Council shall appoint a lead Federal agency within 15 days ~~Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part.~~
- (3) **Use of contractors.** ~~Consistent with applicable conflict of interest laws, t~~ The agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines.
- (4) **Coordination with other laws** ~~Consultation.~~ The agency official should coordinate the section 106 process, to the extent practicable, shall involve the consulting parties described in paragraph (c) of this section in findings and determinations made during the section 106 process. The agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other the requirements of in other statutes, as applicable, such as including the National Environmental Policy Act (NEPA), the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archaeological Resources Protection Act, the Endangered Species Act, and agency-specific legislation such as Section 4(f) of the Department of Transportation Act. The Council encourages the agency official to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part.
- (b) **Council.** The Council issues regulations to implement section 106, and provides guidance and advice on the application of the procedures in this part, ~~and generally oversees the operation of the section 106 process~~. The Council also consults with and provides comments to agency officials on individual undertakings and programs that affect historic properties.
- (1) **Council entry into participation in the section 106 process.** As detailed in this part, each agency shall provide ~~When the Council determines that its involvement is necessary to ensure that the~~ opportunity to comment on each undertaking. The Council does not have to provide comments on each undertaking purposes of

- ~~section 106 and the act are met, the Council may enter the section 106 process. Criteria guiding Council decisions to enter the section 106 process provide comments are found in appendix A to this part. The Council will document that the criteria have been met and notify the parties to the section 106 process as required by this part.~~
- (2) **Council assistance.** Participants in the section 106 process may seek advice, guidance and assistance from the Council on the application of this part to specific undertakings, including the resolution of disagreements, ~~whether or not the Council is formally involved in the review of the undertaking. If questions arise regarding the conduct of the section 106 process, participants are encouraged to obtain the Council's advice on completing the process.~~
- (c) **Consulting parties.** The following parties may have consultative roles in the section 106 process.
- (1) **State historic preservation officer.** ~~The State historic preservation officer (SHPO) reflects the interests of the State and its citizens in the preservation of their cultural heritage.~~ In accordance with section 101(b)(3) of the act, the State historic preservation officer (SHPO) advises and assists Federal agencies in carrying out their section 106 responsibilities and cooperates with such agencies, local governments and organizations and individuals to ensure that historic properties are taking taken into consideration at all levels of in planning and development.
- (i) **SHPO Participation where there has been tribal assumption of SHPO responsibilities.** ~~If Where~~ an Indian tribe has assumed the section 106 responsibilities functions of the SHPO ~~in the section 106 process for undertakings on tribal lands pursuant to section 101(d)(2) of the Act, consultation for undertakings occurring on tribal land or for effects on tribal land is with the tribal historic preservation officer (THPO) for the Indian tribe in lieu of the SHPO. Section 101(d)(2)(D)(iii) of the Act authorizes owners of properties on tribal lands which are neither owned by a member of the tribe nor held in trust by the Secretary for the benefit of the tribe to request the SHPO to participate in the section 106 process in addition to the THPO. The SHPO shall also participate as a consulting party if the undertaking takes place on tribal lands but affects historic properties off tribal lands, if requested by the agency official or the tribe in accordance with § 800.3(e)(1), or if the Indian tribe agrees to include the SHPO pursuant to § 800.3(f)(3).~~
- (ii) **Undertakings involving more than one State.** If more than one State is involved in an undertaking, the involved SHPOs may agree to designate a lead SHPO to act on their behalf in the section 106 process, including taking actions that would conclude the section 106 process under this part.
- (2) **Indian tribes and Native Hawaiian organizations.** It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that should be consulted in the section 106

process and invite them to be consulting parties.

(i) ***Consultation on tribal lands.***

(A) ***Tribal historic preservation officer.*** For an Indian tribe that has assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the Aact, the ~~tribal historic preservation officer (THPO)~~ appointed or designated in accordance with the Aact is the official representative for the purposes of section 106. The agency official shall consult with the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands.

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

(ii) ***Consultation on historic properties of significance to Indian tribes and Native Hawaiian organizations.*** ~~Section 101(d)(6)(B) of the act requires that~~ The agency official ~~to shall~~ consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking consistent with the definition of “historic property” in 36 CFR 800.16(j). ~~This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party.~~

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

~~(B) The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. Nothing in this part alters, amends,~~

~~repeals, interprets, or modifies tribal sovereignty, any treaty rights, or other rights of an Indian tribe, or preempts, modifies, or limits the exercise of any such rights.~~

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

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

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

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

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

(4) ***Applicants for Federal assistance, permits, licenses, and other approvals.*** An applicant for Federal assistance or for a Federal permit, license, or other approval is entitled to participate as a consulting party. ~~as defined in this part. The agency official may authorize. An applicant or their designee may also group of applicants to~~ initiate early consultation directly with the SHPO/THPO and others, consistent with §

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800.7(a), but the agency remains legally responsible for all findings and determinations charged to the agency official. ~~The agency official shall notify the SHPO/THPO when an applicant or group of applicants is so authorized. A Federal agency may authorize all applicants in a specific program pursuant to this section by providing notice to all SHPO/THPOs. Federal agencies that provide authorizations to applicants remain responsible for their government-to-government relationships with Indian tribes.~~

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

(d) **The Public participation at agency discretion.**—

**(1) Authorization to initiate public participation at agency discretion.** Consistent with Section 106 of the NHPA, an agency may provide the public with an opportunity to participate at any point in the Section 106 process. The agency has exclusive discretion to determine the usefulness of public participation, including, e.g., as necessary to resolve community concerns. The agency shall consider how offering an opportunity for public participation is balanced against the cost of other values, such the public interest.

~~(1)(2) *Nature of involvement.* In determining whether and how to solicit public involvement, The views of the public are essential to informed Federal decisionmaking in the section 106 process. The agency official shall seek and may consider, among other things, the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties; the likely interest of the public in the effects on historic properties; the likely utility of public involvement; any delays that may be created by the process of seeking public comment; confidentiality concerns of private individuals, and businesses, and tribes; and the relationship of the Federal involvement to the undertaking.~~

~~(2)(3) *Providing notice and information.* The agency official must may, except whereas appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking and its effects on historic properties and seek public comment and input. Members of the public may also provide their views on their own initiative. for Tthe agency official shall determine how much weight to assign such views, and when and how to incorporate them into the consider in decisionmaking process.~~

~~(3)(4) *Use of other agency procedures.* The agency official may use the agency's procedures for public involvement under the National Environmental Policy Act/NEPA or other program requirements in lieu sources of law to solicit public comment/public involvement requirements in subpart B of this part, if they provide, in the agency official's judgment, adequate opportunities for public involvement consistent with this subpart.~~

## **Subpart B—The Section 106 Process**

### **§ 800.3 Determining Whether There is an Undertaking**~~Initiation of the section 106 process.~~

- (a) ***Establish undertaking.*** The agency official shall determine whether the proposed Federal action is an Federal undertaking which section 106 analysis is required~~as defined in § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.~~

(1) An action is a Federal undertaking for the purposes of Section 106, and thus, further analysis under this Subpart is required, when:

- (i) It is carried out by or on behalf of an agency of the Federal government;
- (ii) It is the action of a third party funded by the Federal government, and falls under the direct or indirect jurisdiction of a Federal agency; or
- (iii) A third party is taking action that requires a license, permit or approval from the Federal government, subject to the limitations to Federal jurisdiction over a third party's action, such as where a permit, license, or approval is merely a but-for cause of such action, which does not convert it into a Federal undertaking.

(2) Procedural obligations under Section 106 do not apply under the following circumstances:

- (i) When the action or decision will not result in final agency action under the Administrative Procedure Act, see 5 U.S.C. § 704, or other relevant statute that also includes a finality requirement;
- (ii) When the proposed activity or decision is exempted from review under section 106 by law;
- (iii) When review under section 106 would conflict with the requirements of another provision of law;
- (iv) In circumstances where Congress by statute has prescribed decisional criteria with sufficient completeness and precision such that the agency official retains no residual discretion to alter its action based on the consideration of the results of a section 106 review;
- (v) For State or local governmental actions, including where the state or local government is exercising delegated federal authority to act or to issue a license to a third party;
- (vi) For actions funded by federal grants where the federal government does not retain control over how, to whom, or why the grants are disbursed;
- (vii) For actions merely subject to a federal veto, but not requiring affirmative

Federal approval in the form of a license, permit, or other form of formal approval;

(viii) When the proposed action is an action for which another statute's requirements serve the function of agency compliance with the Act;

(ix) For actions with no or minimal Federal funding, or with no or minimal Federal involvement where a federal agency cannot control the outcome of the project. A but-for causal relationship is insufficient to make an agency responsible for a particular action and thus, does not by itself convert that action into a Federal undertaking within the meaning of the language of the Act.

(3) In determining whether a proposed project constitutes an undertaking for which section 106 review applies, the agency official will consider only the action or project over which the agency has discretion and control to approve, fund, or otherwise authorize.

(b) ***Potential to cause effects.*** If the agency official determines the proposed action is an undertaking, the official shall determine whether it is a type of activity that has the potential to cause effects on historic properties.

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

(2) ***Program alternatives.*** If the review of the undertaking is governed by a Federal agency program alternative established under § 800.14(b) of this part after [date of promulgation], a Federal agency program alternative in existence before [date of promulgation], or a programmatic agreement in existence before January 11, 2001, the agency official ~~shall~~ may follow the program alternative.

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

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

- ~~(1) **Tribal assumption of SHPO responsibilities.** Where an Indian tribe has assumed the section 106 responsibilities of the SHPO on tribal lands pursuant to section 101(d)(2) of the act, consultation for undertakings occurring on tribal land or for effects on tribal land is with the THPO for the Indian tribe in lieu of the SHPO. Section 101(d)(2)(D)(iii) of the act authorizes owners of properties on tribal lands which are neither owned by a member of the tribe nor held in trust by the Secretary for the benefit of the tribe to request the SHPO to participate in the section 106 process in addition to the THPO.~~
- ~~(2) **Undertakings involving more than one State.** If more than one State is involved in an undertaking, the involved SHPOs may agree to designate a lead SHPO to act on their behalf in the section 106 process, including taking actions that would conclude the section 106 process under this subpart.~~
- ~~(3) **Conducting consultation.** The agency official should consult with the SHPO/THPO in a manner appropriate to the agency planning process for the undertaking and to the nature of the undertaking and its effects on historic properties.~~
- ~~(4) **Failure of the SHPO/THPO to respond.** If the SHPO/THPO fails to respond within 30 days of receipt of a request for review of a finding or determination, the agency official may either proceed to the next step in the process based on the finding or determination or consult with the Council in lieu of the SHPO/THPO. If the SHPO/THPO re-enters the Section 106 process, the agency official shall continue the consultation without being required to reconsider previous findings or determinations.~~
- ~~(e) **Consultation on tribal lands.** Where the Indian tribe has not assumed the responsibilities of the SHPO on tribal lands, consultation with the Indian tribe regarding undertakings occurring on such tribe's lands or effects on such tribal lands shall be in addition to and on the same basis as consultation with the SHPO. If the SHPO has withdrawn from the process, the agency official may complete the section 106 process with the Indian tribe and the Council, as appropriate. An Indian tribe may enter into an agreement with a SHPO or SHPOs specifying the SHPO's participation in the section 106 process for undertakings occurring on or affecting historic properties on tribal lands.~~
- ~~(f) **Plan to involve the public.** In consultation with the SHPO/THPO, the agency official shall plan for involving the public in the section 106 process. The agency official shall identify the appropriate points for seeking public input and for notifying the public of proposed actions, consistent with § 800.2(d).~~
- ~~(g) **Identify other consulting parties.** In consultation with the SHPO/THPO, the agency official shall identify any other parties entitled to be consulting parties and invite them to participate as such in the section 106 process. The agency official may invite others to participate as consulting parties as the section 106 process moves forward.~~
- ~~(1) **Involving local governments and applicants.** The agency official shall invite any local governments or applicants that are entitled to be consulting parties under § 800.2(c).~~

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

~~(3) **Requests to be consulting parties.** The agency official shall consider all written requests of individuals and organizations to participate as consulting parties and, in consultation with the SHPO/THPO and any Indian tribe upon whose tribal lands an undertaking occurs or affects historic properties, determine which should be consulting parties.~~

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

#### **§ 800.4 Agency Official's Responsibility to Prepare a Section 106 Report ~~Identification of historic properties.~~**

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

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

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

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

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

~~(b)(a) **Preparation of Report** ~~Identify historic properties.~~ If the agency official determines the project is a Federal undertaking pursuant to § 800.3(a)(1) and that it has the potential to cause effects, the agency official shall prepare a "Section 106 Report." In~~

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

~~(1) *Level of effort.* The agency official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. The agency official shall take into account (although the agency official need not exhaustively document) past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects. The Secretary's standards and guidelines for identification provide guidance on this subject. The agency official should also consider other applicable professional, State, tribal, and local laws, standards, and guidelines. The agency official shall take into account any confidentiality concerns raised by Indian tribes or Native Hawaiian organizations during the identification process.~~

~~(2) Include background research from publicly available or archival sources;~~

~~(3) Solicit input from consulting parties;~~

~~(4) Conduct sample field investigations and field surveys as necessary to identify and evaluate historic properties, or to assess alternatives, taking into account reasonable considerations and factors like the cost and time of doing so;~~

~~(5) Establish by regulation, guidance, or other means, time limits within which the above work needs to be completed, either in general or as to a specific project;~~

~~(6) Engage in early consultation pursuant to § 800.7(a) with some or all consulting parties when, in the agency official's judgment, such early consultations would be helpful to the preparation of the report and not unduly disruptive to the section 106 process or the timeline of the overall project;~~

~~(7) Take into account the deadlines imposed pursuant to section (5) above considering the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects; and~~

~~(e) Rely on the Secretary's standards and guidelines for identification and also consider other applicable professional, State, tribal, and local laws, standards, and guidelines, as appropriate.~~

~~(8)~~

~~(b) *Contents of Report.* The Section 106 Report shall provide a concise analysis that includes~~

the following:

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

- (i) The agency official shall document how he drew reasonable and manageable lines regarding the consideration of effects that are remote in time or place.

~~(1)~~(2) Identify historic properties, if any, within the area of potential effects.

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

~~(d) Evaluate historic significance—~~

- (i) **Apply National Register criteria.** ~~Section 106 applies~~In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified properties that are eligible and guided by the Secretary's standards and guidelines for or listed in evaluation, the National Register. The agency official shall determine whether the property is eligible for the National Register by applying ~~apply~~ the National Register criteria (36 CFR part 63) to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility. The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible. ~~The agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.~~

~~(2) Determine whether a property is eligible. If the agency official determines any of the National Register criteria are met and the SHPO/THPO agrees, the property shall be considered eligible for the National Register for section 106 purposes. If the agency official determines the criteria are not met and the SHPO/THPO agrees, the property~~

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shall be considered not eligible. If the agency official and the SHPO/THPO do not agree, or if the Council or the Secretary so request, the agency official shall obtain a determination of eligibility from the Secretary pursuant to 36 CFR part 63. If an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to a property off tribal lands does not agree, it may ask the Council to request the agency official to obtain a determination of eligibility.

~~(e) Results of identification and evaluation —~~

- ~~(1) No historic properties affected.~~ If the agency official finds that either there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them as defined in § 800.16(i), the agency official shall provide documentation of this finding, as set forth in § 800.11(d), to the SHPO/THPO. The agency official shall notify all consulting parties, including Indian tribes and Native Hawaiian organizations, and make the documentation available for public inspection prior to approving the undertaking.
- ~~(i)~~ If the SHPO/THPO, or the Council if it has entered the section 106 process, does not object within 30 days of receipt of an adequately documented finding, the agency official's responsibilities under section 106 are fulfilled.
- ~~(ii)~~ If the SHPO/THPO objects within 30 days of receipt of an adequately documented finding, the agency official shall either consult with the objecting party to resolve the disagreement, or forward the finding and supporting documentation to the Council and request that the Council review the finding pursuant to paragraphs (d)(1)(iv)(A) through (d)(1)(iv)(C) of this section. When an agency official forwards such requests for review to the Council, the agency official shall concurrently notify all consulting parties that such a request has been made and make the request documentation available to the public.
- ~~(iii)~~ During the SHPO/THPO 30 day review period, the Council may object to the finding and provide its opinion regarding the finding to the agency official and, if the Council determines the issue warrants it, the head of the agency. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The agency shall then proceed according to paragraphs (d)(1)(iv)(B) and (d)(1)(iv)(C) of this section.
- ~~(iv)~~
- ~~(A)~~ Upon receipt of the request under paragraph (d)(1)(ii) of this section, the Council will have 30 days in which to review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with the Council's opinion regarding the finding. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. If the Council does not respond within 30 days of receipt of the request, the agency official's responsibilities under section 106 are fulfilled.

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

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

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

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

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

~~§ 800.5 Assessment of adverse effects.~~

(3) Evaluate whether the project will have adverse effects on these historic properties.

- (i) *Apply criteria of adverse effect.* ~~In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified historic properties,~~ The agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects. As to each historic property within the area of potential effects, if the agency official finds that there will be adverse effects, the agency official shall explain in the report the adverse effect. ~~The agency official shall consider any views concerning such effects which have been provided by consulting parties and the public.~~
- (ii) *Criteria of adverse effect.* An adverse effect is found when it is reasonably foreseeable that an undertaking will cause material alteration in ~~may alter, directly or indirectly,~~ any of the characteristics of a historic property that qualifies the historic property for inclusion in the National Register ~~in a manner that would diminish the integrity of the property's location, design, setting, materials,~~

~~workmanship, feeling, or association.~~ Consideration shall be given to all qualifying characteristics of an eligible or listed historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects ~~may include~~ only those reasonably foreseeable effects that have a reasonably close causal relationship to ~~caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.~~

(A) The agency official may consider effects of the undertaking that may occur later in time or will be far removed in distance, to the extent it assists the agency in making reasoned decisions within the limits of its statutory authority. If it chooses to do so, the agency official shall document how he or she defined the reasonable limits in considering such effects.

(B) Adverse effects do not include the effects of other projects separate in time or place, or that otherwise fall outside of the agency's regulatory authority, or that would have to be initiated by a third party.

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

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

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

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

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

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

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

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

(iv) **Finding of no adverse effect.** An undertaking results in no adverse effect if the undertaking's effects do not meet the criteria of adverse effect. If a finding of no

adverse effect is made, the agency shall proceed to subsection (c) of this part.

(4) **Identify the measures to be taken to address adverse effects** identified pursuant to subsection (b)(4)(iii) of this subsection or memorialize when the agency official has determined that other considerations outweigh those of historic preservation.

(i) The agency official shall develop and evaluate reasonable mitigation measures that are within the federal agency's regulatory authority to address the adverse effects on historic properties of the undertaking that are within the federal agency's regulatory authority.

(ii) The agency official may document its determination that other considerations outweigh those of historic preservation as to any or all effects or properties.

(c) **Certification.** The Section 106 Report shall be analytic, concise, and no longer than necessary to provide the information in § 800.5(b). In finalizing the Report, the agency official will certify that: the agency has considered the factors mandated by Section 106; the Report represents the agency's good-faith effort to identify an undertaking's potential effects on historic properties; prioritization of effects based on the agency's expert judgment; and any considerations addressed briefly or left unaddressed are presumed to be intentional based on the agency's judgment that such considerations are comparatively unimportant or frivolous.

(d) **Notice of Conclusions.** When the agency official has completed the Section 106 Report, he shall transmit it to all consulting parties pursuant to § 800.5(a)(1) along with a notice that the agency has reached one of the following conclusions:

(1) **No historic properties are present.**

(2) **No historic properties are affected.** The agency official determines that there are historic properties present but the undertaking will have no material effect upon them.

(3) **Historic properties are affected.** The agency official determines that there are historic properties present and that the undertaking will have adverse effects on them, and it identifies any reasonable mitigation proposed to address adverse effects, pursuant to subsection (b)(4) of this part.

~~(f)~~(e) **Phased evaluation-application of criteria.**

(1) Where ~~the project involves alternatives under consideration consist of~~ corridors or large land areas, or ~~for other reason where access to properties is restricted~~, the agency official may ~~elect to issue multiple reports in use~~ a phased process, ~~provided that the agency approves or performs work only for those phases of an undertaking covered by a report that has completed review under §§ 800.5-6 in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to § 800.4(b)(2).~~

(2) The agency official may also defer identification and evaluation of historic properties

if such deferred process is specifically provided for in a memorandum of agreement executed pursuant to § 800.6(c), programmatic agreement executed pursuant to § 800.14(b), or the documents used by an agency official to comply with NEPA pursuant to § 800.8. The phased-evaluation process should establish the likely presence of historic properties within the area of potential effects for each alternative or inaccessible area through background research, consultation and an appropriate level of investigation for the proposed undertaking under its regulatory authority.

### **§ 800.5 Circulation of Report for Comments**

#### **(a) Consulting parties.**

(1) Upon completion of the report, the agency official shall transmit the Section 106 Report to the following persons and invite them to participate as consulting parties:

(i) The Council.

(ii) The SHPO or SHPOs of any state within the area of potential effects, except as provided in § 800.2(c)(1).

(iii) The appropriate THPO or THPOs, or any other Indian tribe or Native Hawaiian organization, as provided for in § 800.2(c)(2).

(iv) Project applicants.

(v) Representatives of any local governments that are entitled to be consulting parties under § 800.2(c)(3).

#### **(b) Timing**

(1) Parties shall be deemed to have received the report and invitation to consult:

(i) On the day of dispatch, if it is delivered via a known e-mail address or other reliable electronic means.

(ii) 5 days after dispatch, if sent by other means.

(2) Unless otherwise specified by the agency official pursuant to § 800.1(c)(2), parties have 60 days after receipt to respond.

(3) Any party which fails to respond within 60 days shall be deemed to have waived any objections or comments to the report.

**(c) Types of Response.** Consulting parties should submit comments supporting one or more of the following types of response:

(1) **Support.** The consulting party can support the agency official's report.

(2) **Factual objection.** The consulting party can object, as a question of fact, to the

agency official's determinations as to:

- (i) The scope of the area of potential effects;
- (ii) The presence of historical properties within the area of potential effects;
- (iii) Whether the project will have adverse effects on a given property or properties; or
- (iv) Whether the reasonable mitigation to address adverse effects will, as a question of fact, result in the resolution envisioned in the report.

(3) **Comment.** Consulting parties may provide commentary on the policy choices reflected in the report, including the desirability of allowing other considerations to outweigh those of historic preservation.

~~(2) The agency official, in consultation with the SHPO/THPO, may propose a finding of no adverse effect when the undertaking's effects do not meet the criteria of paragraph (a)(1) of this section or the undertaking is modified or conditions are imposed, such as the subsequent review of plans for rehabilitation by the SHPO/THPO to ensure consistency with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines, to avoid adverse effects.~~

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

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

~~(2) **Disagreement with finding.**~~

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

~~(ii) If within the 30 day review period the Council provides the agency official and, if the Council determines the issue warrants it, the head of the agency, with a written opinion objecting to the finding, the agency shall then proceed according to paragraph~~

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- ~~(c)(3)(ii) of this section. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part.~~
- ~~(iii) The agency official should seek the concurrence of any Indian tribe or Native Hawaiian organization that has made known to the agency official that it attaches religious and cultural significance to a historic property subject to the finding. If such Indian tribe or Native Hawaiian organization disagrees with the finding, it may within the 30-day review period specify the reasons for disagreeing with the finding and request the Council to review and object to the finding pursuant to paragraph (c)(2)(ii) of this section.~~
- ~~(3) Council review of findings.~~
- ~~(i) When a finding is submitted to the Council pursuant to paragraph (c)(2)(i) of this section, the Council shall review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with its opinion as to whether the adverse effect criteria have been correctly applied. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The Council will provide its opinion within 15 days of receiving the documented finding from the agency official. The Council at its discretion may extend that time period for 15 days, in which case it shall notify the agency of such extension prior to the end of the initial 15-day period. If the Council does not respond within the applicable time period, the agency official's responsibilities under section 106 are fulfilled.~~
- ~~(ii)~~
- ~~(A) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion in reaching a final decision on the finding.~~
- ~~(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial finding of no adverse effect, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.~~
- ~~(C) The Council shall retain a record of agency responses to Council opinions on their findings of no adverse effects. The Council shall make this information available to the public.~~

~~(b) Results of assessment —~~

- ~~(1) *No adverse effect.* The agency official shall maintain a record of the finding and provide information on the finding to the public on request, consistent with the confidentiality provisions of § 800.11(e). Implementation of the undertaking in accordance with the finding as documented fulfills the agency official's responsibilities under section 106 and this part. If the agency official will not conduct the undertaking as proposed in the finding, the agency official shall reopen consultation under paragraph (a) of this section.~~
- ~~(2) *Adverse effect.* If an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to § 800.6.~~

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

**§ 800.6 FinalizationResolution of adverse effects.**

- ~~(a) *Analysis of Responses.* When the agency official has received the responses, the agency official shall evaluate the responses and may, at its election, either:~~
- ~~(1) Consult further with any or all of the commenters to resolve the objections or concerns of that commenter, and revise the Section 106 Report as necessary, on a timeline to be set by the agency official; or.~~
  - ~~(2) Explain, via a memorandum of decision, the agency's determination on addressing adverse effects through the Section 106 Report.~~
  - ~~(3) Invite some or any of the commenters to enter into a memorandum of agreement.~~
- ~~(b) *Memorandum of Decision.* Once the agency official has evaluated the responses and reached a determination as to how, if at all, it will address the effects, it may fulfill its responsibilities under section 106 by issuing a memorandum of decision, memorializing its determination as to how it will address effects or whether other considerations outweigh those of historical preservation as to certain effects, certain properties, or the project as a whole.~~
- ~~(1) In accordance with section 110(l) of the act, 54 U.S.C. § 306114, a memorandum of decision with respect to any undertaking that adversely affects a historic property must be signed by the head of the agency responsible for the undertaking, who may not delegate this decision.~~
- ~~(c) *Memorandum of Agreement.* The agency may wish to incorporate its conclusions into a Memorandum of Agreement between itself and other parties. A memorandum of agreement executed and implemented pursuant to this section evidences the agency official's compliance with section 106 and this part and shall govern the undertaking. The agency official shall ensure that the undertaking is carried out in accordance with the memorandum of agreement.~~
- ~~(1) *Signatories.* The Signatories shall have sole authority to execute, amend or terminate the memorandum of agreement in accordance with this subpart.~~

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- (i) Required signatories: The agency official and any relevant SHPO/THPO are required to be Signatories to a memorandum of agreement executed pursuant to paragraph (b)(1) of this section. The Council is also required to be a signatory if it has chosen to participate in consultations.
- (ii) Invited signatories:
- (A) The agency official shall invite an Indian tribe or Native Hawaiian organization that is a consulting party pursuant to § 800.2(c) and attaches religious and cultural significance to historic properties at issue to be an Invited Signatory to a memorandum of agreement concerning such properties.
- (B) The agency official shall invite any party that assumes a responsibility under a memorandum of agreement to be an Invited Signatory.
- (C) The agency official may invite additional parties to be signatories to a memorandum of agreement. The Invited Signatories shall have the same rights with regard to seeking amendment or termination of the memorandum of agreement as other Signatories.
- (iii) The refusal of any party invited to become an Invited Signatory to a memorandum of agreement does not invalidate the memorandum of agreement.
- (2) ***Terms.*** The memorandum of agreement shall specify the ways in which adverse effects shall be resolved, and it shall include a covenant not to sue. Beyond those essential terms, the memorandum of agreement is intended to be a flexible instrument, and may include any such terms as are helpful, as, e.g., provisions to deal with the subsequent discovery or identification of additional historic properties that may be affected by the undertaking, provisions for monitoring and reporting on its implementation, or provisions for termination if the undertaking has not been implemented within a specific time.
- (3) ***Amendments.*** The Signatories to a memorandum of agreement may amend it by unanimous written consent. If the Council was not a Signatory to the original memorandum of agreement and the Signatories execute an amended memorandum of agreement, the agency official shall file it with the Council.
- (4) ***Termination of Participation.*** If any Signatory or Invited Signatory determines that the terms of a memorandum of agreement cannot be or are not being carried out, that Signatory or Invited Signatory can request consultation among the Signatories to seek amendment of the memorandum of agreement. If the consultation does not occur or does not result in amendment of the memorandum of agreement within 60 days of notifying the Council of such consultation request, that Signatory may rescind their signature and terminate their participation in the memorandum of agreement. If the Signatory that terminated their participation had substantive obligations under the memorandum of agreement, the agency official can sever or unilaterally reform any provision that imposed such obligations after consultation with the Council.

(d) **Publication.** The agency official shall publish the Memorandum of Decision on the agency's website and provide all consulting parties with a copy.

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

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

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

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

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

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

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

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

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

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

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

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

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

~~(b) *Resolve adverse effects* —~~

~~(1) *Resolution without the Council.*~~

~~(i) The agency official shall consult with the SHPO/THPO and other consulting parties to seek ways to avoid, minimize or mitigate the adverse effects.~~

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

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

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

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

~~(2) *Resolution with Council participation.* If the Council decides to participate in the~~

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

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

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

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

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

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

~~(2) *Invited signatories.*~~

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

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

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

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

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

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

implementation.

- (5) *Duration.* A memorandum of agreement shall include provisions for termination and for reconsideration of terms if the undertaking has not been implemented within a specified time.
- (6) *Discoveries.* Where the signatories agree it is appropriate, a memorandum of agreement shall include provisions to deal with the subsequent discovery or identification of additional historic properties affected by the undertaking.
- (7) *Amendments.* The signatories to a memorandum of agreement may amend it. If the Council was not a signatory to the original agreement and the signatories execute an amended agreement, the agency official shall file it with the Council.
- (8) *Termination.* If any signatory determines that the terms of a memorandum of agreement cannot be or are not being carried out, the signatories shall consult to seek amendment of the agreement. If the agreement is not amended, any signatory may terminate it. The agency official shall either execute a memorandum of agreement with signatories under paragraph (c)(1) of this section or request the comments of the Council under § 800.7(a).
- (9) *Copies.* The agency official shall provide each consulting party with a copy of any memorandum of agreement executed pursuant to this subpart.

**§ 800.7 Early Consultation Failure to resolve adverse effects.**

- (a) *Invitation of Consulting Parties.* The agency official may invite any party that could be a consulting party under § 800.5(a), to consult earlier in the process of preparing a report. When a project applicant has been authorized to initiate early consultation pursuant to § 800.2(c)(4), it may initiate consultation on behalf of the agency official. Such early consultation may be appropriate where:
  - (1) SHPOs, THPOs, or other individuals or organizations are likely to have knowledge of historic properties in the area of potential effects and be able to identify issues relating to the undertaking's potential effects on such historic properties; or
  - (2) Indian tribes or Native Hawaiian organizations or their respective THPOs are likely to have knowledge regarding historic properties within the area of potential effects, which may be of religious and cultural significance that are eligible for or listed in the National Register.
- (b) If a party is so invited:
  - (1) *Deadline for initial response.* Any such party shall respond to confirm their participation within 15 days of service or its participation is deemed waived.
  - (2) *Default timelines.* The agency official may set timelines for participation in its notice, provided such deadlines are reasonable in light of the project as a whole. In the absence of such a deadline, the default deadlines shall be:

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- (i) 30 days to assist in the identification of historic properties.
  - (ii) 45 days, to run concurrently, to assist in the evaluation of effects and to propose ways to address adverse effects.
- (3) **Confidentiality.** In the early consultation process, the agency official should address concerns raised about confidentiality pursuant to § 800.11(c).
- (4) **No creation of rights:** Participation in early consultation creates no rights on the part of the consulting party nor obligations on the part of the agency beyond those provided by Section 106 and this part.
- (a) **Termination of consultation.** After consulting to resolve adverse effects pursuant to § 800.6(b)(2), the agency official, the SHPO/THPO, or the Council may determine that further consultation will not be productive and terminate consultation. Any party that terminates consultation shall notify the other consulting parties and provide them the reasons for terminating in writing.
  - (1) If the agency official terminates consultation, the head of the agency or an Assistant Secretary or other officer with major department wide or agency wide responsibilities shall request that the Council comment pursuant to paragraph (c) of this section and shall notify all consulting parties of the request.
  - (2) If the SHPO terminates consultation, the agency official and the Council may execute a memorandum of agreement without the SHPO's involvement.
  - (3) If a THPO terminates consultation regarding an undertaking occurring on or affecting historic properties on its tribal lands, the Council shall comment pursuant to paragraph (c) of this section.
  - (4) If the Council terminates consultation, the Council shall notify the agency official, the agency's Federal preservation officer and all consulting parties of the termination and comment under paragraph (c) of this section. The Council may consult with the agency's Federal preservation officer prior to terminating consultation to seek to resolve issues concerning the undertaking and its effects on historic properties.
- (b) **Comments without termination.** The Council may determine that it is appropriate to provide additional advisory comments upon an undertaking for which a memorandum of agreement will be executed. The Council shall provide them to the agency official when it executes the memorandum of agreement.
- (c) **Comments by the Council—**
  - (1) **Preparation.** The Council shall provide an opportunity for the agency official, all consulting parties, and the public to provide their views within the time frame for developing its comments. Upon request of the Council, the agency official shall provide additional existing information concerning the undertaking and assist the Council in arranging an onsite inspection and an opportunity for public participation.

- ~~(2) *Timing.* The Council shall transmit its comments within 45 days of receipt of a request under paragraph (a)(1) or (a)(3) of this section or § 800.8(c)(3), or termination by the Council under § 800.6(b)(1)(v) or paragraph (a)(4) of this section, unless otherwise agreed to by the agency official.~~
- ~~(3) *Transmittal.* The Council shall provide its comments to the head of the agency requesting comment with copies to the agency official, the agency's Federal preservation officer, all consulting parties, and others as appropriate.~~
- ~~(4) *Response to Council comment.* The head of the agency shall take into account the Council's comments in reaching a final decision on the undertaking. Section 110(l) of the act directs that the head of the agency shall document this decision and may not delegate his or her responsibilities pursuant to section 106. Documenting the agency head's decision shall include:~~
- ~~(i) Preparing a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's comments and providing it to the Council prior to approval of the undertaking;~~
  - ~~(ii) Providing a copy of the summary to all consulting parties; and~~
  - ~~(iii) Notifying the public and making the record available for public inspection.~~

### **Subpart C—Other Considerations**

#### **§ 800.8 Integrating Section 106 Compliance with the National Environmental Policy Act.**

##### ~~(a) *General principles*~~

- ~~(1) *Early coordination.* Federal agencies are encouraged to coordinate compliance with section 106 and the procedures in this part with any steps taken to meet the requirements of the National Environmental Policy Act (NEPA). Agencies should consider their section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner. The determination of whether an undertaking is a “major Federal action significantly affecting the quality of the human environment,” and therefore requires preparation of an environmental impact statement (EIS) under NEPA, should include consideration of the undertaking's likely effects on historic properties. A finding of adverse effect on a historic property does not necessarily require an EIS under NEPA.~~
- ~~(2) *Consulting party roles.* SHPO/THPOs, Indian tribes, and Native Hawaiian organizations, other consulting parties, and organizations and individuals who may be concerned with the possible effects of an agency action on historic properties should be prepared to consult with agencies early in the NEPA process, when the purpose of and need for the proposed action as well as the widest possible range of alternatives are under consideration.~~

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

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

(a) **Use of the NEPA process for section 106 purposes.** For any Federal undertaking that is also a “major federal action” subject to NEPA, a An agency official may elect to use the process and documentation required for the preparation of an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) ~~A FONSI~~ or an Environmental Impact Statement (EIS) Record of Decision (ROD) to comply with section 106 in lieu of the procedures set forth in §§ 800.3-~~7 through 800.6~~ if the agency official has notified in advance the SHPO/THPO and the Council that it intends to do so and the following standards are met.

**(1) Standards for developing environmental documents to comply with Section 106.**

During preparation of the EA or ~~draft EIS (DEIS)~~, the agency official shall:

- (i) Identify the area of potential effects and relevant consulting parties ~~either pursuant to § 800.3(f) or~~ through the NEPA scoping process with results consistent with §§ 800.4(b) and 800.5(a) ~~§ 800.3(f)~~;

(A) The agency official may engage in early consultation with such parties as part of the NEPA process, if the official determines it would be helpful.

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

(iii) Evaluate reasonable mitigation measures to address adverse effects of the undertaking on historic properties, describe them, and explain the agency official's selection of reasonable measures or determination that other factors outweigh the interests in historic preservation for this particular effect, property, or project, in the EA or EIS.

- ~~(ii) Consult regarding the effects of the undertaking on historic properties with the SHPO/THPO, Indian tribes, and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, other consulting~~

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parties, and the Council, where appropriate, during NEPA scoping, environmental analysis, and the preparation of NEPA documents;

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

**(2) Review of environmental documents.**

- (i) The agency official shall submit the EA, ~~DEIS~~, or EIS to the relevant consulting parties identified pursuant SHPO/THPO, Indian tribes, and Native Hawaiian organizations that might attach religious and cultural significance to § 800.5(a) as if it were a Section 106 Report under this part, and follow the same procedures as set forth in §§ 800.5-6 for obtaining affected historic properties, and other consulting parties prior to or when making the document available for public comment and to inform the agency's decision for the purposes of section 106 review. If the document being prepared is a DEIS or EIS, the agency official shall also submit it to the Council.
  - (ii) As part of this process, the agency official may specify deadlines by which comments must be received to comply with the relevant deadlines applicable to the NEPA process under statute, regulation, or other agency policy.
  - (iii) The agency's determination related to effects to historic properties may be incorporated into a FONSI for any EA and/or the agency's decision document or a ROD, as appropriate, depending on the out of the NEPA review.
  - (i) ~~Prior to or within the time allowed for public comment on the document, a SHPO/THPO, an Indian tribe or Native Hawaiian organization, another consulting party or the Council may object to the agency official that preparation of the EA, DEIS, or EIS has not met the standards set forth in paragraph (c)(1) of this section or that the substantive resolution of the effects on historic properties proposed in an EA, DEIS, or EIS is inadequate. If the agency official receives such an objection, the agency official shall refer the matter to the Council.~~
- ~~(2) Resolution of objections. Within 30 days of the agency official's referral of an objection under paragraph (c)(2)(ii) of this section, the Council shall review the objection and notify the agency as to its opinion on the objection.~~
- (i) ~~If the Council agrees with the objection:~~
    - (A) ~~The Council shall provide the agency official and, if the Council determines the issue warrants it, the head of the agency with the Council's opinion regarding the objection. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The person to whom the~~

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~~Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion in reaching a final decision on the issue of the objection.~~

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

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

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

~~(3) *Approval of the undertaking.* If the agency official has found, during the preparation of an EA or EIS that the effects of an undertaking on historic properties are adverse, the agency official shall develop measures in the EA, DEIS, or EIS to avoid, minimize, or mitigate such effects in accordance with paragraph (c)(1)(v) of this section. The agency official's responsibilities under section 106 and the procedures in this subpart shall then be satisfied when either:~~

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

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

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

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

**(b) *Modification of the undertaking.*** If the undertaking is modified after approval through the ROD or other decision document in a manner that materially changes the undertaking or alters its effects on historic properties, or if the agency official fails to ensure that the measures adopted to address avoid, minimize or mitigate adverse effects (as specified in either ~~the FONSI or the ROD~~ or other decision document, or in the document binding commitment adopted pursuant to paragraph ~~(a)(2)(c)(4)~~ of this section and § 800.6 are carried out, the agency official shall notify the Council and all consulting parties and proceed in accordance with any appropriate process under this part or at that supplemental environmental documents will be prepared in compliance with NEPA ~~or that the procedures in §§ 800.3 through 800.6 will be followed as necessary.~~

(c) *Actions categorically excluded under NEPA.* If a project, activity or program is found to be excluded pursuant to a categorical exclusion under NEPA, see 42 U.S.C. §§ 4336(a)(2), (b)(2), the agency official shall determine if, notwithstanding that finding, the project, activity, or program qualifies as a Federal undertaking requiring review under section 106 pursuant to § 800.3(a). If so, the agency official shall first review whether the undertaking falls within an exempted category under § 800.14(c). If not, the agency official shall then proceed with section 106 review in accordance with the procedures in this part.

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

#### **§ 800.9 Council review of section 106 compliance.**

- (a) *Assessment of agency official compliance for individual undertakings.* The Council may provide to the agency official its advisory opinion regarding the substance of any finding, determination or decision or regarding the adequacy of the agency official's compliance with the procedures under this part. The Council may provide such advice at any time at the request of any individual, agency or organization ~~or on its own initiative. The agency official shall consider the views of the Council in reaching a decision on the matter in question.~~
- (b) *Agency failure to provide foreclosure of the Council's an opportunity to comment.* Where an agency official has failed to complete the requirements of section 106 in accordance with the procedures in this part prior to the approval of an undertaking, the Council's may be deprived of an opportunity to comment on the agency official's findings may be foreclosed. The Council may review such an undertaking a ease to determine whether the Council was so deprived a foreclosure has occurred. If tThe Council determines that the agency failed to provide it with an opportunity to comment, then it shall notify the agency official and the agency's Federal preservation officer and allow 30 days for the agency official to provide information as to whether deprivation of the Council's opportunity to comment foreclosure has occurred. If the Council determines foreclosure has occurred, tThe Council shall transmit the determination to the agency official and the head of the agency. The Council shall also make the determination available to the public and any parties known to be interested in the undertaking and its effects upon historic properties.
- (c) *Intentional adverse effects by applicants –*
- (1) *Agency responsibility.* Section 110(k) of the act prohibits a Federal agency from granting a loan, loan guarantee, permit, license or other assistance to an applicant who, with intent to avoid the requirements of section 106, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed such significant adverse effect to occur, unless the agency official, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. ~~Guidance issued by the Secretary pursuant to section 110 of the act governs its implementation.~~

- (2) **Consultation with the Council.** When an agency official determines, based on the actions of an applicant, that section 110(k) is applicable and that circumstances may justify granting the assistance, the agency official shall notify the Council and provide documentation specifying the circumstances under which the adverse effects to the historic property occurred and the degree of damage to the integrity of the property. This documentation shall include any views obtained from the applicant, SHPO/THPO, an Indian tribe if the undertaking occurs on or affects historic properties on tribal lands and the Indian tribe does not have an appointed or designated THPO, and other parties known to be interested in the undertaking.
- (i) Within ~~30~~<sup>thirty</sup> days of receiving the agency official's notification, ~~unless otherwise agreed to by the agency official,~~ the Council shall provide the agency official with its opinion as to whether circumstances justify granting assistance to the applicant and any possible mitigation of the prior adverse effects.
- (ii) The agency official shall consider the Council's opinion in making a decision on whether to grant assistance to the applicant, and shall notify the Council, the SHPO/THPO, and other parties known to be interested in the undertaking prior to granting the assistance.
- (d) **Compliance with Section 106.** If an agency official, after consulting with the Council, determines to grant the assistance, the agency official shall comply with §§ 800.3 through 800.6 to take into account the effects of the undertaking on any historic properties.
- (e) **Evaluation of Section 106 operations.** The Council may evaluate the operation of the section 106 process by periodic reviews of how participants have fulfilled their legal responsibilities and how effectively the outcomes reached advance the purposes of the act.
- (1) **Information from participants.** Section 203 of the act authorizes the Council to obtain information from Federal agencies necessary to conduct evaluation of the section 106 process. The agency official shall make documentation of agency policies, operating procedures and actions taken to comply with section 106 available to the Council upon request, to the extent permitted by law and within available funds. The Council may request available information and documentation from other participants in the section 106 process.
- (2) **Improving the operation of section 106.** Based upon any evaluation of the section 106 process, the Council may make recommendations to participants, the heads of Federal agencies, and the Secretary of actions to improve the efficiency and effectiveness of the process. Where the Council determines that an agency official or a SHPO/THPO has failed to properly carry out the responsibilities assigned under the process in this part, the Council may participate in individual case reviews conducted under such process ~~in addition to the SHPO/THPO~~ for such period that it determines is necessary to improve performance or correct deficiencies. If the Council finds a pattern of failure by a Federal agency in carrying out its responsibilities under section 106, the Council may review the policies and programs of the agency related to

historic preservation pursuant to section 202(a)(6) of the act and recommend methods to improve the effectiveness, coordination, and consistency of those policies and programs with section 106.

#### **§ 800.10 Special requirements for protecting National Historic Landmarks.**

- (a) **Statutory requirement.** Section 110(f) of the act requires that the agency official, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic Landmark that may be directly and adversely affected by an undertaking. When commenting on such undertakings, the Council shall use the process set forth in §§ 800.5-6 through 800.7 and give special consideration to protecting National Historic Landmarks ~~as specified in this section.~~
- ~~(b) **Resolution of adverse effects.** The agency official shall request the Council to participate in any consultation to resolve adverse effects on National Historic Landmarks conducted under § 800.6.~~
- ~~(e)(b)~~ **Involvement of the Secretary.** The agency official shall notify the Secretary of any consultation involving a National Historic Landmark and invite the Secretary to participate in the consultation where there may be an adverse effect. The Council may request a report from the Secretary under section 213 of the act to assist in the consultation.
- ~~(d)(c)~~ **Report of outcome.** When the Council participates in consultation under this section, it shall report the outcome of the section 106 process, providing its written comments or any memoranda of agreement to which it is a signatory, to the Secretary and the head of the agency responsible for the undertaking.

#### **§ 800.11 Documentation standards.**

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

**(c) Confidentiality –**

(1) **Authority to withhold information.** Section 304 of the act provides that the head of a Federal agency or other public official receiving grant assistance pursuant to the act, after consultation with the Secretary, shall withhold from public disclosure information about the location, character, or ownership of a historic property when disclosure may cause a significant invasion of privacy; risk harm to the historic property; or impede the use of a traditional religious site by practitioners. When the head of a Federal agency or other public official has determined that information should be withheld from the public pursuant to these criteria, the Secretary, in consultation with such ~~Federal~~ agency head or official, shall determine who may have access to the information for the purposes of carrying out the act.

(2) **Consultation with the Council.** When the information in question has been developed in the course of an agency's compliance with this part, the Secretary shall consult with the Council in reaching determinations on the withholding and release of information unless the information is required to be withheld from disclosure by another statute. In furtherance of this consultation requirement, the~~The~~ Federal agency shall provide the Council with relevant available information, including views of the SHPO/THPO, Indian tribes and Native Hawaiian organizations, related to the confidentiality concern. The Council shall advise the Secretary and the Federal agency within 2130 days of receipt of available information; provided, that a failure by the Council to provide timely advice shall not delay the Secretary's determination regarding the withholding and release of information~~adequate documentation.~~

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

(d) **Report.** ~~Finding of no historic properties affected.~~ Documentation shall include, as relevant:

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

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

- ~~(1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, and drawings, as necessary;~~

- ~~(2) A description of the steps taken to identify historic properties;~~
- ~~(3)(4) A description of the affected any historic properties present, including information on the characteristics that qualify them for inclusion in the National Register;~~
- ~~(4)(5) A description of the undertaking's effects on those historic properties; and~~
- ~~(5)(6) An explanation of why the criteria of adverse effect were found applicable or inapplicable, including any reasonable mitigation to address adverse effects, or, where appropriate, an explanation of why other considerations outweigh any conditions or future actions to avoid, minimize or mitigate adverse effects; and~~
- ~~(6) Copies or summaries of any views provided by consulting parties and the public.~~
- ~~(e) **Memorandum of decision.** A memorandum of decision shall include, as appendices, the report and the agency official's response to any comments received from consulting parties.~~
- ~~(a) **Memorandum of agreement.** A memorandum of agreement shall include, as appendices, the report and the agency official's response to any comments received from consulting parties. When a memorandum of agreement is filed with the Council, the documentation shall include, any substantive revisions or additions to the documentation provided the Council pursuant to § 800.6(a)(1), an evaluation of any measures considered to avoid or minimize the undertaking's adverse effects and a summary of the views of consulting parties and the public.~~
- ~~(b) **Requests for comment without a memorandum of agreement.** Documentation shall include:~~
  - ~~(1) A description and evaluation of any alternatives or mitigation measures that the agency official proposes to resolve the undertaking's adverse effects;~~
  - ~~(2) A description of any reasonable alternatives or mitigation measures that were considered but not chosen, and the reasons for their rejection;~~
  - ~~(3) Copies or summaries of any views submitted to the agency official concerning the adverse effects of the undertaking on historic properties and alternatives to reduce or avoid those effects; and~~
  - ~~(4) Any substantive revisions or additions to the documentation provided the Council pursuant to § 800.6(a)(1).~~

## **§ 800.12 Emergency situations.**

- ~~(a) **Agency procedures.** The Each agency official, in consultation with the appropriate SHPOs/THPOs, affected Indian tribes and Native Hawaiian organizations, and the Council, is encouraged to develop procedures for taking historic properties into account during operations which respond to a disaster or emergency declared by the President, a tribal government, or the Governor of a State or which respond to other~~

emergency situations. ~~immediate threats to life or property.~~ If ~~approved~~ agreed to by the Council, the procedures shall govern the agency's historic preservation responsibilities during any disaster or emergency in lieu of §§ 800.3 through 800.6.

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

- (1) Following a programmatic agreement developed pursuant to § 800.14(b) that contains specific provisions for dealing with historic properties in emergency situations; or
- (2) Notifying the Council, the appropriate SHPOs/THPOs and any Indian tribe or Native Hawaiian organization ~~entitled that may attach religious and cultural significance to historic properties likely~~ to be a consulting party under § 800.2(c)(2) ~~affected~~ prior to the undertaking and affording them an opportunity to comment within ~~7~~ seven days of notification. If the agency official determines that circumstances do not permit ~~7~~ seven days for comment, the agency official shall notify the Council, the SHPO/THPO and ~~such~~ the Indian tribe or Native Hawaiian organization as soon as is feasible, including, if necessary, after the undertaking, and invite any comments within the time available.

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

### **§ 800.13 Post-review discoveries.**

- (a) ***Planning for subsequent discoveries –***

- (1) ***Using a programmatic agreement.*** An agency official may develop a programmatic agreement pursuant to § 800.14(b) to govern the actions to be taken when historic properties are discovered during the implementation of an undertaking.
- (2) ***Using memoranda of decision or memorandum of agreement documents.*** When the agency official's identification efforts in accordance with § 800.4 indicate that historic properties are likely to be discovered during implementation of an undertaking and no programmatic agreement ~~governs the undertaking~~ has been developed pursuant to paragraph (a)(1) of this section, the agency official shall include in any ~~finding of no adverse effect or~~ memorandum of decision or memorandum of agreement, the ~~a~~ process that agency official shall follow to address ~~to resolve~~ any adverse effects upon such subsequently discovered properties. Actions

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in conformance with ~~the~~such process satisfy the agency official's responsibilities under section 106 and this part.

- (b) ***Discoveries without prior planning.*** If historic properties are discovered or unanticipated effects on historic properties found after the agency official has completed the section 106 process without establishing a process under paragraph (a) of this section, the agency official shall make reasonable efforts to ~~avoid, minimize or mitigate~~address adverse effects to such properties and:
- (1) If the agency official has not approved the undertaking or if construction on an approved undertaking has not commenced, consult to ~~resolve~~address adverse effects pursuant to §§ 800.4-6; or
  - (2) If the agency official, the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the affected property agree that such property is of value solely for its scientific, prehistoric, historic or archaeological data, the agency official may comply with the Archaeological and Historic Preservation Act instead of the procedures in this part and provide the Council, the SHPO/THPO, and ~~the~~such Indian tribe or Native Hawaiian organization with a report on the actions within a reasonable time after they are completed; or
  - (3) If the agency official has approved the undertaking and construction has commenced, determine actions that the agency official can take to ~~resolve~~address adverse effects, and notify the SHPO/THPO, any Indian tribe or Native Hawaiian organization ~~that might attach religious and cultural significance~~entitled to be a consulting party under § 800.2(c)(2)~~the affected property~~, and the Council within 48 hours of the discovery. The notification shall describe the agency official's assessment of National Register eligibility of the property and proposed actions to ~~resolve the~~address adverse effects. The SHPO/THPO, ~~the~~any Indian tribe or Native Hawaiian organization ~~entitled to be a consulting party under § 800.2(c)(2)~~, and the Council shall respond within 48 hours of the notification. The agency official shall take into account their recommendations regarding National Register eligibility and proposed actions, and then carry out any actions the agency official determines to be appropriate~~actions~~. The agency official shall provide the SHPO/THPO, ~~the~~any Indian tribe or Native Hawaiian organization ~~entitled to be a consulting party under § 800.2(c)(2)~~, and the Council a report of the actions when they are completed.
- (c) ***Eligibility of properties.*** The agency official, ~~in consultation with the SHPO/THPO~~, may assume a newly-discovered property to be eligible for the National Register for purposes of section 106. The agency official shall specify the National Register criteria used to assume the property's eligibility so that information can be used to address ~~in the resolution of~~ adverse effects.
- (d) ***Discoveries on tribal lands.*** If historic properties are discovered on tribal lands, or there are unanticipated effects on historic properties found on tribal lands, for an approved undertaking that did not include~~after the agency official has completed the~~

~~section 106 process without establishing~~ a process under paragraph (a) of this section and ~~ground-disturbing activities have~~~~construction has~~ commenced, the agency official shall comply with applicable tribal ~~laws~~~~regulations~~ and ~~consult with the THPO or procedures and obtain the concurrence of the~~ Indian tribe, as applicable, on the proposed action.

## **Subpart DC—Program Alternatives**

### **§ 800.14 Federal agency program alternatives.**

- ~~(a) *Alternate procedures.* An agency official may develop procedures to implement section 106 and substitute them for all or part of subpart B of this part if they are consistent with the Council's regulations pursuant to section 110(a)(2)(E) of the act.~~
- ~~(1) *Development of procedures.* The agency official shall consult with the Council, the National Conference of State Historic Preservation Officers, or individual SHPO/THPOs, as appropriate, and Indian tribes and Native Hawaiian organizations, as specified in paragraph (f) of this section, in the development of alternate procedures, publish notice of the availability of proposed alternate procedures in the **Federal Register** and take other appropriate steps to seek public input during the development of alternate procedures.~~
- ~~(2) *Council review.* The agency official shall submit the proposed alternate procedures to the Council for a 60-day review period. If the Council finds the procedures to be consistent with this part, it shall notify the agency official and the agency official may adopt them as final alternate procedures.~~
- ~~(3) *Notice.* The agency official shall notify the parties with which it has consulted and publish notice of final alternate procedures in the **Federal Register**.~~
- ~~(4) *Legal effect.* Alternate procedures adopted pursuant to this subpart substitute for the Council's regulations for the purposes of the agency's compliance with section 106; except that where an Indian tribe has entered into an agreement with the Council to substitute tribal historic preservation regulations for the Council's regulations under section 101(d)(5) of the act, the agency shall follow those regulations in lieu of the agency's procedures regarding undertakings on tribal lands. Prior to the Council entering into such agreements, the Council will provide Federal agencies notice and opportunity to comment on the proposed substitute tribal regulations.~~
- ~~(b)~~(a) ***Programmatic agreements.*** The Council and the agency official may negotiate develop and agree to a programmatic agreement to govern the implementation of a particular program or ~~the resolution of~~to address adverse effects from certain complex project situations or multiple undertakings.

- (1) ***Use of programmatic agreements.*** A programmatic agreement may be used:
- (i) When effects on historic properties are similar and repetitive or are multi-State or regional in scope;

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- (ii) When effects on historic properties cannot be fully determined prior to approval of an undertaking;
- (iii) When nonfederal parties are delegated major decisionmaking responsibilities;
- (iv) Where routine management activities are undertaken at Federal installations, facilities, or other land-management units; or
- (v) Where other circumstances warrant a departure from the normal standard section 106 process.

**(2) Developing programmatic agreements for agency programs.**

- (i) Consultation. The agency official may consult~~consultation shall involve~~, as appropriate, individual SHPOs/THPOs, the National Conference of State Historic Preservation Officers (NCSHPO), Indian tribes and Native Hawaiian organizations, other Federal agencies, and members of the public, in developing ~~the~~ programmatic agreement. If a programmatic agreement has the ~~If the~~ reasonable foreseeable potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization off tribal lands, the agency official shall also follow paragraph (d) of this section.

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

- ~~(iii)~~(ii) Effect. The programmatic agreement shall take effect when executed by the Council and, the agency official. The agency official and the Council shall seek, but are not required to obtain, the concurrence of the appropriate SHPOs/THPOs when the programmatic agreement concerns a specific region, or the president of NCSHPO when NCSHPO has participated in the consultation. A programmatic agreement shall take effect on tribal lands only when the applicable THPO, Indian tribe, or a designated representative of the tribe is a signatory to the programmatic agreement. Compliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the programmatic agreement until it expires or is terminated by the agency official, the president of NCSHPO when a signatory, or the Council. Termination by an individual SHPO/THPO or Indian tribe shall only terminate the application of a regional programmatic agreement within the jurisdiction of the SHPO/THPO. If a THPO assumes the responsibilities of a SHPO pursuant to section 101(d)(2) of the act and the SHPO is signatory to programmatic agreement, the THPO assumes the role of a signatory, including the right to terminate a regional programmatic agreement, but only on tribal

lands ~~under the jurisdiction of the tribe.~~

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

(iv) If the Council determines that the terms of a programmatic agreement are not being carried out and terminates that programmatic agreement, or if such an agreement is terminated, or if such agreement is terminated by NCSHPO, a SHPO/THPO, or Indian tribe, as applicable, then those individual undertakings of the program that do not survive termination under paragraph (a)(2)(ii) the agency official shall comply with subpart B of this part ~~with regard to individual undertakings of the program covered by the agreement.~~

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

~~(4)~~(3) **Prototype programmatic agreements.** The Council may designate an agreement document as a prototype programmatic agreement that may be used for the same type of program or undertaking in more than one case or area. When an agency official uses such a prototype programmatic agreement, the agency official may develop and execute the agreement with the appropriate SHPO/THPO and the agreement shall become final without need for Council participation in consultation or Council signature.

~~(e)(b)~~ **Exempted categories –**

(1) **Criteria for establishing.** The Council or an agency official may at any time propose a program or category of undertakings that may be exempted from review under the provisions of subpart B of this part, if the program or category meets the following criteria:

- (i) The actions within the program or category would otherwise qualify as “undertakings” as defined in § 800.16;
- (ii) Such action, considering its magnitude, normally does not have adverse ~~The potential effects of the undertakings within the program or category upon historic properties, or such effects are foreseeable and likely to be~~ normally minimal ~~or not adverse~~; and

(iii) Exemption of the program or category is consistent with the purposes of the act.

(iv)

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

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

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

(2) **Consultation.** The agency official may consult, as appropriate, NCSHPO, individual SHPOs/THPOs, Indian tribes and Native Hawaiian organizations, other Federal agencies, and members of the public, in formulating an exempted category. If a proposed exemption has reasonably foreseeable potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization off tribal lands, the agency official shall also follow paragraph (d) of this section.

~~(5)~~(3) **Council review of proposed exemptions.** The Council shall review an proposed exemption ~~proposal~~ that is supported by documentation describing the program or category for which the exemption is sought, demonstrating that the criteria of paragraph (c)(1) of this section have been met, describing the methods used to seek the views of the public, and summarizing any views submitted, as applicable, by the SHPOs/THPOs, the public, and any others consulted. Unless it requests further information, the Council shall approve or reject the proposed exemption within 30 days of receipt, and thereafter notify the relevant agency official and SHPO/THPOs of the decision. The decision shall be based on the consistency of the exemption with the purposes of the act, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties in accordance with section 214 of the act.

~~(6)~~(4) **Legal consequences.** Any undertaking that falls within an approved exempted program or category shall require no further review pursuant to subpart B of this part, unless the agency official ~~or the Council~~ determines that there are extraordinary circumstances under which the normally excluded undertaking should be reviewed under subpart B of this part.

~~(7)~~(5) **Termination.** The Council may terminate an exemption at the request of the agency official or when the Council determines, after consultation with the relevant

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agency officials, that the exemption no longer meets the criteria of paragraph (c)(1) of this section and cannot be narrowed in scope to meet such criteria. ~~The Council shall notify the agency official 30 days before termination becomes effective.~~

**(6) Notice.**

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

~~(i)~~(ii) The Council shall maintain a catalog of approved exemptions.

**(7) Periodic Review.** The Council and agency officials shall periodically review existing exemptions and propose new exemptions from review, using the criteria set forth in subsection (1) above.

~~(c) Standard treatments—~~

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

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

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

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

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

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

**(1) Agency request.** The agency official shall identify the category of undertakings,

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specify the likely effects on historic properties, specify the steps the agency official will take to ensure that the effects are taken into account, identify the time period for which the comment is requested and summarize any views submitted by interested parties or the public.

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

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

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

(2) *Consultation.* The agency official shall consult, as appropriate, NCSHPO, individual SHPOs/THPOs, Indian tribes and Native Hawaiian organizations, other Federal agencies, and members of the public, in formulating a programmatic comment. If a proposed programmatic comment concerns projects that may reasonably foreseeably affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization off tribal lands, the agency official shall also follow paragraph (d) of this section.

(i) ***Council action.*** Unless the Council requests additional documentation, notifies the agency official that it will decline to comment, or obtains the consent of the agency official to extend the period for providing comment, the Council shall comment to the agency official within 45-30 days of the request.

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

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

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

~~(e)~~(d) Consultation with Indian tribes and Native Hawaiian

organizations when developing program alternatives. Whenever ~~an~~ the Council or the agency official proposes a program alternative pursuant to paragraphs (a) through (c) of this section that has reasonably foreseeable potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization off tribal lands, the Council or, the agency official shall ensure that development of the program alternative includes appropriate government-to-government consultation with affected Indian tribes and consultation with affected Native Hawaiian organizations.

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

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

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

## SUBPART E DEFINITIONS

### **§ 800.16 Definitions.**

(a) **Act** means the National Historic Preservation Act of 1966, as amended, 54 U.S.C. 300101, et seq. ~~16 U.S.C. 470-470w-6.~~

(b) **Address adverse effects** means those measures adopted in accordance with § 800.6 to avoid, minimize, or otherwise mitigate the adverse effects of the undertaking on

historic properties identified in § 800.4.

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

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

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

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

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

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

~~(h)~~(i) Day or days means calendar days.

~~(i)~~(j) Effect means material alteration to the characteristics of a historic property that qualify ~~ing it~~ the historic property for inclusion in ~~or eligibility for~~ the National Register.

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

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

~~(h)~~(k) \_\_\_\_\_

- (1) As defined in section § 301(5) of the Act ~~h~~Historic property “means any prehistoric or historic district, site, building, structure, or object included ~~in~~on, or eligible for inclusion ~~in~~on, the National Register [of Historic Places maintained by the Secretary of the Interior], ~~of Historic Places maintained by the Secretary of the~~

~~Interior. This term~~ includes artifacts, records, and material remains ~~that are related to and located within such properties~~ relating to the district, site, building, structure, or object.” 54 U.S.C. § 300308. The term includes “Property properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and [that] may be determined to be eligible for inclusion on meet the National Register criteria.” 54 U.S.C. § 302706(a).

(2) A physical location qualifies as property under both of these definitions if:

- (i) It includes, or has included at some point in the past, tangible human improvements; and
- (ii) It is geographically compact.

For the avoidance of doubt, noncompact, unimproved natural features such as mountains, valleys, bodies of water, or landscapes, including ethnographic landscapes, do not qualify as property for the purposes of section 106.

~~(2)(3)~~ The term ***eligible for inclusion in the National Register*** includes both properties formally determined as such in accordance with regulations of the Secretary ~~of the Interior~~ and all other properties that meet the National Register criteria.

~~(m)~~(1) ***Indian tribe*** means an Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation, or village corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

~~(m)~~ ***Invited Signatories*** means those persons that sign a programmatic agreement or memorandum of agreement.

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

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

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

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

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

~~(s)(r)~~ \_\_\_\_\_

- (1) **Native Hawaiian organization** means any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians.
- (2) **Native Hawaiian** means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.
- ~~(t) **Programmatic agreement** means a document that records the terms and conditions agreed upon to resolve the potential adverse effects of a Federal agency program, complex undertaking or other situations in accordance with § 800.14(b).~~
- ~~(s) **Reasonable mitigation** means measures that are technically and economically feasible to address adverse effects while taking into account the goals of the undertaking.~~
- ~~(t)(t)~~ **Secretary** means the Secretary of the Interior acting through the Director of the National Park Service except where otherwise specified.
- ~~(u) **Required Signatories** means those persons that are required to sign a programmatic agreement or memorandum of agreement.~~
- (v) **State Historic Preservation Officer (SHPO)** means the official appointed or designated pursuant to section 101(b)(1) of the act to administer the State historic preservation program or a representative designated to act for the State historic preservation officer.
- (w) **Tribal Historic Preservation Officer (THPO)** means the tribal official appointed by the tribe's chief governing authority or designated by a tribal ordinance or preservation program who has assumed the responsibilities of the SHPO for purposes of section 106 compliance on tribal lands in accordance with section 101(d)(2) of the act.
- (x) **Tribal lands** means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.
- (y) **Undertaking** means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.
- ~~(z) **Senior policy official** means the senior policy level official designated by the head of the agency pursuant to section 3(e) of Executive Order 13287.~~

## **SUBPART F TRANSITION**

### **§ 800.17 Transition**

- (a) Any consultation, related to an undertaking under this Part, which commenced prior to [the effective date of this rulemaking] shall continue to be evaluated under the process prescribed by this Part as of INSERT DATE, unless the project sponsor requests in writing for the consultation to be processed under this Part as of [the effective date of this rulemaking].
- (b) For one year subsequent to [the effective date of the rulemaking], a project proponent may elect to undertake consultations under the process prescribed by this Part as of INSERT DATE.

## **SUBPART G SEVERABILITY**

### **§ 800.18 Severability**

The sections of this part are separate and severable from one another. If any section or portion therein is stayed or determined to be invalid, or the applicability of any section to any person or entity is held invalid, it is the Council's intention that the validity of the remainder of those parts will not be affected, with the remaining section, and all applications thereof, to continue in effect.

## **Pt. 800, App. A**

### **Appendix A to Part 800 – Criteria for Council Involvement in Reviewing Individual section 106 Cases**

- (a) ***Introduction.*** This appendix sets forth the criteria that will be used by the Council to determine whether to enter an individual section 106 review that it normally would not be involved in.
- (b) ***General policy.*** The Council may choose to exercise its authorities under the section 106 regulations to participate in an individual project. ~~pursuant to~~ The Council's decision to do so will be guided by the following criteria. However, the Council will not always elect to participate even though one or more of the criteria may be met.
- (c) ***Specific criteria.*** The following criteria inform when tThe Council is likely to enter the section 106 process ~~at the steps specified in the regulations in this part when an undertaking:~~
  - (1) ***Has substantial impacts on important historic properties.*** This may include adverse effects on properties that possess a national level of significance or on properties that are of unusual or noteworthy importance or are a rare property type; or adverse effects to large numbers of historic properties, such as impacts to multiple properties within a historic district.
  - (2) ***Presents important questions of policy or interpretation.*** This may include questions about how the Council's regulations are being applied or interpreted, including possible foreclosure or anticipatory demolition situations; situations where the outcome will set a precedent affecting Council policies or program goals; or the

development of programmatic agreements that alter the way the section 106 process is applied to a group or type of undertakings.

- (3) ***Has the potential for presenting procedural problems.*** This may include cases with substantial public controversy that is related to historic preservation issues; with disputes among or about consulting parties which the Council's involvement could help resolve; that are involved or likely to be involved in litigation on the basis of section 106; or carried out by a Federal agency, in a State or locality, or on tribal lands where the Council has previously identified problems with section 106 compliance pursuant to § 800.9(d)(2).
- (4) ***Presents issues of concern to Indian tribes or Native Hawaiian organizations.*** This may include cases where there have been concerns raised about the identification of, evaluation of or assessment of effects on historic properties to which an Indian tribe or Native Hawaiian organization attaches religious and cultural significance; where an Indian tribe or Native Hawaiian organization has requested Council involvement to assist in the resolution of adverse effects; or where there are questions relating to policy, interpretation or precedent under section 106 or its relation to other authorities, such as the Native American Graves Protection and Repatriation Act.