Historic and Archaeological Resource Protection for USEPA Personnel

An Instruction Manual on
Implementing Section 106 of the
National Historic Preservation Act

and the Revised Regulations of the
Advisory Council on Historic Preservation
on Protection of Historic Properties

October 22, 2003

EPA United States Environmental Protection Agency

HISTORIC PRESERVATION AND 106 COORDINATION FOR USEPA OFFICIALS

TABLE OF CONTENTS

HISTORIC PRESERVATION AND 106 COORDINATION FOR USEPA OFFICIALS

TABLE OF CONTENTS
(continued)

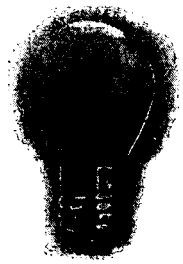
ATTACHMENTS

IT'S THE LAW

THE RULES & REGS REQUIRE IT

IT'S POLICY

IT'S A GOOD IDEA



UNIT #1: WHY SHOULD YOU CARE ABOUT HISTORICAL AND ARCHAEOLOGICAL RESOURCES?

Reason 1 ..... It's the law

Page 1 of your handout lists many of the Federal Laws which require protection of historical and archaeological resources. As you can see, there are at least 30 different laws which contain provisions requiring protection of cultural resources. You should especially be familiar with the following:

The American Antiquities Act of 1906 (16 USC 431-433) first codified the federal authority to protect cultural resources as well as natural resources. This Act found strong support in the east where there was intense interest in protection of properties linked to the colonial era and the revolutionary war. It was further bolstered by support from the west, where concern for protection of natural and scenic resources had led naturally to a desire to protect above ground archaeological sites and ruins. It prohibited disturbance of archaeological resources and objects of antiquity on federal lands without a permit. It also gave the President authority to designate national monuments.

The Historic Sites, Buildings, Objects, and Antiquities Act of 1935 (16 USC 461-467). This Act declared that "it is a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States". It laid the groundwork for today's legislative protections for historic resources. This Act, commonly known as the Historic Sites Act, first established the role of the Secretary of the Interior and the National Park Service in historic preservation.

The National Historic Preservation Act (NHPA) of 1966 as amended (16 USC 470-470t, 110)

Section 101(a):	Established the National Register of Historic Places.
Section 201-212:	Established the Advisory Council on Historic Preservation (ACHP) and authorized them to develop implementing regulations.
Section 106:	Established a required review process to protect resources which is now commonly known as **106 Review.**
Section 110:	Required all Federal Agencies to develop a Preservation Program and to designate a qualified official to be known as the agency's "preservation officer" with responsibility for coordinating agency activities under this Act.

Native American Graves Protection and Repatriation Act of 1990 (25 USC 3001-3013) specified ownership and control of Native American cultural items which are excavated or discovered on Federal or tribal lands. NHPA and NAGPRA are distinctly different laws and each imposes a different requirement on the agency. These two should not be confused. (See unit 8).

Reason 2 ..... The regs require it.

If you look at the reverse side of your handout, you will see at the top of the page a list of regulations which protect cultural resources. In particular, you should note the regulations of two parties:

A. **The Advisory Council on Historic Preservation** (ACHP) or ("the Council") whose regulations, at 36 CFR PART 800 are titled "Protection of Historic and Cultural Resources". These specify the procedures for implementing 106 review. They are the central focus of this course. 36 CFR Part 800 is attached to your course manual. You should read these regulations. There are 20 members on the Advisory Council. EPA Administrator Carol M. Browner is one of those 20 members.

B. **The Secretary of the Interior** who keeps the National Register of Historic Places and sets the standards for:
   Architectural and Engineering documentation (HABS/HAER)
   Professional Qualifications
   Rehabilitation
   Treatment of Historic Properties

Reason 3 ..... It's policy.

E.O. 11593 "Protection and Enhancement of the Cultural Environment" 1971
Requires federal agencies to consult with the Advisory Council on Historic Preservation in development of procedures to preserve and enhance sites, structures, and objects of historical or archaeological importance.

E.O. 13007 "Indian Sacred Sites 1996"
Requires federal agencies to (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.

Reason 4 ..... It's a good idea.

Why is it a good idea to protect historical and archaeological resources? Write down one or more reasons why you think it might be important.

Are there any reasons why you think it might **not** be a good idea to protect historical and archaeological resources?

Laws, Regulations, Standards, Guidelines, and Executive Orders Related to Cultural Resources

This listing was prepared by the National Park Service. It is current as of February, 2000. For an update, or for more information on any of the items listed, visit the Park Service at http://www.cr.nps.gov/linklaws.htm!

Laws

Abandoned Shipwreck Act of 1987 (PL 100-298; 43 U.S.C. 2101-2106)
American Antiquities Act of 1906 (16 USC 431-433)
American Indian Religious Freedom Act of 1978 (42 USC 1996 and 1996a)
Archeological and Historic Preservation Act of 1974 (16 USC 469-469c)
Archaeological Resources Protection Act of 1979, as amended (16 USC 470aa-mm)
Bald Eagle Protection Act of 1940 (16 USC 668-668d)
The Copyright Act of 1976 (17 USC 101 et seq. [1988 & Supp. V 1993])
Disposal of Records (44 USC 3301 et seq.)
Endangered Species Act of 1973, as amended (16 USC 1531-1543)
Federal Property and Administrative Services Act of 1949, as amended (40 USC 483 [b])
Federal Records Act of 1950, as amended (Records Management by Agencies, 44 USC 3101 et seq.)
Freedom of Information Act of 1982 (5 USC 552)
Historic Sites, Buildings, Objects, and Antiquities Act of 1935 (16 USC 461-467)
Internal Revenue Code of 1986 (Qualified Conservation Contributions) (26 U.S.C.170[h])
Internal Revenue Code of 1990 (Rehabilitation Credit) (26 USC 47)
Lacey Act of 1900 (18 USC 43-44)
Marine Mammal Protection Act of 1972 (16 USC 1361-1407)
Migratory Bird Treaty Act of 1918 (16 USC 703-711)
Mining in the National Parks Act of 1976 (Section 9) (16 USC 1908)
Museum Properties Management Act of 1955(16 USC 18)
National Environmental Policy Act of 1969 (42 USC 4321)
National Historic Preservation Act of 1966, as amended (16 USC 470-470t, 110)
National Park Service Organic Act of August 25, 1916 (16 USC 1-4, 22, 43)
Native American Graves Protection and Repatriation Act of 1990 (25 USC 3001-3013)
Outer Continental Shelf Lands Act (43 USC 1332)
Preservation, Arrangement, Duplication, Exhibition of Records (44 USC 2109)
Privacy Act of 1974 (5 USC 552a)
Public Buildings Cooperative Use Act of 1976 (40 USC 601a)
Reservoir Salvage Act of 1960, as amended (16 USC 469-469c)
Theft of Government Property (18 USC 641)
1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (19 USC 2601)

Laws, Regulations, Standards, Guidelines, and Executive Orders Related to Cultural Resources (continued)

Regulations

Certifications Pursuant to the Tax Reform Act of 1976 (36 CFR 67.2)
Curation of Federally-Owned and Administered Archeological Collections (36 CFR 79)
Disposition of Federal Records (36 CFR 1228)
Federal Records; General (36 CFR 1220)
Freedom of Information Act Regulations (36 CFR 810)
Historic Preservation Requirements of the Urban Development Action Grant Program (36 CFR 801)
National Historic Landmarks Program (36 CFR 65)
National Register of Historic Places (36 CFR 60) and Determinations of Eligibility for Inclusion in the National Register (36 CFR 63)
Native American Graves Protection and Repatriation Act: Final Rule (43 CFR 10)
Preservation of American Antiquities (43 CFR 3)
Procedures for State, Tribal, and Local Government Historic Preservation Programs (36 CFR 61)
Protection of Archeological Resources (43 CFR 7)
Protection of Historic and Cultural Properties (36 CFR 800)
Research Specimens (36 CFR 2.5)

Standards and Guidelines

Abandoned Shipwreck Act Guidelines
Guidelines for Federal Agency Responsibilities, Under Section 110 of the NHPA
Preparation of Environmental Impact Statements: Guidelines (40 CFR 1500)
The Secretary of the Interior's Standards for Architectural and Engineering Documentation
The Secretary of the Interior's Professional Qualification Standards (48 FR 22716, Sept. 1983)
The Secretary of the Interior's Proposed Historic Preservation Professional Qualification Standards
The Secretary of the Interior's Standards for Rehabilitation (36 CFR 67)
The Secretary of the Interior's Standards for the Treatment of Historic Properties (36 CFR 68)

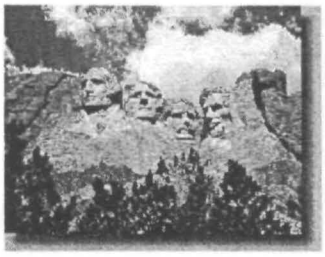
Executive Orders

Executive Order No. 11593 Protection and Enhancement of the Cultural Environment (1971)
Executive Order No. 13006 Locating Federal Facilities On Historic Properties In Our Nation's Central Cities (1996)
Executive Order No. 13007 Indian Sacred Sites (1996)

UNIT TWO WHAT ARE CULTURAL RESOURCES?

DISTRICTS

SITES



BUILDINGS

STRUCTURES

AND OBJECTS

ELIGIBLE FOR LISTING IN THE NATIONAL REGISTER OF HISTORIC PLACES.

UNIT #2 WHAT ARE "CULTURAL RESOURCES"?

Historic and Archaeological Resources include districts, sites, buildings, structures, and objects listed in or eligible for listing in the National Register of Historic Places. These may also be listed in the Historic American Buildings Survey (HABS) or Historic American Engineering Record (HAER) and/or may be National Historic Landmarks.

Sites - are the locations at which events of historical significance have occurred. Examples include a battlefield site (Gettysburg), building ruins, campsite, the place where a treaty was signed (Appomatox Courthouse), first landing point (Plymouth Rock), first point of settlement (Jamestown), and prehistoric and historic archaeological sites.

Districts - are areas which include numerous historic structures, sites, buildings and objects as well as "contributing elements". e.g. Capitol District with buildings, monuments, memorials, museums (and their contents) parks, streets, roads, fences railings, lighting, lawns, etc. Mill District with mill(s), dam and reservoir, raceways, canals, rail spurs, mill housing, church, school, etc. "Contributing Elements" may be as simple as a piece of lawn or a fence, or as complex as the overall setting or context of a resource including noise, air quality...

Buildings - are structures built principally to accomodate human use such as barns, forts, hotels, houses, or industrial facilities that are important either because they are:

1) architecturally valuable as prime examples of building types, (like a Shaker barn or a Greek Revival public building, or a Federal Period house, etc.)
2) or associated with important historical figures or events (as Monticello is associated with Thomas Jefferson and Mount Vernon with George Washington. Appomattox Court House is associated with the end of the Civil War. Sutter's Mill is associated with the 49'ers Gold Rush...etc.)

Structures - constructed for utilitarian purposes such as barns, sheds, outhouses, salt works, mines, quarries, kilns...

Objects - Stones covered with Petroglyphs, the sword of Lafayette, an Atlatl, an artillery piece, a stone drill, a plaque...

Traditional cultural properties (such as dance grounds, vistas, waterways etc.) are also cultural properties which may be subject to protection.

UNIT THREE ARE YOU AFFECTING RESOURCES?

WHO DECIDES WHAT IS AND ISN'T A "RESOURCE"

You
Your Branch Chief or Division Head
The State Historic Preservation Officer
The Tribal Historic Preservation Officer
The Secretary of the Department of the Interior

USING THE EPA SCREENING FORM

A Simple but Effective Way to Evaluate Your Projects

WHAT ARE THE CRITERIA OF ELIGIBILITY?

Associated with Significant Events
Associated with Lives of Significant Persons
Embodying Distinctive Characteristics
Containing Important Prehistoric or Historic Information

UNIT #3 ARE YOU AFFECTING CULTURAL RESOURCES

Who decides what is and isn't a resource? ..... The Key Players

- EPA Responsible Official (Usually the Division Head or Branch Chief) as advised by EPA cultural resource personnel, the project manager or program manager, the program or project staff and their consultant archaeologists and historians.
- State Historic Preservation Officer (SHPO) - Center of coordination efforts and the first point of contact for EPA. The SHPO is responsible for developing a "Comprehensive Statewide Historic Preservation Plan" and implementing it.
- Tribal Historic Preservation Officer (THPO) - For federally recognized tribes with a delegated program, otherwise the tribe may provide a representative under SHPO review.
- Secretary of the Department of the Interior - The Secretary is the keeper of the National Register and also develops criteria of eligibility for the register

Using the EPA Screening Form

EPA Cultural resource personnel have developed a screening form which you can use to characterize the cultural resource impacts of your projects. A copy of this form is appended to this manual. It summarizes the questions you should ask when considering the potential for cultural resource impacts on your projects. The form is also available in digital format (Adobe Acrobat or Microsoft Word) and can be completed interactively on-screen.

The Criteria Used to Determine Register Eligibility ..... (36 CFR 60.4)

"The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and:

(a) that are associated with events that have made a significant contribution to the broad patterns of our history; or

(b) that are associated with the lives of persons significant in our past; or

(c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

(d) that have yielded, or may be likely to yield, information important in prehistory or history."

Note that this definition is very broad and that it allows for listing of a wide range of different resource types anywhere in the nation. What may appear to you to be empty field, hillside or desert may actually be a major prehistoric site of significant archaeological importance. What might look to the casual observer like decaying junk might actually be an important remnant of a bygone industrial age.

There are also a number of qualifiers on these criteria. The Council calls them "Criteria considerations". Ordinarily cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have

achieved significance within the past 50 years shall not be considered eligible for the National Register.

However, such properties will qualify if they are integral parts of districts that do meet the criteria or if they fall within the following categories:

(a) A religious property deriving primary significance from architectural or artistic distinction or historical importance; or

(b) A building or structure removed from its original location but which is significant primarily for architectural value, or which is the surviving structure most importantly associated with a historic person or event; or

(c) A birthplace or grave of a historical figure of outstanding importance if there is no appropriate site or building directly associated with his productive life.

(d) A cemetery which derives its primary significance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events; or

(e) A reconstructed building when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan, and when no other building or structure with the same association has survived; or

(f) A property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance; or

(g) A property achieving significance within the past 50 years if it is of exceptional importance."

UNIT FOUR MAKING THE 106 PROCESS WORK FOR YOU

FOUR STEPS TO SUCCESS

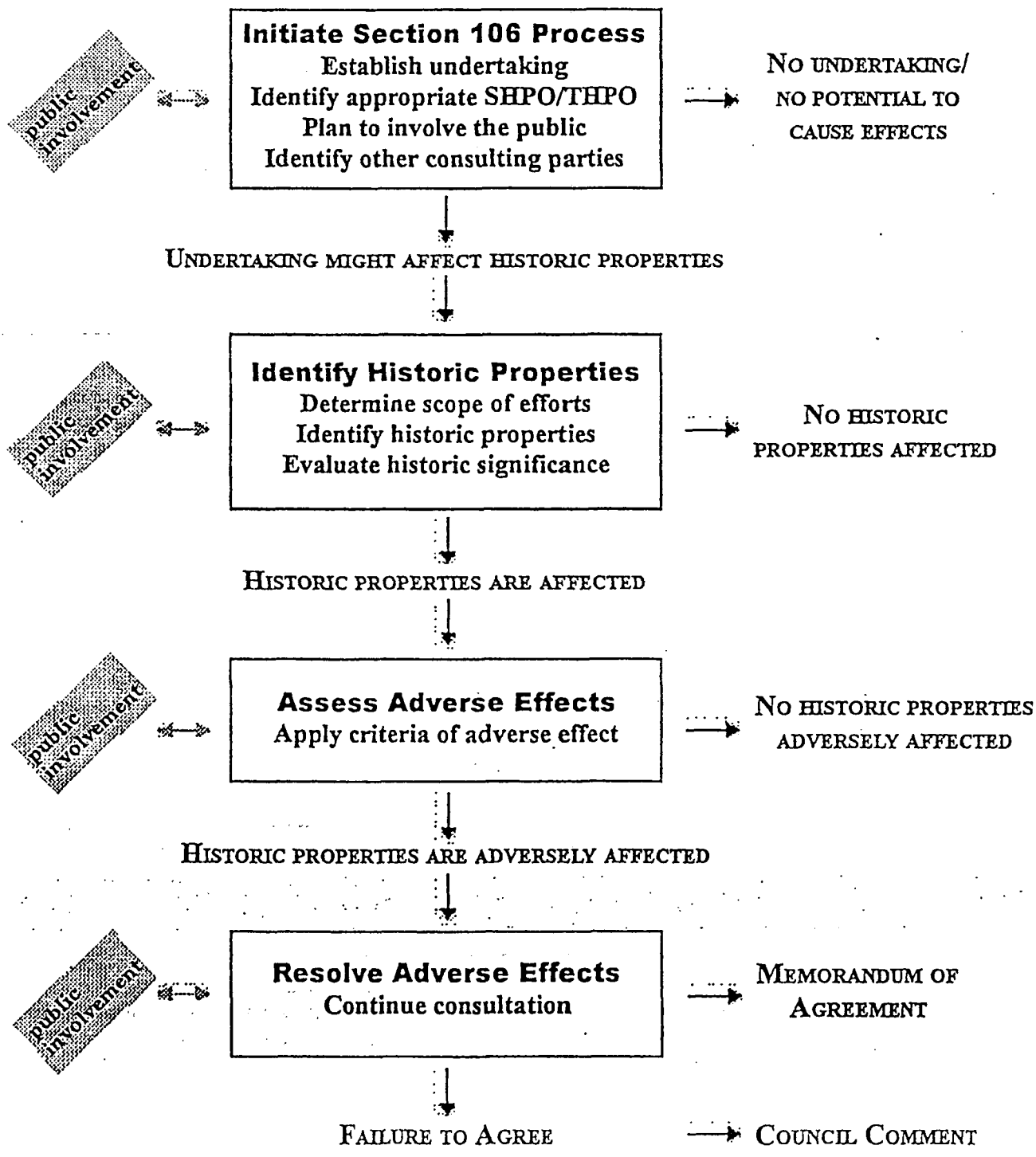
I INITIATE THE PROCESS

II ASSESS ADVERSE EFFECTS

III IDENTIFY HISTORIC PROPERTIES

IV RESOLVE ADVERSE EFFECTS

The Revised Section 106 Process:
Flow Chart
May 1999



(over)

The Revised Section 106 Process: A Summary

Section 106 of the National Historic Preservation Act of 1966 (NHPA) requires Federal agencies to take into account the effects of their undertakings on historic properties, and afford the Advisory Council on Historic Preservation a reasonable opportunity to comment. The historic preservation review process mandated by Section 106 is outlined in regulations issued by the Council. These regulations, "Protection of Historic Properties," were revised in May, 1999 and are summarized below. They will be codified at 36 C.F.R. Part 800.

Initiate Section 106 process

The responsible Federal agency first determines whether it has an undertaking that could affect historic properties, which are properties that are included in or that meet the criteria for the National Register of Historic Places. If so, it must identify the appropriate State Historic Preservation Officer/Tribal Historic Preservation Officer (SHPO/THPO) to consult with during the process. It should also plan to involve the public, and identify other potential consulting parties. If it determines that it has no undertaking, or that its undertaking has no potential to affect historic properties, the agency has no further Section 106 obligations.

Identify historic properties

If the agency's undertaking could affect historic properties, the agency determines the scope of appropriate identification efforts and then proceeds to identify historic properties in the area of potential effects. The agency reviews background information, consults with the SHPO/THPO and others, seeks information from knowledgeable parties, and conducts additional studies as necessary. Districts, sites, buildings, structures, and objects listed in the National Register are considered; unlisted properties are evaluated against the National Park Service's published criteria, in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that may attach religious or cultural importance to them.

If questions arise about the eligibility of a given property, the agency may seek a formal determination of eligibility from the National Park Service. Section 106 review gives equal consideration to properties that have already been included in the National Register as well as those that meet National Register criteria.

If the agency finds that no historic properties are present or affected, it provides documentation to the SHPO/THPO and, barring any objection in 30 days, proceeds with its undertaking.

If the Agency finds that historic properties are present, it proceeds to assess possible adverse effects.

Assess adverse effects

The agency, in consultation with the SHPO/THPO, makes an assessment of adverse effects on the identified historic properties based on criteria found in the Council's regulations.

If they agree that there will be **No Adverse Effect**, the agency proceeds with the undertaking and any agreed upon conditions.

If the parties cannot agree or they find that there is an **Adverse Effect**, the agency begins consultation to identify ways to avoid, minimize, or mitigate adverse effects.

Resolve adverse effects

The agency consults with the SHPO/THPO and others, who may include Indian tribes and Native Hawaiian organizations, local governments, permit or license applicants, and members of the public. The Council may participate in consultation when there are substantial impacts to important historic properties, when a case presents important questions of policy or interpretation, when there is a potential for procedural problems, or when there are issues of concern to Indian tribes or Native Hawaiian organizations.

Consultation usually results in a Memorandum of Agreement (MOA), which outlines agreed upon measures that the agency will take to avoid, minimize, or mitigate the adverse effect. In some cases, the consulting parties may agree that no such measures are possible, but that the adverse effects must be accepted in the public interest.

Implementation

If an MOA is executed, the agency proceeds with its undertaking under the terms of the MOA.

Failure to resolve adverse effects

If consultation proves unproductive, the agency or the SHPO/THPO, or the Council itself, may terminate consultation. If an SHPO terminates consultation, the agency and the Council may conclude an MOA without SHPO involvement. However, if a THPO terminates consultation and the undertaking is on or affecting historic properties on tribal lands, the Council must provide its comments. The agency must submit appropriate documentation to the Council and request the Council's written comments. The agency head must take into account the Council's written comments in deciding how to proceed.

Tribes, Native Hawaiians, & the public

Public involvement is a key ingredient in successful Section 106 consultation, and the views of the public should be solicited and considered throughout the process.

The regulations also place major emphasis on consultation with Indian tribes and Native Hawaiian organizations, in keeping with the 1992 amendments to NHPA. Consultation with an Indian tribe must respect tribal sovereignty and the government-to-government relationship between the Federal government and Indian tribes. Even if an Indian tribe has not been certified by NPS to have a THPO that can act for the SHPO on its lands, it must be consulted about undertakings on or affecting its lands on the same basis and in addition to the SHPO.

UNIT #4 MAKING THE 106 PROCESS WORK FOR YOU: FOUR STEPS TO SUCCESS

Handout: The Revised Section 106 Process: Flow Chart, ACHP May 1999 (attached)

STEP I: ..... INITIATE THE PROCESS

Question: Do you have an "undertaking" which might affect historic properties?

First, you must determine if you have an "undertaking" as defined by the National Historic Preservation Act. EPA has developed a Screening Document to evaluate appropriate level of 106 review. The 106 process should be coordinated with other reviews (e.g. NEPA)

The National Historic Preservation Act defines "undertaking" - as:

> "...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; those requiring a Federal permit, license or approval; ~~and those subject to state or local regulation administered pursuant to a delegation or approval by a Federal agency.~~"

Then, identify consulting parties. Consulting parties include:

The appropriate SHPO and/or THPO (listing available at www.achp.org)
Other consulting parties identified by the SHPO/THPO
Members of the general public - outreach should reflect the:

- nature and complexity of the undertaking
- nature and complexity of the impacts
- extent of Federal involvement in the undertaking
- likely public interest and
- confidentiality concerns

Then consult with the identified parties to:

- include the parties in the Agency planning process
- establish the nature of the undertaking
- establish the nature of the undertaking's effects.

Two possible answers:

No! This is not an undertaking and/or this has no potential to cause effects -
Yes! This is an undertaking which might affect Historic Properties - GO TO STEP II

STEP II ..... IDENTIFY HISTORIC PROPERTIES

The Question: Are there historic properties in the project area which might be affected by the undertaking?

In this step, you will work with the SHPO/THPO to determine the Area of Potential Effect (APE), identify historical properties, identify properties of religious and cultural significance to recognized tribes and make a determination on properties and the potential effects.

In general, the steps you will follow in the process of identifying historic properties are:

1. Establish areas(s) of potential effect
2. Determine whether the area has been surveyed or otherwise inspected to identify historic properties
3. Determine whether the area is "large" or "small"
4. Determine whether the available information provides a reliable basis for decision making
5. Determine whether the area should be subjected to intensive survey, and whether such a survey can be carried out within a reasonable period of time and at reasonable cost
6. Determine whether an alternative to intensive survey is appropriate
7. Decide how to proceed with Section 106 review

Survey of historic properties

Few Agency employees have the necessary expertise to complete the research needed to evaluate the presence of, or significance of cultural resources. Therefore it is frequently necessary to work with consultant archaeologists and historians. Archaeologists and historians may be contracted directly by the Agency, but more commonly are consultants to the applicant or project proponent.

Much of the work that needs to be done is research. The resource identification process is divided into two progressive levels of survey:

Stage IA - Documentation Review and Strategy Development, and
Stage IB - Site Recognition Survey.

In certain instances, the limited scope of the project or its limited potential for effect on cultural resources may permit the combination of the two levels of survey.

Stage IA - Documentation Review and Strategy development

The applicant, through the assistance of a qualified professional, carries out the Stage IA survey to identify documented cultural resources and areas of cultural sensitivity in the project area. The information from the survey is used to screen and develop project alternatives in order to minimize direct and indirect impacts on historic and cultural resources. At a minimum, the survey should include the following:

- A broad-based literature search,

- Analysis of documentation obtained from the SHPO, state archaeologist, historical and archaeological societies, libraries, museums and universities (at the local, state, and regional levels),

- Analysis of published accounts, models of settlement systems and geomorphology to predict the relative potential of the project area for the existence of documented resources, and

- An initial field reconnaissance for familiarization with the planning area.

The qualified professional will prepare a report of the survey, including recommendations for whether or not additional investigation is necessary. The EPA, in consultation with the state reviewing agency, then evaluates the report and its recommendations for adequacy.

If additional work is recommended, the report should contain an explicit research strategy for the field survey (Stage IB-Site Recognition Survey). The scope of the Stage IB will include the sampling of areas of varying cultural sensitivity identified in the Stage IA survey.

Stage IB - Site Recognition Survey

The survey area for the Stage IB survey will be the area of direct impact of the proposed alternative(s) and will be based on the research design. This survey will determine the presence or absence of important cultural resources that could be affected by the proposed project and will target those resources which would require further investigation. Subsurface testing to identify undocumented archaeological sites will generally be necessary. Survey methodology and field activities will be documented in a report prepared by the qualified professional detailing specific recommendations for further action in relation to the proposed alternatives.

EPA, in consultation with the state reviewing agency, will evaluate all findings and recommendations for adequacy and assess, in conjunction with facility planning documents, the potential of project impacts. If potential impacts on an identified resource cannot be avoided or insufficient data on the resource is available, the state/EPA will advise of the need to conduct a Stage II - Site Definition and Evaluation Survey. The state/EPA will evaluate the design and scope of the proposed Stage II survey for its adequacy,

Stage II - Site Definition and Evaluation Survey

This survey is carried out by the applicant on identified cultural resources that may be subject to impact. The survey is undertaken when direct effects on a resource cannot be avoided by reasonable modification of the undertaking or when information (extent, depth, significance) about a resource is insufficient to assess avoidance/preservation alternatives. At a minimum, this survey will provide data to allow for an assessment of the resource's National Register eligibility (boundaries, integrity and significance) according to the "Criteria for Evaluation" in 36 CFR 60.6. EPA and the state, in consultation with the SHPO, will use this data to:

- Avoid impacts to the cultural resource,
- Assess the need to request a determination of eligibility from the Keeper of the National Register (36 CFR 63),
- Assess the proposed impact on the resource, and
- Develop a proposal for appropriate mitigation should the cultural resource be determined eligible for listing in the National Register and avoidance is not practical.

Stage III - Data recovery.

Data recovery is sometimes appropriate to resolve adverse effects where disturbances are unavoidable (i.e. certain archaeological sites). Data recovery can take the form of archaeological excavation, recordation of architectural elements, or documentation of configurations of contributing elements. See unit seven for guidance on the use of Data Recovery as a means to resolve adverse effects.

National Register Eligibility Process

When a resource appears to meet the criteria for listing on the National Register, the EPA, in consultation with the SHPO, will apply the "Criteria for Evaluation" to the resource. EPA, with assistance from the state agency, will prepare appropriate documentation according to DOI guidelines for eligibility. As part of the documentation, EPA will also solicit a written opinion from the SHPO concerning the resource eligibility. If both the EPA and SHPO agree on the eligibility, then the resource is considered eligible by "Consensus Determination".

If a question exists, or if EPA and the SHPO cannot agree on eligibility, the documentation can be transmitted to the Keeper of the National Register for an official determination of eligibility pursuant to 36 CFR 63.3.

The answers:

NO! "**No historic properties affected**" either because there are no historic properties in the APE or because there are historic properties, but the undertaking won't affect them.

If so, provide documentation to the SHPO/THPO, notify consulting parties, and make documentation available to the public. SHPO/THPO and Advisory Council have 30 days to file an objection. If none filed within 30 days

106 COORDINATION COMPLETED

YES! **Historic properties affected** PROCEED TO STEP III

STEP III ..... DETERMINE EFFECT

In this step, you work with the SHPO/THPO and the public to apply the criteria of adverse effect and determine if the effect of your undertaking on historic properties will be adverse.

The question: Will the affect on Historic Properties be adverse?

Criteria are Defined by §800.5:

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

Who decides if an effect is adverse? The same parties who made the decision regarding what is and isn't a resource in Unit Three. These parties must be consulted regarding the effect. Usually, the guidance of the SHPO/THPO is instrumental in the Agency decision regarding effects although the Council may step in, especially to resolve disputes regarding resources and effects.

Review the list of examples of adverse effects below (taken from 800.5). Can you offer specific examples of effects which result from your projects or programs?

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

- (I) Physical destruction of or damage to all or part of the property;
- (ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation and provision of handicapped access, that is not consistent with the Secretary's Standards for the Treatment of Historic Properties (36 CFR part 68) and applicable guidelines;
- (iii) Removal of the property from its historic location;
- (iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;
- (v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;
- (vi) Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and
- (vii) 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. "

The criteria of adverse effect are applied in consultation with consulting parties

You must:
- consult with the SHPO/THPO
- consult with any tribe regarding religious and cultural significance
- consider views provided by consulting parties and the public.

Phased application is allowed for
- corridors,
- large areas, and
- cases where access to properties is restricted.

Two possible answers:

NO! **No Historic Properties Adversely Affected**

You must provide documentation and findings to all consulting parties and to the public.

The SHPO/THPO has 30 days to file an objection. If the SHPO/THPO does not respond in 30 days than that is the same as agreement.

The Council will review only if there is a disagreement or by specific Council request.

The Council has 15 days to review. If there is no Council response within 15 days that is the same as agreement

106 COORDINATION COMPLETED

YES! **Historic Properties Adversely Affected**

PROCEED TO STEP IV

STEP IV ..... RESOLVE ADVERSE EFFECTS

Question: Can we come to an agreement which will allow us to proceed in a manner which will minimize and/or mitigate adverse effects?

A. Send notification to the Council - ACHP must be notified for **all** adverse effect findings. ACHP can be notified by sending them the same documentation package as was sent to consulting parties. The notification must include a description of:

the undertaking and the APE
identification steps and affected historic properties
effects and applicability of the criteria of adverse effect
views of consulting parties and the public.

It is important that the Council be notified of every finding of adverse effect as soon as the finding is complete. The MOA should NOT be the first notice that the Council receives of an undertaking with adverse effects.

B. Invite the Council to participate if:

a National Historic Landmark is adversely affected,
a Programmatic Agreement is proposed or
The agency wants Council involvement.

C. Consider alternatives to avoid effects and alternatives to mitigate or minimize effects to historic properties

Alternatives to **avoid** potential effects to historic properties might include:

- no action alternative
- shift in alignment
- relocation to different area
- design or process modification
- non-structural solutions
- other

Alternatives to **mitigate or minimize** potential effects might include:

- shift in alignment
- design or process modification
- non-structural solutions
- data recovery
- HABS/HAER* documentation
- other

* Historic American Building Survey/Historic American Engineering Record

Answers:

YES! Negotiate stipulations, prepare MOA, get signatures and approvals END.
SEE UNIT 5 "AGREEMENT DOCUMENTS"

NO! Council **must** be invited to participate. Council may either consult, or comment
SEE UNIT 6A "WORKING WITH THE ADVISORY COUNCIL"

A. WHAT ARE AGREEMENT DOCUMENTS?

NAEs/ MOAs / PAs

B. HOW IS THE DECISION TO PREPARE A DOCUMENT REACHED?

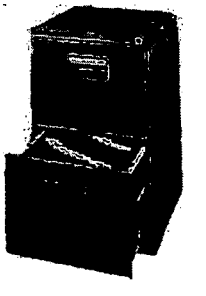
C. WHO PREPARES THE DOCUMENT?

WHEREAS
NOW
THEREFORE

D. WHO SIGNS THE DOCUMENT?

E. WHY DO WE NEED AGREEMENT DOCUMENTS?

F. CAN THEY BE REVISED?



G. WHAT IF THE TERMS AREN'T CARRIED OUT?

UNIT 5 ..... AGREEMENT DOCUMENTS

A. What are agreement documents?

Agreement documents are the formal written evidence that the Agency has complied with the 106 process. Decision documents record the findings of the 106 process, formalize the agreement between consulting parties, and provide a written record of the measures to be undertaken to resolve adverse effects.

The term "agreement document" includes three types of documents that conclude the process of review under Section 106. Each type represents an agreement between an agency and a SHPO, or an agreement among an agency, the SHPO, the Council, and sometimes other parties.

"No Adverse Effect" (NAE) determinations are made by agencies in consultation with SHPOs under 36 CFR (185) 800.5(d). Often in making such a determination, an agency, an SHPO, and sometimes other parties agree on project changes or conditions to prevent adverse effects to historic properties. Agencies provide NAE determinations, with supporting documentation, to the Council for review.

Memoranda of Agreement (MOA) are executed under 36 CFR (185) 800.5(e)(4). In an MOA an agency, a SHPO, the Council, and sometimes other parties agree on measures to avoid, reduce, or mitigate adverse effects on historic properties, or to accept each effect in the public interest.

Programmatic Agreements (PA) are executed under 36 CFR (185) 800.13. In a PA an agency, the Council, and other parties agree on a process for considering historic properties with respect to an entire agency program.

B. How is the decision to prepare an agreement document reached?

The process leading to an agreement document depends on the nature of the undertaking and its effects.

NAE determinations. Under the regulations, the responsible Federal agency official applies the Council's Criteria of Effect and Adverse Effect [36 CFR § 800.9] to historic properties within an undertaking's area of potential effects, in consultation with the SHPO. If the agency determines that the undertaking will have no adverse effect, the agency so advises the Council, usually in a letter to the Council with supporting documentation. The extent of the documentation required depends on whether the SHPO has formally concurred in the determination and on the nature of the undertaking's effects.

If the fact that the undertaking will have no adverse effect is obvious, reaching the determination should be easy and involve only simple, routine consultation between the agency and SHPO. If there are questions to be resolved about the nature of the

undertaking's effects, however, substantial consultation may go into reaching the determination, involving onsite reviews, study of documents, weighing of alternatives, perhaps making alterations in project plans, and the development of conditions which, once agreed upon, will ensure, within reason, that adverse effects will be avoided.

MOAs. If the agency's application of the Criteria of Adverse Effect indicates that the undertaking will have adverse effects, achieving agreement normally requires more formal consultation, often involving a wider range of parties than is typical of an NAE determination. Still, however, the nature of the consultation process is determined by the extent of the undertaking and its effects. It may be obvious that there is no reasonable alternative to the action causing adverse effects, and the measures that can be adopted to reduce or mitigate such adverse effects may be equally obvious. In such a case an MOA can usually be developed promptly. Where an undertaking presents more complex issues, consultation involves careful discussion of the undertaking's various effects, examination of alternatives to avoid or mitigate those effects, and a careful weighing of the public interest, often in the context of public meetings, onsite inspections, the conduct of appropriate studies, and the participation of diverse groups of people. The result is usually an MOA representing the best compromise solution agreeable to all the consulting parties.

PAs. A PA is usually developed because an agency finds that its actions under a given program, within a large and complex project, or with respect to a given class of undertakings will require many individual requests for Council comment under 36 CFR § § 800.4 through 800.6, and that making such requests will be inefficient or otherwise inconsistent with effective program management. Under such circumstances the agency suggests to the Council, or to an SHPO, that a PA be developed prescribing a review process tailored to its particular program, to stand in place of the normal Section 106 review process. Alternatively, the Council, an SHPO, or some other party may suggest to an agency that a PA is appropriate, and the agency may agree. The parties then notify the potentially concerned public and consult to reach agreement. The responsible agency and the Council are always consulting parties on a PA, together with one or more SHPOs or the National Conference of SHPOs (NCSHPO). Other parties participate in consultation and sign the PA depending on the nature of the program and its effects. The process of consultation toward a PA under 36 CFR § 800.13 is extremely flexible--to accommodate the diversity of Federal programs, the regulations avoid prescribing a particular procedure. Once agreement is reached, the consulting parties execute the PA, which then goes into effect, superseding the terms of 36 CFR § § 800.4 through 800.6 with respect to actions under the program the PA covers.

C. Who prepares the agreement document?

NAE determinations. Under 36 CFR § 800.5(d), the Federal agency official is responsible for making an NAE determination, and therefore is responsible for documenting it. A document memorializing an agreement on which an NAE determination is based may, however, be developed by another party. For example, if an SHPO writes to an agency saying that in his or her opinion an undertaking will have no adverse effect if specified conditions are carried out, the agency can then write to the Council committing itself to carry out the conditions, appending the SHPO's letter with whatever supporting documentation is necessary for the Council's review, and making its NAE determination. In some cases the Council, too, may draft conditions upon which an NAE determination can be based.

MOAs. The regulations at 36 CFR § 800.5(e) permit agencies and SHPOS to develop MOAs without Council participation, provided the responsible agency notifies the Council when it initiates consultation with the SHPO. This notification affords the Council the opportunity to participate if it chooses. MOAs developed without Council participation are submitted by the agency to the Council for review; acceptance of such an MOA by the Council concludes the Section 106 review process. Such MOAs are commonly called two-party MOAs because a minimum of two parties (the agency official and the SHPO) sign them before they are sent to the Council. Other parties may sign as concurring parties.

The regulations also permit the Council to participate formally in the consultation process. In such an event, the Council is a formal signatory to the MOA along with the agency official, the SHPO, and any other parties. Such an MOA is commonly referred to as a three-party MOA because it has a minimum of three signatories (agency official, SHPO, and Council). Three-party MOAs are often prepared by the Council, but can be prepared by any of the other consulting parties, once the parties have reached agreement on its content.

The Council can also participate informally in the consultation process, so an agency official or SHPO can ask the Council to provide a draft two-party MOA that the consulting parties can then finalize and send to the Council for review and acceptance. The Council will help develop such drafts to the extent that time and personnel limitations permit.

PAs. PAs are usually prepared in final form by the Council, though they are often prepared in draft by an agency official or an SHPO or group of SHPOs, or by others. The Council must be consulted in the development of a PA. [36 CFR § 800.13] Certain kinds of frequently used PAs, covering the programs of local governments using Community Development Block Grants (CDBG) and related program funds, are commonly prepared by SHPOs or local governments with minimum Council participation, however.

D. Who signs the agreement document?

Three-party MOAs are created as the result of consultation under 36 CFR § 800.5(e), in which the Council elects to participate in consultation, or is invited to consult by the agency or SHPO. The Council need not be invited to participate in consultation where the undertaking under review is relatively simple, noncontroversial, and routine. In such cases two-party MOAs are most appropriate. The Council must be notified when an adverse effect on historic properties is found and consultation begins toward a two-party agreement. Upon receiving such notification, or upon otherwise learning about the undertaking, the Council may elect to participate formally in the consultation.

NAE determinations. NAE determinations are usually memorialized in letters signed by the relevant agency official, sometimes with attached conditions or exhibits, and are sent to the Council with appropriate supporting documentation. SHPOs may concur in NAE determinations in the same letter that is signed by the agency official, or in a separate letter. Other parties may concur in NAE determinations. Unless an agency has legal authority to delegate its Section 106 responsibilities to another party, the agency official's signature on the NAE document is mandatory.

MOAs. At minimum, two parties sign every MOA. Normally the two parties are the Federal agency official responsible for the undertaking and the SHPO. If the SHPO declines to sign the MOA, or fails to respond within 30 days after receiving an agency request for his or her signature, the agency official can ask the Council to sign the MOA in lieu of the SHPO. [36 CFR § 800.1(c)(1)(ii)]

When a two-party MOA is accepted by the Council, the Council's authorized representative signs it on an acceptance line. The Council's representative signs three-party MOAs in the same manner as the agency officials and SHPOs. A Federal agency official may only delegate MOA signature authority to a representative of a State or local government if the agency has legal authority to delegate its Section 106 responsibilities. Where multiple Federal agencies are involved in an undertaking, all may sign the MOA, or signature authority may be formally delegated to a lead agency.

Where the undertaking will affect the lands of an Indian tribe, the tribe must be invited to concur in any agreement document. With respect to two-party and three-party MOAs, other parties who have participated in consultation may be invited to concur. For example a local preservation organization may be invited to concur in an MOA if the agency and SHPO (and the Council, if it is a participant) agree to do so.

PAs. PAs are signed by the representative of the responsible agency or local government and by the Council. They are also usually signed by an SHPO, several SHPOs, or the president of NCSHPO, depending on the nature of the program they cover. Other parties may concur in a PA.

E. Why do we need agreement documents?

Execution and implementation of an agreement document, whether it be an NAE determination, an MOA, or a PA, evidences a Federal agency's fulfillment of its responsibilities under Section 106. In other words, agreement documents indicate both that the agency has taken the effects of the undertaking into account, and that the agency has afforded the Council a reasonable opportunity to comment. An agreement document obligates the parties to carry out its terms. If the terms cannot be carried out the document must be amended, or further comments of the Council must be sought in accordance with the regulations.

F. Can agreement documents be revised?

Agreement documents are normally revised if the nature of the undertaking changes. For example, the locations where effects will occur or the nature of those effects may be altered, or unanticipated effects may be identified after the agreement document is concluded. Revisions also are made if the measures originally agreed upon become insufficient to address the preservation problems involved, or if they are unduly expensive or otherwise infeasible. Revisions are sometimes made to accommodate a change in approach occasioned by professional concerns, such as a change in the research questions addressed in an archeological data recovery program. Finally, revisions may be necessary if a considerable amount of time passes between execution of the agreement document and implementation of its terms, during which time concepts of historic significance and how to deal with various kinds of historic properties may change.

If after executing an MOA an agency determines that it will be unable to carry out the MOA's terms, the agency should request an amendment in accordance with 36 CFR § 800.5(e)(5). Any other party to an agreement document may request an amendment--for example, a party may request an amendment if that party believes a change has occurred in the undertaking, which creates new preservation problems that must be addressed. Amendments are negotiated in the same manner as original agreements. Although the regulations do not specify a process for amending agreements associated with NAE determinations, or for amending PAs, these documents too should be revised, where necessary, through consultation among the original participants.

G. What if an agreement document's terms are not carried out?

Since implementation of an agreement document evidences fulfillment of an agency's Section 106 responsibilities, it follows that failure to implement its terms evidences that the agency's Section 106 responsibilities have not been fulfilled.

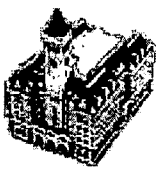
NAE determinations. Agencies are required by the regulations to carry out the measures they agree to in reaching NAE determinations. [36 CFR § 800.5(d)(2)] If an agency fails to do so it has not complied with Section 106 and must resubmit the undertaking for review.

MOAs. Failure to carry out an MOA's terms requires that the agency resubmit the undertaking to which the MOA pertains for Council comment, by preparing a new MOA or amending the existing MOA. If consultation to prepare a new MOA or amendments proves unproductive, the agency is required to seek Council comment in accordance with 36 CFR § 800.6(b). [36 CFR § 800.6(c)(1)]

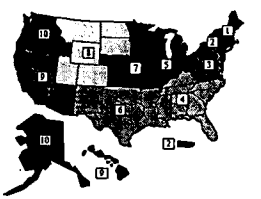
PAs. Failure to carry out a PA's terms requires that the responsible agency comply with the regulations on a case-by-case basis with respect to individual undertakings that would otherwise be covered by the PA. [36 CFR § 800.13(g)]

* This section is excerpted from guidance material prepared by the Advisory Council on Historic Preservation. The full text of ACHP's guidance document is available on-line at the following address: http://www.achp.gov/agreement.html

UNIT SIX WORKING WITH CONSULTING PARTIES



A. THE ADVISORY COUNCIL



B. THE SHPO/THPO

C. NATIVE AMERICAN TRIBES AND NATIVE HAWAIAN ORGANIZATIONS

D. THE PUBLIC

UNIT 6 ..... WORKING WITH CONSULTING PARTIES

A. Working with the Advisory Council on Historic Preservation

The current 106 coordination process greatly reduces the role of the Advisory Council on Historic Preservation.

1. Criteria for Council Involvement

The Council is likely to get involved if the project involves:
- Substantial impacts on important properties,
- Important questions of policy or interpretation,
- Procedural problems, or
- Issues of concern to Native Americans.

The regulations do not specify the conditions under which the Council should be invited to participate, except that 36 CFR § 800.10 requires that the Council participate in consultation concerning direct and adverse effects on National Historic Landmarks. The Council should be invited to participate when the undertaking under review is complicated or potentially controversial, when there is substantial public interest in the historic preservation issues involved, when the undertaking presents issues about which Council policy is not established, or when the national perspective the Council can bring to bear on preservation issues is required or may be useful.

The Council can be consulted informally during a process which otherwise proceeds as a two-party consultation. 30-day Council review is provided for two-party MOAs under 36 CFR § 800.6(a)(1) with respect to a generally routine undertaking with a few unusual elements, or if the consulting parties are unfamiliar with the mechanics of MOA preparation.

2. National Landmarks

If there are adverse impacts on National Landmarks the Council **must** be invited to consult and so must the Secretary of the Interior. 36 CFR § 800.10 requires that the Council participate in consultation concerning direct and adverse effects on National Historic Landmarks.

3. Council Comments:
   - must be made within 45 days (unless otherwise agreed)
   - are sent to the Agency Head (with copies to the Federal Preservation Officer and consulting parties)
   - may be issued even when the Council is a signatory to the MOA

B. Working with the SHPO/THPO

The SHPO/THPO is the official designated to carry out the 106 process for most projects. Regulations now put the SHPO/THPO in charge, with appeal to the Council. The SHPO is also

the individual designated by the governor of the state to develop and administer the Historic Preservation Plan for the State as required by the National Historic Preservation Act. The SHPO is therefore a central repository and archive for all aspects of documentation of historical and archaeological resources within the state. This means that the SHPO is the central source for all of the contextual data which will be needed to adequately evaluate the resources affected by your project.

Contact the SHPO/THPO as soon as an undertaking is identified
SHPO/THPO's office will assign a contact to track the undertaking
Routine coordination with the SHPO/THPO or contact is key to making the process work
Look to leadership by SHPO/THPO in eligibility determinations

- notify SHPO/THPO of the Area of Project Effect (APE) early on
- if SHPO/THPO agrees on a finding of No Historic Properties Affected then 106 coordination process is complete.
- If SHPO/THPO thinks there might be eligible resources in the APE, SHPO/THPO will provide guidance on the need for further investigation/documentation.
- SHPO/THPO/THPO is usually the permitting/licensing authority for archaeological excavation
- SHPO/THPO reviews draft MOA and signs final MOA.
- SHPO/THPO can assist Agency to determine the appropriate level of documentary recording. Agency then verifies that all documentary recording is completed and accepted by SHPO/THPO prior to the initiation of undertaking.
- SHPO may designate appropriate state and local archive locations for copies of the documentation.

The SHPO is mandated under law to provide assistance to the agency. However, like EPA, the SHPO has to work with limited resources. It is therefore important to ensure that inquiries to the SHPO are structured narrowly within the context of the 106 process. The SHPO usually can't, for example, tell you if there are or are not resources in your project area. However, consultation with the SHPO can help you to determine the need for an archaeological or historical survey of your project area. The SHPO won't provide you with a scope of work for the survey, but will typically review draft research proposals to ensure that the survey will be responsive to project need.

C. Working with the Tribes

106 Consultation requirement applies to all Federally Recognized tribes. Tribes with a THPO should always be consulted. Tribes without THPO must still be consulted if project would affect:

properties **on** tribal lands or
religious and cultural properties **off** tribal lands.

The THPO is distinct from the SHPO in that the THPO's authority is limited only to tribal lands and to tribal religious and cultural properties off tribal lands. Therefore the THPO does not have the broader archives or repository of statewide information held by the SHPO

Even tribes without a THPO (i.e. who have not assumed the authority of the SHPO for the tribe) may still have a tribal representative who should be consulted. This consultation is required to help the Agency determine the potential for effects on cultural resources. Native American participation is necessary to identify sacred articles and articles of major cultural significance.

The Native American Graves Protection and Repatriation Act of 1990 (25 USC 3001-3013) may apply to resources in the project area.

Native American Human Remains and Objects including:

Associated funerary objects - objects originally placed with, and still associated with Native American human remains;

Unassociated funerary objects - objects originally placed with, but no longer accompanied by, Native American human remains;

sacred objects - ceremonial objects needed for the practice of religion;

objects of cultural patrimony - objects having ongoing historical, traditional or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native.

NAGPRA should not interfere with scientific study. If a lineal descendant, Indian tribe, or Native Hawaiian organization requests culturally affiliated Native American cultural items the Federal agency or museum shall expeditiously return such items "unless such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States. Such items shall be returned by no later than 90 days after the date on which the scientific study is completed." This provides ample opportunity for evaluation and conservation of resources before return.

D. Working with the Public

The 106 Process must be open to interested parties at all stages. Participants may include local members of community, residents in and near the APE, local historical societies, members of unrecognized tribes, etc. These must all have an opportunity to participate in the 106 process.

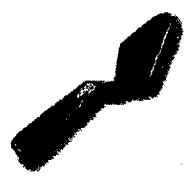
The 106 public participation requirements can normally be fulfilled in coordination with other program or project based public participation activities. Plan to include the 106 process when developing your public participation programs. When making contact through the advertisements, newsletters and the media for public meetings, hearings and workshops remember to explicitly mention the 106 process (e.g "...and in compliance with Section 106 of the National Historic Preservation Act". Collect and save all comments and correspondence relative to historic preservation to document the public coordination process and its results.

UNIT SEVEN GUIDANCE FOR DATA RECOVERY

A. ADVISORY COUNCIL GUIDANCE

B. TWELVE KEYS TO SUCCESSFUL DATA RECOVERY PROGRAMS

C. CONSERVATION AND THE FATE OF RECOVERED RESOURCES



UNIT 7 ..... DATA RECOVERY GUIDANCE

A. The viability of data recovery as a means for resolving adverse effects depends on the nature of the resource. Data recovery programs must be closely tailored to the basis of eligibility. The Advisory Council has issued guidance on data recovery at 64 FR 27085-27087 (attached to the regulations in this manual) . If this guidance is followed, the Council is unlikely to intervene in recovery actions.

B. There are twelve keys to successful data recovery programs:

1. The site must be valuable chiefly for information which can be recovered
2. No human remains, funerary objects, sacred objects, or items of cultural patrimony
3. No long-term value for preservation in place
4. No special significance to ethnic group or community which would object
5. Site not valuable for permanent in-situ display or public interpretation
6. Data recovery plan with research design approved and implemented
7. Work performed by professionals meeting qualification standards (48 FR 44738-39)
8. Adequate resources allocated to complete plan with periodic reporting to all parties
9. Final Report which meets DOI's standards (42 FR 5377-79) sent to SHPO/THPO
10. Oversight and peer review provided for large, unusual or complex projects
11. No unresolved issues with Tribes attaching religious and cultural significance to site
12. Terms and conditions part of MOA or Programmatic Agreement

C. Conservation and the Fate of Recovered Resources

Under the 12 guidelines provided above, data recovery can be an effective means for resolving adverse effects. To ensure that data is not lost, however, the research must be completed thoroughly. NAGPRA requires that human remains, associated and unassociated funerary objects, and objects of tribal patrimony must be promptly surrendered to tribal authorities. However, it provides that any such objects which are the subject of on-going study may remain in the possession of the federal government (or its representatives) while the study in underway. This clause provides ample opportunity for proper completion of field studies, post field-work research and conservation of recovered resources before the resources are surrendered. Objects must then be surrendered within 90 days of the completion of the study.

ATTACHMENT 1
EPA SCREENING FORM

Instructions

Instructions

This form is an Adobe Acrobat file. It has been provided to you in this format to assist you in filling out the form on-line.

Spaces have been provided for written responses where indicated. Click the left mouse button in the empty space and begin typing. Check boxes are activated by single clicking on your left mouse button. Questions which allow multiple answers will have boxes. Those where you can only choose one answer are indicated with circles or "radio buttons". In order to proceed to the next question, you should use your tab key. Boxes and circles can also be activated by using the space bar.

The information you enter on this form can be printed, however your data will not be saved if you choose to exit the program. You will be given two choices at the end of the document: Print or Reset. If you choose reset, all of the data you have entered will be erased. If you need to save your responses, you must print them.

In the future, this form may be placed on the EPA Website. At that point, the completed form may be transmitted to the Office of Federal Activities by selecting the "send" key. Since this form is currently not on the EPA Website, this feature can not be used.

When you have completed the checklist, please print and then mail to:

Patricia Haman
US Environmental Protection Agency
Office of Federal Activities
410 M. Street S. W.
Washington, DC 20460

If you have any questions about the form, please contact Patricia by calling: 202-564-7152 or by e-mail: haman.patricia@epamail.epa.gov

Part A — Background Information / Screening

Checklist for Determining and Assessing Involvement with Section 106 of the National Historic Preservation Act

US Environmental Protection Agency — Office of Federal Activities

Introduction

The purpose of this checklist is to provide background information to EPA's regional and headquarters Historic Preservation Officers to assess the applicability of Section 106 of the National Historic Preservation Act of 1966 as amended, 16 U.S.C. 470f (NHPA). This checklist should be used as early as possible when cultural resources/historic properties are potentially present. Please respond to as many of the checklist items as you can; regional Historic Preservation Officers and/or the project officer should assist in preparing this checklist.

Technical Assistance

The Advisory Council for Historic Preservation maintains a helpful and user-friendly web site. This site provides details on the Section 106 process and may be helpful in preparing this checklist. The site is located at http://www.achp.gov/index.html.

Part A — Background Information/Screening

The purpose of part A is to assist in determining the extent of EPA involvement and responsibility under Section 106 of NHPA and to identify the appropriate project contacts. This section should be completed as much as possible, prior to contacting your regional or headquarters preservation officer.

A1. Project/Action description: [Describe the nature of the project/action and its relationship to historic properties, including a description of any public issues and/or concerns raised.]

A2. Originating EPA region and division:

A3. How was EPA contacted about this project/action? [Describe methods used and parties involved such as letters from public officials.]

A4. EPA point of contact (name, address, phone, e-mail):

A5. Categorize EPA's role: [Include statutory and regulatory references if appropriate, such as Clean Water Act, Clean Air Act etc.]

- ☐ permit action (include type and reference)
- ☐ review under NEPA
- ☐ program implementation
- ☐ other:

A6. Who is undertaking project/action? (choose one)

○ Agency ○ State ○ Tribe ○ Territory ○ Private

(If NEPA Documentation required, name of lead agency)

Primary Contact/Lead Agency Local Government or Tribal Contact

A7. Funding mechanism or program: (choose all that apply)

☐ Federal ☐ State ☐ Local ☑ Private

A8. Check other regulations which may apply to the project/action.

- ☐ National Environmental Policy Act (NEPA) 42 U.S.C. 432 et sec.
- ☐ CEQ regs. implementing NEPA, 40 CFR part 1500
- ☐ EPA regs. implementing NEPA, 40 CFR part 6
- ☐ Section 309 and/or other sections of Clean Air Act
- ☐ Section 404 and/or other sections of the Clean Water Act
- ☐ Section 102 and/or other sections of the Marine Protection, Research, & Sanctuaries Act
- ☐ Endangered Species Act
- ☐ EPA regs. on ocean dumping, 40 CFR parts 220-228

(Question A8 continued next page...)

- [x] EPA regs. on disposal of dredged or fill material, 40 CFR parts 230-231
- [x] EPA regs. for the Municipal Wastewater Treatment Works, 40 CFR, part 35
- [ ] EPA regs: Public Participation; Conservation & Recovery, Safe Drinking and Clean Water Acts, 40 CFR, Part 35.
- [ ] Executive Order 11988, Wetlands
- [ ] Executive Order 11990, Floodplains
- [ ] Executive Order 12898, Environmental Justice
- [ ] other:

A9. Indicate number and type of historic property(ies) potentially affected by the project/ action, using examples below as a guide.

Number

- 1 Building(s): (barn, church, fort, hotel, house, industrial facility)
- _____ Structure(s): (aircraft, boat, bridge, canal, earthwork, kiln, lighthouse, smokestack)
- _____ Object(s): (fountain, milepost, monument)
- _____ Archeological site(s): (battlefield, building ruins, campsite, landscape, prehistoric site, prehistoric rock shelter, ship wreck)
- _____ Traditional cultural properties: (dance grounds, vistas, waterways)

A10. Briefly describe the potentially affected historic properties, including significant characteristics of each (may reference historic reports and studies).

A11. What is the nature of the potential effect?

- [ ] Direct (demolition, earth disturbance, land acquisition, altered views, noise, etc...)
- [ ] Indirect (induced growth, increased traffic, etc...)

Part B — Property or Resources Affected by Project / Action

Part B — Property or Resources Affected by Project/Action

The purpose of part B is to provide additional information regarding potentially affected historic properties.

B1. Project area location/ownership:

USGS quadrangle name(s) _____

Project/action area description:

- ❑ Single site or property
- ❑ Watershed
- ❑ Region
- ❑ Estuary
- ❑ other:

Ownership: (check all that apply and the name of the owner or owners):

- ❑ Private _____
- ❑ Federal _____
- ❑ State _____
- ❑ Tribal _____
- ❑ Municipal _____

B2. What methods were used to identify historic properties? (check all that apply)

- ❑ historic resource identification survey
- ❑ National Register records review
- ❑ field visit
- ❑ historic map review
- ❑ phase I archaeological survey
- ❑ phase II archaeological survey
- ❑ early coordination letter to SHPO/THPO
- ❑ early coordination letter to local government
- ❑ other (describe):

B3. What is the duration of the potential effect?

- ○ Short-term (temporary due to construction, etc…)
- ○ Long-term (land acquisition, demolition, change in land use, etc…)

B4. List potential effect(s) on the historic property (ies) noted above. (check all that apply)

- ☐ access/egress to historic property changed or obstructed
- ☐ demolition of principal building or structure
- ☐ partial or full demolition of ancillary structures or features
- ☐ partial/total acquisition of property
- ☐ relocation of property
- ☐ transfer, sale or lease of property out of Federal control or ownership
- ☐ reconstruction/rehabilitation of principal building or structure
- ☐ alteration of views to and from property
- ☐ modern construction adjacent to historic property or district
- ☐ utility line crossing historic property
- ☐ installation of underground infrastructure (sewer & water lines, other utilities) within property
- ☐ remediation of hazardous and toxic materials
- ☐ other:

B5. Indicate the type of alternatives considered to *avoid* potential effects to historic properties. (check all that apply)

- ☐ no action alternative
- ☐ shift in alignment of proposed project/action
- ☐ relocation to different area
- ☐ design or process modification
- ☐ non-structural solutions
- ☐ other:

B6. Indicate the type of alternatives considered to *mitigate or minimize* the potential effects. (check all that apply)

- ☐ shift in alignment of proposed project/action
- ☐ design or process modification

(Question B6 continued next page...)

- ☐ non-structural solutions
- ☐ data recovery
- ☐ Historic American Building Survey/Historic American Engineering Record Documentation
- ☐ other:

B7. Was a preferred alternative selected? ○ Yes ○ No

If yes, does the preferred alternative have a greater impact on historic resources than the other alternatives studied? ○ Yes ○ No ○ Uncertain

B8. Indicate alternatives or mitigation measures which were considered, but not chosen, and the reason for rejection.

- ☐ no action alternative

Reason for rejection

- ☐ shift in alignment of proposed project/action

Reason for rejection

- ☐ relocation to different area

Reason for rejection

- ☐ design or process modification

Reason for rejection

- ☐ non-structural solutions

Reason for rejection

- ☐ data recovery

Reason for rejection

- ☐ other:

Reason for rejection

Part C — Coordination Summary

The purpose of part C is to provide a summary of the public and agency coordination conducted for the project/action, including a description of the contacts, method of notification, and the responses received. This information is vital in assuring compliance under Section 106, and will be used to determine if any further coordination or public involvement is necessary.

C1. Public outreach and coordination methods. (check all that apply)

- ☐ public information meetings
- ☐ public officials briefing(s)
- ☐ newsletters/brochure mailing
- ☐ special meetings
- ☐ other:

C2. State Historic Preservation Officer (SHPO)/Tribal Historic Preservation Officer (THPO) notified?

○ Yes ○ No

If yes, date notified and method used (attach copies of correspondence):

- ☐ written Date: _____
- ☐ oral Date: _____
- ☐ other: _____ Date: _____

Summary of SHPO/THPO response (attach copies of correspondence):

Did EPA respond to SHPO/THPO comments? ○ Yes ○ No

If yes, date and method of response (attach copies of correspondence):

- ☐ written Date: _____
- ☐ oral Date: _____
- ☐ other: _____ Date: _____

C3. Local government agency or historic society notified?

○ Yes ○ No

If yes, date notified and method used (attach copies of correspondence):

❑ written Date: _____

❑ oral Date: _____

❑ other: _____ Date: _____

Name of agency/society officials contacted: _____

Summary of local response (attach copies of correspondence):

Did EPA respond to local agency/society comments? ○ Yes ○ No

If yes, date and method of response (attach copies of correspondence):

❑ written Date: _____

❑ oral Date: _____

❑ other: _____ Date: _____

C4. Indian Tribes /Native Hawaiian organizations notified?

○ Yes ○ No ○ not applicable

If yes, date notified and method used (attach copies of correspondence):

❑ written Date: _____

❑ oral Date: _____

❑ other: _____ Date: _____

Name of Tribal or Native Hawaiian organization(s) or officials contacted:

Summary of response from Tribal or Native Hawaiian organization(s):

(Question C4 continued next page...)

Did EPA respond to Tribal /Native Hawaiian organization comments? ◎ Yes ◎ No

If yes, date and method of response (attach copies of correspondence):

❑ written Date: _____

❑ oral Date: _____

❑ other: _____ Date: _____

C5. Summary of other Federal, State or local agency coordination efforts/Section 106 consultation.

Name of Person Completing Checklist: _____ Date: _____

phone number: _____

fax number: _____

e-mail address: _____

ATTACHMENT 2
LISTING OF SHPOs BY STATE

State Information and SHPO List

Alabama

Dr. Lee Warner, SHPO
Alabama Historical Commission
468 South Perry Street
Montgomery, AL 36130-0900
Phone: 334-242-3184
Fax: 334-240-3477
E-mail: lwarner@mail.preserveala.org

Deputy: Ms. Elizabeth Ann Brown
E-mail: ebrown@mail.preserveala.org

Alaska

Ms. Judith Bittner, SHPO
Alaska DNR, Ofc History & Archeology
550 West 7th Avenue, Suite 1310
Anchorage, AK 99501-3565
Phone: 907-269-8721
Fax: 907-269-8908
E-mail: judyb@dnr.state.ak.us

Deputy: Joan Antonson

American Samoa

Mr. John Enright, HPO
Executive Offices of the Governor
AS Government/Historic Preservation Office
Pago Pago, American Samoa 96799
Phone: 011-684-633-2384
Fax: 684-633-2367
E-mail: enright@samoatelco.com

Deputy: Mr. David J. Herdrich
E-mail:
David_J_Herdich@samoatelco.com

Arizona

Mr. James W. Garrison, SHPO
Mr. James W. Garrison, SHPO
Arizona State Parks
1300 West Washington
Phoenix, AZ 85007
Phone: 602-542-4174
Fax: 602-542-4180
E-mail: jgarrison@pr.state.az.us

Deputy: Ms. Carol Griffith
E-mail: cgriffith@pr.state.az.us

Deputy: Dr. William Collins
E-mail: wcollins@pr.state.az.us

Arkansas

Ms. Cathie Matthews, SHPO
Department of Arkansas Heritage
323 Center Street, Suite 1500
Little Rock, AR 72201
Phone: 501-324-9150
Fax: 501-324-9154
E-mail: cathiem@arkansasheritage.org

Deputy: Mr. Ken Grunewald, 501-324-9357
E-mail: keng@arkansasheritage.org

No listings for B.

California

Dr. Knox Mellon, SHPO
Office of Hist Pres, Dept Parks & Recreation
P.O. Box 942896
Sacramento, CA 94296-0001
Phone: 916-653-6624
Fax: 916-653-9824

Deputy: Mr. Stephen Mikesell

Colorado

Ms. Georgianna Contiguglia, SHPO
Colorado Historical Society
1300 Broadway
Denver, CO 80203
Phone: 303-866-3395
Fax: 303-866-4464

Deputy: Mr. Mark Wolfe
Phone: 303-866-2776
Fax:303-866-2041
E-mail: mark.wolfe@chs.state.co.us

Deputy: Dr. Susan M. Collins
Phone: 303-866-2736
E-mail: susan.collins@chs.state.co.us

Connecticut

Mr. John W. Shannahan, SHPO
Connecticut Historical Commission
59 So. Prospect Street
Hartford, CT 06106
Phone: 860-566-3005
Fax: 860-566-5078
E-mail: john.shannahan@po.state.ct.us

Deputy: Paul Loether

Delaware

Mr. Daniel Griffith, SHPO
Division of Historical and Cultural Affairs
Tudor Industrial Park
604 Otis Drive
Dover, DE 19901
Phone: 302-739-5313
Fax: 302-739-6711
E-mail: dan.griffith@state.de.us

Deputy: Ms. Joan Larrivee
Delaware State Hist Preservation Office
15 The Green, Dover, DE 19901
Phone: 302-739-5685
Fax: 302-739-5660
E-mail: joan.larrivee@state.de.us

District of Columbia

Ms. Lisa Burcham, SHPO
Historic Preservation Office
801 North Capitol Street NE, 3rd Floor
Washington, DC 20002
Phone: 202-442-8800
Fax: 202-535-2497
E-mail: lisa.burcham@dc.gov

Mr. David Maloney
Phone: 202-442-8818
E-mail: david.maloney@dc.gov

No listings for E

Florida

Dr. Janet Matthews, SHPO
Div of Historical Resources, Dept of State
500 S. Bronough St., Room 305
Tallahassee, FL 32399-0250
Phone: 850-245-6300
E-mail: jmatthews@mail.dos.state.fl.us

Bureau of Historic Preservation
Toll Free Phone: 800-847-7278
Phone: 850-245-6333
Fax: 850-245-6437

Georgia

Mr. Lonice C. Barrett, SHPO
Historic Preservation Division/DNR
156 Trinity Avenue, SW, Suite 101
Atlanta, GA 30303-3600
Phone: 404-656-2840
Fax: 404-651-8739

Deputy: Dr. W. Ray Luce, Director
E-mail: ray_luce@dnr.state.ga.us

Deputy: Mr. Richard Cloues
E-mail: richard_cloues@dnr.state.ga.us

Guam

Ms. Lynda B. Aguon, SHPO
Guam Historic Preservation Office
Department of Parks & Recreation

PO Box 2950 Building 13-8 Tiyan
Hagatna, Guam 96932
Phone: 1-671-475-6290
Fax: 1-671-477-2822
E-mail: laguon@mail.gov.gu

Hawaii

Mr. Peter T. Young, SHPO
Department of Land & Natural Resources
601 Kamokila Blvd, Suite 555
Kapolei, HI 96707
Phone: 808-548-6550
Fax: 808-587-0018

Acting Administrator: Ms. P. Holly McEldowney
State Historic Preservation Office
Phone: 808-692-8015
Fax: 808-692-8020
E-mail: holly.mceldowney@hawaii.gov

Idaho

Steve Guerber, SHPO
Idaho State Historical Society
1109 Main Street, Suite 250
Boise, ID 83702-5642
Phone: 208-334-2682

Deputy: Suzi Neitzel
Phone: 208-334-3847
Fax: 208-334-2775
E-mail: sneitzel@ishs.state.id.us

Deputy: Ken Reid
Phone: 208-334-3861

Illinois

Mr. William L. Wheeler, SHPO
Associate Director
Illinois Historic Preservation Agency
1 Old State Capitol Plaza
Springfield, IL 62701-1512
Phone: 217-785-4512
Fax: 217-524-7525

Deputy: Mr. Theodore Hild, Chief of Staff
E-mail: ted_hild@ihpa.state.il.us

Deputy: Ms. Anne Haaker

Indiana

Mr. John R. Goss, SHPO
Director, Department of Natural Resources
402 West Washington Street
Indiana Govt. Center South, Room W256
Indianapolis, IN 46204
E-mail: dhpa@dnr.state.in.us

Deputy: Jon C. Smith
Phone: 317-232-1646
Fax: 317-232-0693
E-mail: jsmith@dnr.state.in.us

Iowa

Ms. Anita Walker, Acting SHPO
State Historical Society of Iowa
Capitol Complex
East 6th and Locust St.
Des Moines, IA 50319
Phone: 515-281-8741
Fax: 515-242-6498
E-mail: anita.walker@ca.state.ia.us

Deputy: Dr. Lowell Soike
Phone: 515-281-3306
Fax: 515-282-0502
E-mail: lowell.soike@dca.state.ia.us

No listings for J

Kansas

Ms. Mary R. Allman, SHPO, Executive Director
Kansas State Historical Society
6425 Southwest 6th Avenue
Topeka, KS 66615-1099
Phone: 785-272-8681 x202
Fax: 785-272-8682
E-mail: mallman@kshs.org

Deputy: Mr. Richard D. Pankratz, Director
Historic Pres Dept
Phone: 785-272-8681 x217

Deputy: Ms. Christy Davis, Asst. Director
Historic Pres Dept
Phone: 785-272-8681 x215

Kentucky

Mr. David L. Morgan, SHPO, Executive Director
Kentucky Heritage Council
300 Washington Street
Frankfort, KY 40601
Phone: 502-564-7005
Fax: 502-564-5820
E-mail: dmorgan@mail.state.ky.us

Louisiana

Ms. Laurel Wyckoff, SHPO
Dept of Culture, Recreation & Tourism
P.O. Box 44247
Baton Rouge, LA 70804
Phone: 225-342-8200
Fax: 225-342-8173

Deputy: Mr. Robert Collins
Phone: 225-342-8200
E-mail: rcollins@crt.state.la.us

Deputy: Mr. Jonathan Fricker
Phone: 225-342-8160
E-mail: jfricker@crt.state.la.us

Maine

Mr. Earle G. Shettleworth, Jr., SHPO
Maine Historic Preservation Commission
55 Capitol Street, Station 65
Augusta, ME 04333
Phone: 207-287-2132
Fax: 207-287-2335
E-mail: earle.shettleworth@maine.gov

Deputy: Mr. Kirk F. Mohney
E-mail: kirk.mohney@maine.gov

Marshall Islands, Republic of the

Mr. Lenest Lanki, HPO
Secretary of Interior and Outer Islands Affairs
P.O. Box #1454, Majuro Atoll, MH 96960
Phone: 011-692-625-4642
Fax: 011-692-625-5353

Deputy: Clary Makroro
E-mail: tunkul@ntamar.com

Maryland

Mr. J. Rodney Little, SHPO
Maryland Historical Trust
100 Community Place, Third Floor
Crownsville, MD 21032-2023
Phone: 410-514-7600
Fax: 410-514-7678
E-mail: little@dhcd.state.md.us

Deputy: Ms. Elizabeth Hughes
Phone: 410-514-7604
E-mail: hughese@dhcd.state.md.us

Deputy: Mr. Michael Day
Phone: 410-514-7629
E-mail: day@dhcd.state.md.us

Massachusetts

Ms. Cara Metz, SHPO
Massachusetts Historical Commission
220 Morrissey Boulevard
Boston, MA 02125
Phone: 617-727-8470
Fax: 617-727-5128
TTD: 1-800-392-6090
E-mail: Cara.Metz@sec.state.ma.us

Deputy: Ms. Brona Simon, Dir Technical Servs
E-mail: Brona.Simon@sec.state.ma.us

Michigan

Brian D. Conway, SHPO
State Historic Preservation Office
Michigan Historical Center
Box 30740
Lansing, MI 48909-8240
Phone: 517-373-1630
Fax: 517-335-0348
E-mail: conwaybd@state.mi.us

Micronesia, Federated States of

Mr. Rufino Mauricio, FSM HPO
Office of Administrative Services
Div of Archives and Historic Preservation
FSM National Government
P.O. Box PS 70
Palikir, Pohnpei, FM 96941
Phone: 011-691-320-2343
Fax: 691-320-5634
E-mail: fsmhpo@mail.fm

FSM includes four States,whose HPOs are listed below:

Mr. Alfonso Fanechigiy, HPO
Yap Historic Preservation Office
Office of the Governor
PO Box 714
Colonia, Yap, FM 96943
Phone: 011-691-350-2194/2255
Fax: 691-350-2381
E-mail: hpoyapfsm@mail.fm

Mr. David B. Welle, Chuuk SHPO
Department of Commerce & Industry
PO Box 280, Moen, Chuuk (Truk), FM 96942
Phone: 011-691-330-2761
Fax: 691-330-4906

Mr. Emensio Eperiam, HPO
Dir, Dept of Land
Pohnpei State Government
P.O. Box 1149, Kolonia, Pohnpei, FM 96941
Phone: 011-691-320-2611
Fax: 011-691-320-5599
E-mail: nahnsehleng@mail.fm

Mr. Berlin Sigrah, Kosrae HPO
Div of History and Cultural Preservation
Dept of Conservation and Development
Tofol, Kosrae, FM 96944
Phone: 011-691-370-3078
Fax: 011-691-370-3767
E-mail: dalu@mail.fm

Minnesota

Dr. Nina Archabal, SHPO
Minnesota Historical Society
345 Kellogg Boulevard West
St. Paul, MN 55102-1906
Phone: 651-296-2747
Fax: 651-296-1004

Deputy: Dr. Ian Stewart
Phone: 651-297-5513

Deputy: Ms. Britta L. Bloomberg
Phone: 51-296-5434
Fax: 651-282-2374
E-mail: britta.bloomberg@mnhs.org

Mississippi

Mr. Elbert Hilliard, SHPO
Mississippi Dept of Archives & History
P.O. Box 571
Jackson, MS 39205-0571
Phone: 601-359-6850

Deputy: Mr. Kenneth H. P'Pool
Division of Historic Preservation
Phone: 601-359-6940
Fax: 601-359-6955
E-mail: kppool@mdah.state.ms.us

Missouri

Mr. Stephen Mahfood, SHPO
State Department of Natural Resources
205 Jefferson, P.O. Box 176
Jefferson City, MO 65102
Phone: 573-751-4422
Fax: 573-751-7627

Deputy: Mr. Mark A. Miles
Director
State Historic Preservation Office
P.O. Box 176
Jefferson City, MO 65102-0176
Phone: 573-751-7858
Fax: 573-526-2852
E-mail: nrmilem@mail.dnr.state.mo.us

Deputy: Ms. Sara Parker
Phone: 573-751-1010
E-mail: nrparks@mail.dnr.state.mo.us

Montana

Dr. Mark F. Baumler, SHPO
State Historic Preservation Office
1410 8th Avenue
P.O. Box 201202
Helena, MT 59620-1202
Phone: 406-444-7717
Fax: 406-444-6575
E-mail: mbaumler@.state.mt.us

Deputy: Mr. Herbert E. Dawson

Nebraska

Mr. Lawrence Sommer, SHPO
Nebraska State Historical Society
P.O. Box 82554
1500 R Street
Lincoln, NE 68501
Phone: 402-471-4745
Fax: 402-471-3100
E-mail: nshs@nebraskahistory.org

Deputy: Mr. L. Robert Puschendorf
Phone: 402-471-4769
Fax: 402-471-3316
E-mail: dshpo@mail.state.ne.us

Nevada

Mr. Ronald James, SHPO
Historic Preservation Office
100 N Stewart Street
Capitol Complex
Carson City, NV 89701-4285
Phone: 775-684-3440
Fax: 775-684-3442

Deputy: Ms. Alice Baldrica
Phone: 775-684-3444
E-mail: ambaldri@clan.lib.nv.us

New Hampshire

Mr. James McConaha, Director/SHPO
NH Division of Historical Resources
P.O. Box 2043
Concord, NH 03302-2043
Phone: 603-271-6435
Fax: 603-271-3433
TDD: 800-735-2964
E-mail: jmcconaha@nhdhr.state.nh.us

Deputy: Ms. Linda Ray Wilson
Phone: 603-271-6434 or 603-271-3558
E-mail: lwilson@nhdhr.state.nh.us

New Jersey

Mr. Bradley M. Campbell, SHPO
DEP
401 East State Street
PO Box 402
Trenton, NJ 08625
Phone: 609-292-2885
Fax: 609-292-7695

Deputy: Ms. Dorothy Guzzo
Historic Preservation Office, 4th Fl
501 East State Street
PO Box 404
Trenton, NJ 08625
Phone: 609-984-0176

Fax: 609-984-0578
E-mail: dguzzo@dep.state.nj.us

Deputy: Mr. Marc A. Matsil
Historic Preservation Office, 3rd Fl
Phone: 609-292-3541
Fax: 609-984-0836

Deputy: Mr. Richard F. Barker
Phone: 609-292-2772

New Mexico

Ms. Katherine (Kak) Slick, SHPO
Historic Preservation Div, Ofc of Cultural Affairs
228 East Palace Avenue
Santa Fe, NM 87503
Phone: 505-827-6320
Fax: 505-827-6338
E-mail: kslick@oca.state.nm.us

Deputy: Jan Biella
E-mail: jbiella@lvr.state.nm.us

Deputy: Dorothy Victor
E-mail: dvictor@lvr.state.nm.us

New York

Ms. Bernadette Castro, SHPO
Parks, Recreation & Historic Preservation
Agency Building #1, Empire State Plaza
Albany, NY 12238
Phone: 518-474-0443

Historic Preservation Staff:

Ms. Ruth L. Pierpont, Director
Bureau of Field Services
NY State Parks, Rec. & Hist. Pres.
Peebles Island PO 189
Waterford, NY 12188-0189
Phone: 518-237-8643 x 3269
Fax: 518-233-9049
E-mail: ruth.pierpont@oprhp.state.ny.us

North Carolina

Dr. Jeffrey J. Crow SHPO
Division of Archives & History
4610 Mail Service Center
Raleigh, NC 27699-4610
Phone: 919-733-7305
Fax: 919-733-8807
E-mail: jeffrey.crow@ncmail.net

Deputy: Mr. David Brook
Historic Preservation Office
4617 Mail Service Center
Raleigh, NC 27699-4617
Phone: 919-733-4763
Fax: 919-733-8653
E-mail: david.brook@ncmail.net

North Dakota

Mr. Merlan E. Paaverud, Jr., SHPO
State Historical Society of North Dakota
612 E. Boulevard Ave.
Bismarck, ND 58505
Phone: 701-328-2666
Fax: 701-328-3710
E-mail: mpaaverud@state.nd.us

Deputy: Ms. Fern E. Swenson
Phone: 701-328-2672
E-mail: fswenson@state.nd.us

Northern Mariana Islands, Commonwealth of the

Ms Mary Margaret (Maggie) Sablan, Acting HPO
Dept of Community & Cultural Affairs
Div Historic Preservation, Airport Road
Saipan, MP 96950
Phone: 670-664-2120/2125
Fax: 670-664-2139

Ohio

Ms. Rachel M. Tooker, SHPO
Ohio Historic Preservation Office
Ohio Historical Society
567 East Hudson Street
Columbus, OH 43211-1030
Phone: 614-298-2000
Fax: 614-298-2037
E-mail: rtooker@ohiohistory.org

Deputy: Mr. Franco Ruffini
E-mail: fruffini@ohiohistory.org

Oklahoma

Dr. Bob L. Blackburn, SHPO
Oklahoma Historical Society
2100 N. Lincoln Blvd.
Oklahoma City, OK 73105
Phone: 405-521-2491
Fax: 405-521-2492

Deputy: Ms. Melvena Thurman Heisch
State Historic Preservation Office
2704 Villa Prom, Shepherd Mall
Oklahoma City, OK 73107
Phone: 405-522-4484
Fax: 405-947-2918
E-mail: mheisch@ok-history.mus.ok.us

Oregon

Mr. Michael Carrier, SHPO
State Parks & Recreation Department
1115 Commercial Street, NE, Suite 2
Salem, OR 97301-1012

Deputy: Mr. James Hamrick
Phone: 503-378-4168 x231
Fax: 503-378-6447
E-mail: james.hamrick@state.or.us

Palau, Republic of

Ms. Victoria N. Kanai, HPO
Ministry of Community & Cultural Affairs
P.O. Box 100
Koror, PW 96940
Phone: 011-680-488-2489
Fax: 680-488-2657

Pennsylvania

Pennsylvania Historical & Museum Comm
Bureau for Historic Preservation
Commonwealth Keystone Bldg, 2nd Floor
440 North Street, 2nd Floor
Harrisburg, PA 17120-0093
Phone: 717-705-4035
Fax: 717-772-0920

Deputy: Ms. Jean Cutler
E-mail: jecutler@state.pa.us

Puerto Rico, Commonwealth of

Ms. Enid Torregrosa De La Rosa, SHPO
State Historic Preservation Office
PO Box 9066581
San Juan, PR 00906-6581
Phone: 787-721-3737
Fax: 787-722-3622
E-mail: etorregrosa@prshpo.gobierno.pr

Deputy: Elizabeth Sola Oliver
E-mail: esola@prshpo.gobierno.pr

No listings for Q

Rhode Island

Mr. Frederick C. Williamson, SHPO
Rhode Island Historic Preservation & Heritage Comm
Old State House, 150 Benefit St.
Providence, RI 02903
Phone: 401-222-2678
Fax: 401-222-2968

Deputy: Mr. Edward F. Sanderson
E-mail: esanderson@preservation.ri.gov

South Carolina

Dr. Rodger E. Stroup, SHPO
Department of Archives & History
8301 Parklane Road
Columbia, SC 29223-4905
Phone: 803-896-6100
Fax: 803-896-6167

Deputy: Ms. Mary W. Edmonds, 803-896-6168
E-mail: edmonds@scdah.state.sc.us

South Dakota

Mr. Jay D. Vogt, SHPO
State Historic Preservation Office
Cultural Heritage Center
900 Governors Drive
Pierre, SD 57501
Phone: 605-773-3458
Fax: 605-773-6041
E-mail: jay.vogt@state.sd.us

Tennessee

Ms. Betsy L. Child, SHPO
Dept of Environment and Conservation
401 Church Street, L & C Tower 21st Floor
Nashville, TN 37243-0435
Phone: 615-532-0109
Fax: 615-532-0120

Deputy: Mr. Herbert L. Harper
Tennessee Historical Commission
2941 Lebanon Road
Nashville, TN 37243-0442
Phone: 615-532-1550
Fax: 615-532-1549
E-mail: herbert.harper@state.tn.us

Texas

Mr. F. Lawerence Oaks, SHPO
Texas Historical Commission
P.O. Box 12276
Austin, TX 78711-2276
Phone: 512-463-6100
Fax: 512-463-8222
E-mail: l.oaks@thc.state.tx.us

Deputy: Mr. Terry Colley
Phone: 512-463-6100
E-mail: terry.colley@thc.state.tx.us

Deputy: Mr. Stanley O. Graves, Dir
Architecture Div
Phone: 512-463-6094
Fax: 512-463-6095
E-mail: stan.graves@thc.state.tx.us

Deputy: Dr. James E. Bruseth, Dir
Antiquities Prot
Phone: 512-463-6096
Fax: 512-463-8927
E-mail: jim.bruseth@thc.state.tx.us

Utah

Mr. Wilson Martin, SHPO
Utah State Historical Society
300 Rio Grande
Salt Lake City, UT 84101
Phone: 801-533-3500
Fax: 801-533-3503
E-mail: wmartin@utah.gov

Deputy: Mr. Roger Roper, Historic Preservation
Phone: 801-533-3561
E-mail: rroper@utah.gov

Deputy: Mr. Jim Dykman, Antiquities/Archeology
Phone: 801-533-3555
E-mail: jdykman@utah.gov

Vermont

Ms. Emily Wadhams, SHPO
Vermont Division for Historic Preservation
National Life Building, Drawer 20
Montpelier, VT 05620-0501
Phone: 802-828-3211
E-mail: emily.wadhams@state.vt.us

Deputy: Mr. Eric Gilbertson, Director
Phone: 802-828-3043
Fax: 802-828-3206
E-mail: ergilbertson@dca.state.vt.us

Virgin Islands

Mr. Dean C. Plaskett, Esq., SHPO
Department of Planning & Natural Resources
Cyril E. King Airport
Terminal Building — Second Floor
St. Thomas, VI 00802
Phone: 340-774-3320
Fax: 340-775-5706

State Historic Preservation Office:
Mr. Myron Jackson, Director
17 Kongens Gade
Charlotte Amalie
St. Thomas, VI 00802

Deputy: Ms. Claudette C. Lewis
Phone: 340-776-8605
Fax: 340-776-7236

Virginia

Ms. Kathleen Kilpatrick, SHPO
Department of Historic Resources
2801 Kensington Avenue
Richmond, VA 23221
Phone: 804-367-2323
Fax: 804-367-2391
E-mail: kkilpatrick@dhr.state.va.us

Washington

Dr. Allyson Brooks SHPO
Office of Archeology & Historic Preservation
PO Box 48343
Olympia, WA 98504-8343
Phone: 360-586-3065
1063 S Capitol Way, Suite 106
Olympia, WA 98501
Phone: 360-586-3064
Fax: 360-586-3067
E-mail: allysonb@acted.wa.gov

Deputy: Mr. Greg Griffith
E-mail: gregg@cted.wa.gov

West Virginia

Ms. Nancy Herholdt, SHPO
West Virginia Division of Culture & History
Historic Preservation Office
1900 Kanawha Boulevard East
Charleston, WV 25305-0300
Phone: 304-558-0220
Fax: 304-558-2779

Deputy: Ms. Susan Pierce
E-mail: susan.pierce@wvculture.org

Wisconsin

Ms. Alicia L. Goehring, SHPO
Wisconsin Historical Society
816 State Street
Madison WI 53706
Phone: 608-264-6500
Fax: 608-264-6404
E-mail: algoehring@whs.wisc.edu

Wyoming

Mr. Richard Currit, SHPO
Wyoming State Hist. Pres. Ofc.
2301 Central Avenue, 3rd Floor
Cheyenne, WY 82002
Phone: 307-777-5497
Fax: 307-777-3543
E-mail: rcurri@state.wy.us

Deputy: Mary M. Hopkins, Cult Records
Phone: 307-766-5324
E-mail: hopkins@uwyo.edu

No listings for X, Y or Z

Tribal Historic Preservation Offices

8/18/2003

Mr. Robert Cast
Caddo Tribe of Oklahoma
Tribal Historic Preservation Office
P.O. Box 487
Binger, OK 73009
(405) 656-2901

Mr. James Picotte
Cheyenne River Sioux Tribe
P.O. Box 590
Eagle Butte, SD 57625
(605) 964-7554

Ms. Marcia Pablo
Confederated Salish and Kootenai Tribes of the
Flathead Indian Nation
Tribal Preservation Office
P.O. Box 278
Pablo, MT 59855
(406) 675-2700

Dr. Manfred Jaehning
Confederated Tribes of the Umatilla Indian
Reservation
P.O. Box 638
Pendleton, OR 97801
(541) 276-3447

Mr. James Bird
Eastern Band of Cherokee Indians
Cultural Resources Department
Qualla Boundary P.O. Box 455
Cherokee, NC 28719
(828) 497-1594

Mr. Brian Bisonette
Lac Courte Oreilles Band of Lake Superior Chippewa
Indians of Wisconsin
Tribal Historic Preservation Office
13394 W. Trepania Road
Hayward, WI 54843
(715) 634-0092

Mr. Gerald White
Leech Lake Band of Chippewa Indians
6530 Hwy 2 NW
Cass Lake, MN 56633
(218) 335-2940

Ms. Betty Jo Wozniak
Menominee Indian Tribe of Wisconsin
P.O. Box 910
Keshena, WI 54135
(715) 799-5154

Ms. Donna McFadden
Mescalero Apache Tribe
P.O. Box 227
Mescalero, NM 88340
(505) 464-4494

Dr. Wenonah G. Haire
Catawba Indian Nation
Catawba Cultural Preservation Project
611 East Main Street
Rock Hill, SC 29730
(803) 328-2427

Ms. Joan Mitchell
Chippewa Cree Tribe of the Rocky Boy's Reservation
RR1 #544
Box Elder, MT 59521
(406) 395-4147

Ms. Camille Pleasants
Confederated Tribes of the Colville Reservation
Archaeology and History Department
P.O. Box 150
Nespelem, WA 99155
(509) 634-2654

Mr. Robert Brunoe
Confederated Tribes of the Warm Springs
Reservation in Oregon
Department of Cultural Resources
P.O. Box C
Warm Springs, OR 97761
(541) 553-2006

Ms. Loretta Jackson
Hualapai Tribe
P.O. Box 310
Peach Springs, AZ 86434
(928) 769-2224

Ms. Kelly Jackson
Lac du Flambeau Band of Lake Superior Chippewa
Indians
P.O. Box 67
Lac du Flambeau, WI 54538
(715) 588-2139

Ms. Janine Bowechop
Makah Tribe
Makah Cultural and Research Center
P.O. Box 160
Neah Bay, WA 98357
(360) 645-2711

Mr. David Grignon
Menominee Indian Tribe of Wisconsin
P.O. Box 910
Keshena, WI 541350910
(715) 799-5258

Ms. Natalie Weyaus
Mille Lacs Band of Ojibwe Indians
43408 Oodena Drive
Onamia, MN 56359
(320) 532-4181

Mr. John Brown
Narragansett Indian Tribe
P.O. Box 700
Wyoming, RI 02898
(401) 364-9873

Mr. Alan Downer
Navajo Nation
Historic Preservation Department
P.O. Box 4950
Window Rock, AZ 86515
(928) 871-6437

Ms. Corina Williams
Oneida Nation of Wisconsin
Tribal Historic Preservation Office
P.O. Box 365
Oneida, WI 54155
(920) 490-2096

Ms. Stephanie Rolin
Poarch Band of Creek Indians
5811 Jack Springs Road
Atmore, AL 36502
(251) 368-9136

Ms. Lisa Bresette
Red Cliff Band of Lake Superior Chippewas
88385 Pike Road, Highway 13
Bayfield, WI 54814
(715) 779-3648

Ms. Celeste Vigil
Skokomish Indian Tribe
N. 541 Tribal Center Road
Shelton, WA 98584
(360) 426-4232

Ms. Rhonda Foster
Squaxin Island Tribe
SE 70 Squaxin Lane
Shelton, WA 98584
(360) 432-3850

Ms. Marnie Atkins
Table Bluff Reservation - Wiyot Tribe
Tribal Historic Preservation Office
1000 Wiyot Drive
Loleta, CA 95551
(707) 733-5055

Mr. Earl Barbry, Jr.
Tunica-Biloxi Indians of Louisiana
P.O. Box 331
Marksville, LA 71351
(318) 253-8174

Ms. Laurie Perry
Wampanoag Tribe of Gay Head (Aquinnah)
Tribal Historic Preservation Officer
20 Black Brook Road
Aquinnah, MA 025359701
(508) 645-9265

Dr. Thomas Gates
Yurok Tribe
1034 Sixth Street
Eureka, CA 95501
(707) 482-1822

Ms. Bambi Kraus
National Association of Tribal Historic Preservation Officers
P.O. Box 19189
Washington, DC 200369189
(202) 628-8476

Mr. Gilbert Brady
Northern Cheyenne Tribe
P.O. Box 128
Lame Deer, MT 59043
(406) 477-6035

Mr. Donald Soctomah
Passamaquoddy Tribe
Tribal Historic Preservation Office
P.O. Box 102
Princeton, ME 04668
(207) 796-0822

Dr. Jonathan Damp
Pueblo of Zuni
Heritage and Historic Preservation Office
P.O. Box 339
Zuni, NM 87327
(505) 782-4814

Ms. Kathleen Mitchell
Seneca Nation of Indians
Seneca-Iroquois National Museum
794-814 Broad Street
Salamanca, NY 14779
(716) 945-1738

Mr. Randy Abrahamson
Spokane Tribe of Indians
P.O. Box 100
Wellpinit, WA 99040
(509) 258-4315

Mr. Tim Mentz
Standing Rock Sioux Tribe
P.O. Box D
Fort Yates, ND 58538
(701) 854-2120

Timbisha Shoshone Tribe
P.O. Box 206
Death Valley, CA 923280206
(760) 786-2374

Mr. Kade Ferris
Turtle Mountain Band of Chippewa
P.O. Box 900
Belcourt, ND 58316
(701) 477-2641

Mr. John Welch
White Mountain Apache Tribe
Heritage Program
P.O. Box 507
Fort Apache, AZ 85926
(928) 338-3033

For a clickable map of THPO's by tribe visit:
http://www2.cr.nps.gov/tribal/tribaloffices.htm

ATTACHMENT 3
36 CFR PART 800

Federal Register

Tuesday,
December 12, 2000

Part II

Advisory Council on Historic Preservation

36 CFR Part 800

Protection of Historic Properties; Final Rule

ADVISORY COUNCIL ON HISTORIC PRESERVATION

36 CFR Part 800

RIN 3010–AA05

Protection of Historic Properties

AGENCY: Advisory Council on Historic Preservation.

ACTION: Final rule; revision of current regulations.

SUMMARY: The Advisory Council on Historic Preservation is publishing its final rule, replacing the previous rule which implemented the 1992 amendments to the National Historic Preservation Act (NHPA), and improved and streamlined the rule in accordance with the Administration's reinventing government initiatives and public comment. Litigation earlier this year challenged that previous rule. This rulemaking has addressed questions and concerns raised by that litigation, and has given the public a chance to provide input to determine how the rule has operated and revise the rule as appropriate. The final rule modifies the process by which Federal agencies consider the effects of their undertakings on historic properties and provide the Council with a reasonable opportunity to comment with regard to such undertakings, as required by section 106 of the NHPA. The Council has sought to better balance the interests and concerns of various users of the section 106 process, including Federal agencies, State Historic Preservation Officers (SHPOs), Tribal Historic Preservation Officers (THPOs), Native Americans and Native Hawaiians, industry, and the public.

DATES: This final rule is effective January 11, 2001.

FOR FURTHER INFORMATION CONTACT: If you have questions about the rule, please call Frances Gilmore or Paulette Washington at the regulations hotline (202) 606–8508, or e-mail us at regs@achp.gov. When calling or sending e-mail, please state your name, affiliation, and nature of your question, so your call or e-mail can then be routed to the correct staff person. Informational materials about the new rule will be posted on our web site (http://www.achp.gov) as they are developed.

SUPPLEMENTARY INFORMATION: The information that follows has been divided into five sections. The first one provides background information introducing the agency and summarizing the history of the rulemaking process. The second section highlights the changes incorporated into the final rule. The third section describes, by section and topic, the Council's response to public comments on this rulemaking. The fourth section provides a description of the meaning and intent behind specific sections of the final rule. Finally, the fifth section provides the impact analysis section, which addresses various legal requirements, including the Regulatory Flexibility Act, the Paperwork Reduction Act, the National Environmental Policy Act, the Unfunded Mandates Act, the Congressional Review Act and various relevant Executive Orders.

I. Background

The Advisory Council on Historic Preservation ("Council") is the major policy advisor to the Government in the field of historic preservation. Twenty members make up the Council. The President appoints four members of the general public, one Native American or Native Hawaiian, four historic preservation experts, and one governor and one mayor. The Secretary of the Interior and the Secretary of Agriculture, four other Federal agency heads designated by the President, the Architect of the Capitol, the chairman of the National Trust for Historic Preservation and the president of the National Conference of State Historic Preservation Officers complete the membership.

This final rule sets forth the revised section 106 process. Section 106 of the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470f (NHPA), requires Federal agencies to take into account the effect of their undertakings on properties included in or eligible for inclusion in the National Register of Historic Places and to afford the Council a reasonable opportunity to comment on such undertakings.

Through Section 211 of the National Historic Preservation Act, the Council is authorized to "promulgate such rules and regulations as it deems necessary to govern the implementation of section 106 * * * in its entirety."

After publishing two Notices of Proposed Rulemaking (59 FR 50396, October 3, 1994; and 61 FR 48580, September 13, 1996), the Council published a final rule setting forth a revised process implementing section 106 in its entirety (64 FR 27044–27084, May 18, 1999). Such rule went into effect on June 17, 1999, and superseded the rule previously issued in 1986.

Two major forces behind that revision process were the 1992 amendments to the National Historic Preservation Act (NHPA), and the Administration's reinventing government efforts. In October, 1992, Public Law 102–575 amended the NHPA and affected the way section 106 review is carried out. Among other things, the 1992 amendments:

1. Clarified that "[p]roperties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register." 16 U.S.C. 470a(d)(6)(A);

2. Required that "[i]n carrying out its responsibilities under section 106, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties described" above. 16 U.S.C. 470a(d)(6)(B). Also see 36 CFR 800.2(c)(3) (granting such tribes and Native Hawaiian organizations, "consulting party" status in the section 106 process). Implementation of this statutory consultation requirement is found throughout the proposed rule. See, for example, 36 CFR 800.3(f)(2), 800.4(a)(4), 800.4(b), 800.4(c)(1), 800.5(a), 800.6(a)–(b).

3. Added a provision in the NHPA prohibiting Federal agencies from granting a license or assistance to applicants who, with the intent to avoid the requirements of section 106, significantly adversely affected historic properties related to the license or assistance. In such cases, the Federal agency can only grant the license or assistance if it determines, after consulting with the Council, that circumstances justify granting the license or assistance despite the effects to the historic property. 16 U.S.C. 470h–2(k). See 36 CFR 800.9(c).

4. Explicitly recognized the long-standing practice of having Federal agencies develop agreements to address adverse effects of their undertakings to historic properties. This practice had also been recognized in the earlier, 1980 amendments, where Section 205(b) of the NHPA was changed to state that the Council could be represented in court by its General Counsel regarding "enforcement of agreements with Federal agencies." It also clarified that where such an agreement is not reached, the head of the relevant Federal agency must document his/her decision pursuant to section 106. Such agency head cannot delegate that responsibility. It also provided that agreements executed pursuant to the section 106 process would govern the relevant Federal undertaking and all its parts. 16 U.S.C. 470h–2(l). See 36 CFR 800.6, 800.7.

5. Added a member to the Council. This Council member would be a Native

American or Native Hawaiian appointed by the President. 16 U.S.C. 470i(a)(11).

6. Explicitly clarified the fact that the Council has authority to "promulgate such rules and regulations as it deems necessary to govern the implementation of section 106 of this Act *in its entirety.*" 16 U.S.C. 470s (emphasis added) (highlighted text was added by the 1992 amendments); and

7. Amended the definition of the term "undertaking," by adding "[projects, activities, and programs] subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency" to the list of actions constituting an "undertaking." 16 U.S.C. 470w(7)(D). The amended, statutory definition of "undertaking" was adopted verbatim in the rule. 36 CFR 800.16(y).

Additionally, as part of the Administration's National Performance Review and overall regulatory streamlining efforts, the Council undertook a review of its regulatory process to identify potential changes that could improve the operation of the section 106 process and conform it to the principles of the Administration. A description of the Council's revision efforts from 1992, which led to the final rule that went into effect in 1999 ("1999 rule"), is found in its preamble (64 FR 27044–27084, May 18, 1999). That preamble extensively details its history, purpose, intent, and response to public comment.

On February 15, 2000, the National Mining Association ("NMA") filed a lawsuit challenging the 1999 rule. Among other things, the lawsuit alleged violations of the Appointments Clause of the Constitution and certain provisions of the Administrative Procedure Act pertaining to rulemaking. After assessing the allegations contained in the lawsuit, the Council decided to move forward with the present rulemaking process that culminates today with this final rule. The Council believed that this rulemaking would provide an opportunity to address assertions about the procedural adequacy of the promulgation of the 1999 rule, including those about the participation of the National Trust for Historic Preservation ("Trust") and the National Conference of State Historic Preservation Officers ("NCSHPO"), as Council members, in the adoption of the final, revised rule. It would also give the public a chance to provide input to determine how the rule has operated and revise the rule as appropriate. This rulemaking does not evidence Council agreement with the merits of the allegations but, rather, the Council's desire to remove these issues from litigation.

Accordingly, at the June 23, 2000 Council meeting in Maine, the Chairman of the Council asked the Council members to take two actions. The first action was a new vote on the adoption of the 1999 rule, without the participation of the Trust and NCSHPO. The Council members voted 16–0 in favor of the 1999 rule, with the Trust and NCSHPO voluntarily recusing themselves from the vote and any deliberation on it.

The second action was a vote on undertaking the present rulemaking process, using the text of the 1999 rule as the proposed rule. Again, the Council members voted in favor of moving forward with the rulemaking by a vote of 16–0, with the Trust and NCSHPO voluntarily recusing themselves from the vote and any deliberation on it. Accordingly, on July 11, 2000 the Council published a proposed rule for public comment (65 FR 42833–42849).

The public was given a 30-day period, until August 10, in which to comment on the proposed rule. All those who filed a timely request for an extension of the comment period were given until August 31 to submit their comments. We believe the extension granted was reasonable in light of the circumstances.

As stated above, the text of the proposed rule submitted for public comment was the same as the one for the final rule that had been in effect for more than a year. That final rule, in turn, was the product of a rulemaking process that afforded the public ample opportunity, throughout six years, to participate and comment. The preamble of that 1999 final rule (found at 64 FR 27044–27084, May 18, 1999) extensively details its history, purpose, intent, and response to public comment. It is a lengthy document and will not be re-printed here.

After the close of the public comment period, the Council, minus the Trust and NCSHPO, considered the comments and incorporated changes into a draft rule as was deemed appropriate. On November 17, 2000, the Council voted on whether to adopt the draft rule as a final rule. As stated before, the Council members representing the Trust and NCSHPO had already recused themselves from the rulemaking process and proposed suspension. They accordingly removed themselves from the table and took no part in the deliberations and vote on this matter.

The Council voted to adopt the draft rule as the final rule now being published, by a vote of 17 for, 1 abstention, and none against.

The Council reiterates that the Trust and NCSHPO did not participate in any way whatsoever in the deliberations, decisions, votes, or any other Council activities regarding this rulemaking. Their only participation in this rulemaking took the form of a written comment filed by NCSHPO on the proposed rule. Such comment was submitted by NCSHPO, as a member of the general public, during the commenting period provided by the notice of proposed rulemaking.

II. Highlights of Changes

The Council retained the core elements of the section 106 process that have been its hallmark since 1974. The Council also retained the major streamlining improvements that were adopted in June, 1999. Changes adopted were primarily modifications to remove operational impediments in the process and clarifications of certain provisions and terms. In addition, a number of technical and informational edits were made throughout the rule. Major changes are as follows:

1. Clarification of the Role of State Historic Preservation Officers.

Section 800.2(c)(1) was amended to acknowledge the statutory responsibility of SHPOs to cooperate with agencies, local governments, and organizations and individuals to ensure that historic properties are considered in planning.

2. Clarification of the Role of Indian Tribes and Tribal Historic Preservation Officers

Section 800.2(c)(2) was completely rewritten to better distinguish the roles of Indian tribes that had assumed the responsibilities of SHPOs on their tribal lands under section 101(d)(2) of the Act from that of Indian tribes which had not. The Council notes that these amendments do not change the substantive role of non-101(d)(2) Tribes or any other party in the section 106 process under the proposed rule, but simply provide for a clearer rule. Section 800.2(c)(2)(ii) was also amended to clarify that the Act requires agency consultation with Indian tribes and Native Hawaiian organizations that attach religious and cultural significance to historic properties regardless of whether the historic properties are located on or off tribal land. Section 800.2(c)(2)(ii)(B) was amended to better reflect the sovereignty of Indian tribes over their tribal lands.

3. More Flexibility To Involve Applicants

Section 800.2(c)(5) was amended to resolve a major problem regarding the participation of applicants for Federal assistance or permission in the Section 106 process. Under the change, an agency may authorize a group of applicants to initiate the section 106 process, rather than being required to grant individual authorizations. Language was also added to clarify that such authorizations do not relieve the Federal agency of its obligations to conduct government-to-government consultation with Indian tribes.

4. Clarification of Undertakings Covered by the Section 106 Process

Section 800.3(a)(1) was amended to better state the premise of the rule that only an undertaking that presents a type of activity that has the potential to affect historic properties requires review. The previous language implied that making such a determination related to the circumstances of the particular undertaking, rather than the more generic analysis of whether the type of undertaking had the potential to affect historic properties.

5. Reinforcement of the Federal Agency's Responsibilities in Identifying Historic Properties

Section 800.4(a) was amended to assert that determinations in this subsection are made unilaterally by the Agency Official, after consultation with SHPO/THPO. Some had misunderstood the previous version as providing for consensus determinations.

6. Revision of the Role of Invited Signatories

Section 800.6(c)(2) was rewritten to remove confusion about the ability of the Federal agency to invite other parties to become formal signatories to Memoranda of Agreement and to clarify their rights and responsibilities as invited signatories. Also regarding memoranda of agreement, § 800.6(c)(8) was amended to provide that the option for their termination exists not only when one party simply cannot comply with its terms, but also when the terms are not being followed for whatever reason.

7. Revision of the Use of Environmental Impact Statements (EIS) To Comply With Section 106

Section 800.8(c)(4) was rewritten to more clearly state the actions a Federal agency must take in making a binding commitment in an NEPA documents to carry out measures to avoid, minimize or mitigate adverse effects and thereby use the NEPA process to comply with section 106 requirements.

8. Redefinition of the Role of the Council When Improving the Operation of Section 106

Section 800.9(d)(2) was amended to require the Council to participate in section 106 reviews in a manner parallel to SHPOs/THPOs when the Council decides to join individual case reviews it would not otherwise engage in. This occurs when the Council has determined that section 106 responsibilities are not being properly carried out by an agency or SHPO/THPO and the Council's participation can remedy the problem.

9. Modification of Documentation Standards

Section 800.11(a) was amended to state that a Federal agency's responsibility to provide documentation was limited by legal authority and the availability of funds. Section 800.11(c)(2) was also amended to require Federal agencies to include the views of the SHPO/THPO when consulting with the Council on withholding confidential information.

10. Inclusion of National Register Eligibility Assessment in Consideration of Post-Review Discoveries

Section 800.13(b)(3) was amended to add a requirement that a Federal agency seeking expedited section 106 review for properties discovered after approval of an undertaking provide information on the eligibility of affected properties for the National Register.

11. Increased Flexibility for Programmatic Agreements

Section 800.14(b) was amended by the addition of a new section authorizing the Council to create "prototype programmatic agreements" which could be executed by a Federal agency and an SHPO/THPO without Council participation. This would permit routine programmatic agreements that follow an accepted model to be completed more expeditiously.

12. Improved Consideration of Stakeholder and Public Views on Proposed Exemptions

Section 800.14(c)(5) was amended to add Council consideration of the views of SHPOs/THPOs and others consulted when determining whether to approve an exemption from the section 106 process. The Council was also required to notify the agency and SHPOs/THPOs of it decision on the requested exemption.

13. More Flexibility for Federal Agencies When Consulting With Indian Tribes on Nationwide Program Alternatives

Section 800.14(f) was amended to reemphasize a Federal agency's obligation under various authorities to consult with Indian tribes and Native Hawaiian organizations when developing nationwide program alternatives, but to acknowledge that it is the agency's responsibility to determine the appropriate means of meeting those obligations.

III. Response to Public Comments

Following is a summary of the public comments received in response to the notice of proposed rulemaking, along with the Council's response. The public comments are printed in bold typeface, while the Council response follows immediately in normal typeface. They are organized according to the relevant section of the proposed rule or their general topic.

Section 800.1

The Council should expand the definition of SHPO responsibilities beyond cooperation with the Secretary, Advisory Council and Federal agencies to include explicit reference to organizations and individuals, such as regulatees and their consultants. The Council noted that such language was warranted by the NHPA, and therefore inserted language regarding such SHPO duties per section 101(b)(3)(F) of the NHPA.

The very last sentence of this section should be changed to: "The Agency Official is encouraged to initiate the section 106 process as early as practicable in the undertaking's planning so that it may consider impacts on historic resources." The language on the proposed rule stated that the Agency Official "shall ensure that the section 106 process is initiated early in the undertaking's planning * * *" The Council disagreed with the commenter's proposed change since it is crucial that agencies initiate the section 106 process at a point where alternatives have not yet been foreclosed. Otherwise, the review would be rendered meaningless.

Council is urged to preserve flexibility provision under the 1986 regulations, which stated: "The Council recognizes that the procedures for the Agency Official set forth in these regulations may be implemented by the Agency Official in a flexible manner reflecting different program requirements, as long as the purposes of section 106 of the Act and these regulations are met." Specific areas of

flexibility are incorporated in the proposed rule to embody the general flexibility term found in the 1986 rule. Among these are: phased identification, compression of steps, NEPA coordination, and the various program alternatives under § 800.14 of the rule.

Section 800.2(a)

The regulations should state that Federal agencies that authorize applicants to initiate consultation are still responsible for their government to government relationships with tribes. The Council agreed and incorporated such change at § 800.2(c)(5) since the statement comports with Executive Orders and Memoranda regarding the government-to-government responsibilities of Federal agencies towards federally recognized tribes.

Requirements of § 800.14 preclude implementation of § 800.2(a) insofar as it calls for utilization of the agency's existing procedures to fulfill consultation requirements. The Council disagreed. The comment failed to consider the difference between procedures that implement 36 CFR part 800 (those under § 800.2(a)) and procedures that actually substitute/modify the process under 36 CFR part 800 (those under § 800.14).

Nothing in NHPA requires Federal agencies to consult with a particular party, thus, while such consultation may be beneficial, it should be left to the discretion of the Federal agency under NHPA. The Council not only believes that such consultation is beneficial, but it also believes it has the required authority to justify this and all other sections of the proposed rule. Consultation occurs in the section 106 process propounded by the rule in a way that is fully consistent with the statute. See, for example, the statutory language under section 101 of the NHPA regarding SHPO and THPO assistance to Federal agencies in the section 106 process, the consultation requirements with Indian tribes and Native Hawaiian organizations under the 1992 amendments to the NHPA, and language under Section 110 of the NHPA ensuring that public involvement occurs in the section 106 process. Such consulting entities have the specialized knowledge and interest that Federal agencies may lack. Consultation with these parties provides the Federal agency with the information it needs to make reasoned assessment of how its undertakings affect historic properties. Furthermore, it is clear to the Council through its years of experience, that such consultation is necessary and that Federal agencies heavily rely on such assistance (in particular that of the SHPOs). Please also refer to responses given under the legal topics.

Federal officials (and not State, local or tribal government officials) are responsible for taking into account the effects of their undertakings on historic properties. Furthermore, it is inappropriate to mention Section 112 of the NHPA in this section since the Council has no authority to enforce it. The Council agrees that the responsibility for section 106 compliance lies with Federal agencies, including the "take into account" responsibility. The Council clarifies that section 112 is merely restated in the rule for reference purposes (as opposed to enforcement).

ACHP refusal to take a position regarding delegation of authority have resulted in SHPOs disregarding FCC's jurisdiction and emphasizes on enforcement over historic preservation. During the time frame of this rulemaking, the Council issued a memorandum to the FCC, all SHPOs and the telecommunications industry clarifying its position on delegations of authority. This and several other issues mentioned by the telecommunications industry in this rulemaking process have been or are in the process of being addressed through ongoing discussions with the industry, the FCC and SHPOs. These discussions commenced before the present rulemaking process. Such ongoing discussions are referred hereinafter as "Telecommunications Working Group."

Although section 101 of the NHPA establishes an advisory role for SHPOs to assist Federal agencies, the rules fail to establish consistent objective standards for SHPOs to apply in carrying out their duties. It undermines the ability of SHPOs and Federal agencies to adequately serve the Council's goal of protecting historic properties. The Council believes that the rule contains adequate standards that guide SHPOs in carrying out their functions. These standards can be found in various parts of the rule (e.g., criteria of adverse effect under § 800.5(a), and various definitions of terms under § 800.16). Further standards, such as the National Register Criteria of Eligibility (36 CFR part 63), are referenced in the present rule, and guide SHPO duties. Furthermore, pursuant to the NHPA, the Department of the Interior regularly reviews SHPO programs and ensures such programs and their personnel have the necessary expertise to guide their performance of their statutory duties, which include "to consult with * * * Federal agencies * * * on Federal undertakings that may affect historical properties." 16 U.S.C. 470a(b)(3)(I).

"Delegation authority" should be expanded to include "approved" state agencies and other pre-approved designees to conduct section 106 coordination on behalf of the Agency Official. The Council disagrees since the comment fails to realize that such authority can only come through statute. Congress specifically placed section 106 compliance responsibilities on Federal agencies. Only Congress can shift that responsibility. The Council is only aware of certain Department of Housing and Urban Development programs containing such a statutory delegation.

Section 800.2(b)

Licensees should be recognized as consulting parties under the regulations. Applicants for licenses, permits, approvals or assistance are specifically listed in the rule as consulting parties (see §§ 800.2(c)(5) and 800.3(f)(1)).

Add the following to § 800.2(b)(2): "Within 30 days of receipt of a request for such advise, the Council shall reply in writing with advise, or it shall reply in writing that it will not offer advice stating its reason(s) for so doing." This is needed to ensure Council responds in a timely fashion. The Council disagreed with this proposal. Time limits, and the consequences of not replying in time, are already specified in the proposed rule as needed.

Section 800.2(c)

Remove the first sentence of § 800.2(c)(1)(I). It is unrealistic to charge the SHPO with "reflecting the interests of the State and its citizens in the preservation of their cultural heritage." This only encourages agencies to treat SHPO coordination as the be-all and end-all of consultation, even where large numbers of a State's citizens violently disagree with a SHPO position. The rule reasonably supports the idea that the SHPO reflects the interests of the State by virtue of being a State official appointed by the elected State Governor.

Several comments requested that the rule distinguish the roles of Tribes that have an approved "Tribal Historic Preservation Officer' (THPO) pursuant to section 101(d)(2) of the NHPA, and those that do not. The use of the term "THPO" for both was deemed to be highly confusing. As stated in the highlight of changes above, § 800.2(c)(2) was completely rewritten to better distinguish the roles of Indian tribes that had assumed the responsibilities of SHPOs on their tribal lands under section 101(d)(2) of the Act from that of Indian tribes which had not. The Council notes that these amendments do

not change the substantive role of non-101(d)(2) Tribes or any other party in the section 106 process of the proposed rule, but simply provide for a clearer rule.

Many THPO's have construed this provision to mean that they must be invited to participate as "consulting parties" on all undertakings affecting properties of traditional religious and cultural importance, a position at odds with the NHPA. It is requested that the role of tribal representatives and THPO's in consultation off tribal land to be clarified consistent with the statute. The Council believes that section 101(d)(6)(B) of the NHPA clearly gives federally recognized tribes and Native Hawaiian organizations a right to be consulted regarding historic properties of religious and cultural significance to them. The cited section of the statute does not qualify that right depending on whether the historic property is located on or off tribal lands. It also does not qualify that right depending on whether the tribe has a THPO certified pursuant to section 101(d)(2) of the NHPA.

Too difficult to implement requirements of § 800.2(c)(2) when the project is not on reservation land. It is unreasonable for each Federal agency to develop on their own information as to which tribe(s) may be associated with specific geographic areas. While the Council acknowledges certain initial difficulties in identifying tribes to consult outside tribal lands, it believes the statute is clear in mandating such consultation regardless of the location of the historic property. The Council and the National Park Service are currently conducting a guidance project to assist agencies in identifying Indian tribes to be consulted.

Regulations do not create a "consultative" role for SHPO staff who would prefer to spend their time and efforts preserving historic properties rather than enforcing procedures on telecommunications projects. The SHPOs have a specific statutory duty to consult with Federal agencies and assist them with their section 106 duties. 16 U.S.C. 470a(b)(3)(I). Moreover, the SHPOs do spend their time directly preserving historic properties through their involvement in the section 106 process. The Council has not received contrary views from any SHPOs. Finally, similar issues of SHPO/telecommunications industry work in the section 106 process is being addressed by the ongoing Telecommunications Working Group.

Definition of "additional consulting parties" is too open ended, since it makes it possible for anyone who can claim a "concern" to become a consulting party, adding delays and expenses to the process (§ 800.2(c)(6)). Even if Council had authority over this issue, at a minimum the rule should require a demonstration of some form of protectable interest similar to the concept of legal standing. Standards for additional consulting parties adequately balance the project's need for expediency and the right of those with defined interests in getting involved in the process. To ensure this provision is not abused, the rule gives the Agency Official the ultimate discretion to invite additional consulting parties or not. The Council believes the Agency Official is in a better position to balance the benefits of including these parties against the costs of so doing. The Agency Official will be able to do this on a case by case basis, according to the particulars of the specific undertaking at issue.

Use of the phrase "SHPO/THPO" has led to misunderstandings concerning the different regulatory roles of the SHPOs and THPOs in consultation on projects located off tribal lands. Guidance is needed to clarify these roles. The Council believes the rule is clear in that Federally recognized tribes have to be consulted regarding historic properties of cultural and religious significance to them, regardless of the location of such properties. With the changes regarding the use of the term THPO, there should be no confusion as to consultative rights of tribes.

Expanded definition of consulting parties has made it difficult and time consuming for agency officials to establish an appropriate consultation process. Guidelines for determining formal consulting parties should be developed. The Council believes that §§ 800.2 and 800.3(f) set forth clear standards for who should be a consulting party, and a clear process for who makes the determination and when. A further expansion on this topic to aid Federal agencies is better suited for guidance.

Regulations give tribes a secondary role to SHPOs with respect to tribal cultural and sacred properties which are not on tribal lands. The 1992 Amendments were intended to provide tribes with rights at least equivalent to SHPOs regardless of where the properties are located. Tribes want same consultation rights as SHPO for tribal cultural properties located off tribal lands. SHPO role is a creation of the regulations and is not required in the Act. The Council does not believe that Tribes have a secondary role to SHPOs. They do have a different role however. The rule recognizes that Tribes are entitled to consult regarding historic properties of religious and cultural significance to them that may be affected by an undertaking. The SHPO is also entitled to consult, consistent with the definition of SHPO responsibilities in the Act, regarding historic properties. 16 U.S.C. 470a(b)(3).

The regulations assume that the THPO is a regulatory/executive body of a tribal government. Federal agencies believe that consulting with the THPO or tribal cultural resource manager fulfills the government-to-government responsibility. Agencies need to become familiar with this responsibility. The regulations fail to address or identify the process for government-to-government consultation. It is the duty of the relevant Federal agency (and not the Council) to specify how they meet their government-to-government responsibilities. See Executive Memorandum on Government-to-Government Relations with Native American Governments, dated April 29, 1994.

Granting SHPOs a role on tribal lands where there is no 101(d)(2) THPO is an intrusion on tribal sovereignty and is hypocritical since tribes are not given an equivalent role for their traditional cultural and sacred properties off tribal lands. The Council disagrees. Tribes that attach religious and cultural significance to historic properties must be invited to consult, regardless of where the property is located. The proposed rule follows statutory roles given to Tribes and SHPOs. See 16 U.S.C. 470a in general, and 470a(d)(2)(D)(iii).

The regulations provide a significant role for the THPO, above the tribal government leader. Federal agencies now have an "out" to avoid the government-to-government responsibility. Agencies need to learn, and ACHP trainers need to emphasize, the difference. The regulations should include a section that requires agencies to develop a process that recognizes the THPO role. The Council reasonably assumes 101(d)(2) THPOs are the appropriate contact for government to government relations. Nevertheless, the Council will confirm this statement with the Department of the Interior.

800.2(c)(3)(vi) is confusing. This allows for the SHPO and Council to ignore and avoid tribal involvement. It also provides an outlet for Federal agencies to disregard Federal law, E.O.s, etc. Finally, the SHPO then becomes a decision maker on tribal lands. This provision was requested by Tribal comments that wanted to avoid Tribes being required to sign an agreement if they chose not to sign it. A

waiver under § 800.2(c)(3)(vi) requires positive action from the Tribe, and therefore does not present a loophole to be used by Federal agencies or any other entities.

A tribe that does not have a 101(d)(2) THPO does not have the same authority as a tribe that does. This gives the SHPO the ability to come onto reservation lands and dictate how the tribe handles its preservation program and individual projects. Would like the regulations to provide tribes the option of inviting the SHPO into consultation on tribal lands. Section 101(d)(2) of the NHPA provides for THPO substitution of the SHPO on tribal lands if approved by DOI. If there is no approved 101(d)(2) THPO, NHPA provides that the SHPO shall consult with Federal agencies on any undertaking within the State. Also, NHPA specifically states the right of private owners of land within tribal boundaries to request SHPO involvement in undertakings on tribal lands. See section 470a(d)(2)(D)(iii) of NHPA.

Change last sentence to: Nothing in this part alters, repels, interprets, or modifies tribal sovereignty or preempts, modifies, or limits the exercise of any such rights. This change would delete "is intended to . . ." The Council agreed with such a change since it was needed to more properly accord with tribal sovereign rights and the original intent of the section.

Section 800.2(c)(5)

Several comments requested that the rule be changed so that Federal agencies will not be required to give specific authorization for each applicant to initiate consultation with SHPO/THPOs. The Council supported amending the proposed rule to allow agencies to authorize applicants to initiate consultation on a broader basis than individual authorizations.

Because of the time and resources required to consult with Tribes, more Federal agencies are delegating their consultation responsibilities, without guidance, to consultants, applicants and others. Many tribes, however, refuse to interact with parties other than the Federal agency or agency director. The Council responds to this concern by clarifying that such insistence is due to the Federal agencies' government-to-government responsibilities under Executive Orders and Memoranda.

Delegating authority to applicants is delegating Federal agency responsibility. This process lacks the integrity of upholding the intent of laws and EOs. Generally, tribes are insisting on formal consultation with Federal agencies, not applicants. Federal agencies are required to consult with Indian Tribes on a government-to-government basis pursuant to Executive Orders, Presidential memoranda, and other authorities. The proposed rule therefore was amended to acknowledge this responsibility. The authorization to applicants to initiate consultation does not include consultation with Tribes.

Section 800.2(d)

***Proposed part 800 elaborate* procedures for public participation go well beyond the provisions of NHPA. NHPA does not require separate public notice and comment requirements at every stage of the review process. Recommend that part 800 recognize Federal agencies' existing public participation procedures and permit agencies to rely on those procedures in addressing adverse effects only.** The rule does not require separate public notice and comment requirements at each step. Also, the proposed rule already allows for use of agency procedures. Nevertheless, it is simply impractical and illogical to solely rely on agency procedures for public involvement regarding section 106 if such procedures fail to address historic preservation issues.

Public participation provisions are an improvement over the 1996 proposed rule, but still invite problems. Council is not vested with authority to regulate public participation. Section 106 does not address this topic. Council has no authority to vest anyone, but itself, with a reasonable opportunity to comment on the Federal undertaking. The Council believes it has the required authority to justify this and all other sections of the proposed rule. Please refer to our response regarding legal authority, below.

This provision lies outside of the NHPA section 106 authority, and is a back door mechanism to impose upon Federal agencies the Council's interpretation of the interested public instead of leaving the interpretation of that role to the agencies, in consultation with the Secretary of Interior as provided for in section 110(a)(2)(E) of the NHPA. Deleting this provision is recommended. The Council disagrees. As stated below, the Council has the required authority to justify this and all other sections of the proposed rule. Furthermore, § 800.2(d)(3) allows the use of agency procedures to the extent they provide pertinent information on historic preservation.

Section 800.3(a)

Several comments requested clarification that under § 800.3(a) the agency should not be considering case-specific issues, and that in this section the reference is to "type and nature" of the undertaking. In light of these comments and practical experience, the Council agreed that such a change was necessary. The language in § 800.3(a) was amended to state that the determination is as to whether the undertaking is a "type" of activity that has the potential to cause effects on historic properties, assuming such properties would be present.

Regulations should address what happens with program alternatives or PAs that were executed before the effective date of the new regulations. Such agreements are still valid and will continue to be in effect according to their terms.

Section 800.3(b)

The section should read that the Agency Official "may coordinate * * *." Council cannot require such coordination. The comment misreads the proposed rule. It only states that the Agency Official "should coordinate," implying encouragement, but not requirement.

Section 800.3(c)

30 day response period is too long and only ensures the destruction or damage to an archeological site where the project went forward because of the necessities of the mission. A 15 day response period would be much more appropriate in recognition of the rapid forms of communication available. The Council disagrees. The 30 day time period reflects an adequate balance between project need for expediency and workload requirements on reviewers.

Either delete section 3(c)(3) altogether, or add further guidance or regulatory definition of the phrase "* * * and to the nature of the undertaking and its effects on historic properties." Also, delete any discussion of timing in section 3(c)(4). It erroneously implies that nearly everything submitted to the SHPO falls under a 30 day review period. Review time periods should simply be referenced in the various sections of §§ 800.4–800.6. The rule indeed imposes a 30 day limit on SHPO/THPO at each step of the process where a formal response is required to findings and determinations, unless otherwise noted. See § 800.3(c)(4). SHPO/THPO cannot require the process to stop by failing to respond by the end of this period. On the other hand, there is no such clock for consultation alone (e.g., regarding APE or for seeking ways to avoid, minimize or mitigate adverse

effects). All that the Federal agency needs to do regarding such consultation is to make a reasonable effort to consult (which may or may not take 30 days) and move forward with the process.

Section 800.3(d)

Once SHPO declines to participate, Federal agencies should have no further burdens. To the extent that the Council is relying on SHPOs to comment or consult on its behalf under section 106, the agency complies with section 106 by providing SHPO (Council) an opportunity to comment. Rule should also contain presumption that SHPO concurs with a written finding if it does not respond within 30 days. Accordingly, § 800(d) should read: (1) If the SHPO declines in writing to participate, or otherwise cooperate, in the section 106 process, the Agency Official shall proceed as it believes appropriate; (2) If the SHPO does not respond within 30 days to a written finding under this part, or sooner if reasonably requested by the Agency Official, a presumption of concurrence with such finding shall be created. Federal agency obligations under section 106 of the NHPA do not terminate when the SHPO or any other entity declines to continue participating. SHPOs do not comment or participate in consultation on behalf of the Council. A process of allowing the agency to proceed without any Council review when SHPO declines to participate or respond within the 30 days is inconsistent with the letter, intent and spirit of the law. Nothing in the NHPA indicates in any way whatsoever that Federal agency responsibilities under section 106 disappear once a SHPO refuses to participate. The statute mandates Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment regardless of what any other entity does or does not do. 16 U.S.C. 470f. It is noted that the rule does have certain, reasonable presumptions of concurrence when a response does not come in time. See particularly, § 800.3(c)(4).

Section 800.3(f)

The regulations do not give adequate guidance regarding federally designated THPO's, Federally recognized tribes without a designated THPO, and federally recognized tribes not occupying tribal lands. Guidance is also needed to identify associated tribes, crosscutting boundaries or ancestral lands, differentiate among differing views of ancestral lands to ensure that tribes' rights are addressed without impinging upon the property rights of private landowners. Such information can be provided in guidance but is not appropriate in a rule. Furthermore, see information above regarding Council/NPS project regarding assistance to Federal agencies regarding ancestral lands.

Section fails to establish who is responsible for establishing the list of consulting parties, setting a time limit in which the SHPO should respond, and defining what constitutes a good faith effort in doing so. This comment is incorrect. The proposed rule does establish that the Agency Official is ultimately responsible for establishing the list of consulting parties. It also sets forth the 30 day comment period. The meaning of a "good faith effort" will be better handled through guidance.

Section 800.4(a)

This is a useful and important provision. Minor wording changes are proposed to remove any suggestion that the SHPO is responsible for the decision: "(a) Determine scope of identification efforts. In consultation with the SHPO/THPO and other consulting parties, the Agency Official shall (1) Determine and document the area of potential effects, as defined in § 800.16(d); etc." The Council agreed with this recommended amendment since it clarifies that the ultimate decision here is made by the Agency Official. However, the phrase "and other consulting parties" was removed from the recommended language since the obligation to consult at this stage would not extend to other consulting parties.

Section on determining Area of Potential Effect fails to include time limit for a response by SHPO or other consulting parties to an agency's determination of APE. As stated above, the agency obligation is to consult. Failure by SHPO/THPO to respond to consultation within a reasonable time would allow agency to finalize its unilateral determination of the area of potential effect and move forward in the process.

Indian Tribes are given broad discretion to designate any property to which they attach religious and cultural significance, whether or not within tribal lands, as historic in the context of the consultation process. There are no standards directly relevant to the eligibility of such properties for the National Register. The broad discretion creates great uncertainty, delay, and costs. The rule should contain criteria on designating religiously or culturally significant properties. This comment is incorrect. These properties must be "historic properties" and therefore meet the National Register criteria. They must follow the same process as other potentially historic properties.

Requirement to consult with SHPO regarding the APE should be deleted. It needlessly extends the already protracted consultation process without any concomitant benefits. The Council believes that consultation with SHPO is valuable at this critical point to avoid later problems. Furthermore, consultation with the SHPO/THPO at this critical decision making point has always been viewed as an important part of the process. The Council decided to retain the duty to consult with the SHPO/THPO since the Council believes that SHPO/THPOs have special expertise as to the historic areas in their jurisdiction and the idiosyncracies of such areas, and can greatly assist the Agency Official, using such expertise, in determining an accurate area of potential effects. Nevertheless, it is noted that the Federal agency is ultimately responsible for making the final determination about the area of potential effect (*i.e.*, the concurrence of the SHPO/THPO in such determination is not required).

In the case of scattered site housing rehabilitation program, the Agency Official should have the authority to determine that (1) the area of potential effect is limited to the property to be rehabilitated, and (2) any structure to be rehabilitated that is less than 50 years old is not considered eligible. The result would allow scattered site housing rehabilitation to proceed in a responsible manner without adding a time-consuming consultation process with no apparent benefit to the public or environment. The Council disagrees. Not all scattered site projects are the same. Where a block of properties are to be rehabilitated, the historic district may be affected. The less than 50 years old exemption should be handled during negotiation of a Programmatic Agreement.

Given that some of the tribes with ancestral interest in a project area are no longer physically located within the state, it is difficult or unfeasible to comply with this provision. The reg needs to set some practical limits on consulting with Tribes in identifying historic properties. The NHPA does not set such limits on consultation. The location of tribes and the boundaries of tribal lands are consequences of history to which tribes were subjected. Accordingly, the fact that a tribe may not live on or near a significant property should not be an impediment to its participation in consultation. As stated above, this is the subject of a guidance

project currently under way between the Council and the National Park Service.

The regulations should set forth a process to follow when the SHPO disagrees with an agency determination of the area of potential effects (APE)—similar to the process for determinations of eligibility. Also, we need further guidance on what is considered "documenting" the APE. The Council believes the process in the rule regarding APE should remain unchanged. The determination of APE should be ultimately done by the Federal agency in consultation with the SHPO. SHPO can seek informal advice from the Council. Guidance could be developed regarding what is considered "documenting" the APE.

Section 800.4(b)

Comments recommended that the provisions of section 106 be extended only to properties formally determined eligible, and that this section should therefore be deleted. The Council disagrees. Both the Council and the Department of the Interior have interpreted the NHPA to require section 106 consideration of all properties that are listed on the Register, as well as all those that meet the criteria of eligibility on the National Register, regardless of whether a formal determination by the Keeper has been made. Well established Department of the Interior regulations regarding formal determinations of eligibility specifically acknowledge the appropriateness of section 106 consideration of properties that Federal agencies and SHPOs determine meet the National Register criteria. See 36 CFR 63.3. The NHPA specifically defines "historic properties" as those that are "included in, or eligible for inclusion on the National Register." 16 U.S.C. 470W(5). Not only does the statute allow this interpretation, but it is the only interpretation that reflects (1) the reality that not every single acre of land in this country has been surveyed for historic properties, and (2) the NHPA's intent to consider all properties of historic significance. It has been estimated that of the approximately 700 million acres under the jurisdiction or control of Federal agencies, more than 85 percent of these lands have not yet been investigated for historic properties. Even in investigated areas, more than half of identified properties have not been evaluated against the criteria of the National Register of Historic Places. These estimates represent only a part of the historic properties in the United States since the section 106 process affects properties both on Federal and non-Federal land. Finally, the fact that a property has never been considered by the Keeper neither diminishes its importance nor signifies that it lacks the characteristics that would qualify it for the National Register.

Rule should clarify that the section 106 process does not impose identification burdens upon the private applicant. Although identification obligations are placed on Federal agencies, in reality the burden is often passed on to the applicant through delays or conditioning the agency's decision until the applicant has funded the identification efforts. Federal agency ability to shift burden to applicant is dependent on that agency's independent authority. The section 106 rule does not confer such authority nor relieve Federal agencies of its duties. This may be an appropriate guidance topic to be developed.

Regulations fail to respect the National Register nomination and listing process and grant unbridled authority to impose section 106 requirements on properties already deemed ineligible. Properties that are determined ineligible are not subject to section 106 consideration. Revisiting eligibility determinations is encouraged on certain occasions, but not mandatory.

Any imputation of a new substantive duty under section 106 to discover unidentified properties is negated by the detailed provisions for the discovery of unknown properties contained elsewhere in NHPA. The Council disagrees. The obligation to identify during planning is different than coming across something during construction. Further obligation is limited in scope, duration and intensity. The "discovery" provisions of the NHPA do impose a continuing duty to survey and identify historic properties. See 16 U.S.C. 470h–2(2)(A). However, the reality is that such an effort has not reached every acre of land of this country that could be affected by a Federal undertaking, and the NHPA seeks to protect historic properties even if they had not been identified prior to the proposition of an undertaking. This is clearly reflected in the statute where it provides, for example, that agency procedures implementing the Council's section 106 rule would provide a process for identifying historic properties. 16 U.S.C. 470h–2(a)(2)(E)(ii). The NHPA would not contain this language if it believed the other, general surveying provisions were sufficient.

Since SHPOs are statutorily required to conduct comprehensive statewide surveys of historic properties (section 101(b)(3) of NHPA), Federal agencies and permit applicants should not have to be required to engage in field investigations or surveys. SHPOs should already know what historic properties exist. No. Agency obligation to "take into account" effects on historic properties necessarily places an affirmative duty to identify historic properties. The Council notes that the rule does not compel shifting of such agency burden to applicants. Also, please refer to the immediately preceding response.

Although proposed rule on its face may place identification efforts on Federal agencies, the reality is that these burdens are borne by applicants. This is usually done by delaying or conditioning the Federal decision until the applicant has funded the identification effort requested by the SHPO or Council. This tactic is improper and the rule should clarify that the process does not impose the burden upon applicants through either direct or indirect means, including delays. The rule does not compel shifting of this or other Federal agency burdens to applicants. Section 106 obligations lie with the Federal agency. Although Federal agencies may be requiring submissions, as a basis of accepting applications, this is not compelled by the rule.

Council only has authority to promulgate rules regarding section 106. Since section 106 does not address the identification of historic properties or evaluation of historic significance, the Council has no authority to regulate these activities. The duty to identify historic properties are placed upon Federal agencies, the Secretary of the Interior, and SHPOs under other sections of the NHPA (namely sections 101 and 110). The Council disagrees. The NHPA grants the Council the authority to promulgate regulations regarding section 106 "in its entirety." 16 U.S.C. 470s. It would be impossible for an agency to take into account the effects of its undertakings on historic properties (which include those listed on the Register, as well as those eligible for listing), as section 106 requires, if it does not know what those historic properties are in the first place. Accordingly, the identification and evaluation provisions of this rule are reasonable under the authority. Also, see response to comment above regarding ongoing identification duties.

This provision for phased identification and evaluation using an MOA is inconsistent with our prior understanding that an MOA should be used exclusively to stipulate mitigation measures for properties that have been identified and fully evaluated. With this change, why would an agency do a project specific PA? Phased identification acknowledges the reality

of large projects. A programmatic agreement may be an alternative, but this provision expands the flexibility of the rule.

Section 800.4(c)

This section should be revised to overcome the current perception that agencies are required to identify every single specific property that may be affected and study each sufficiently to apply the National Register criteria. This drives up the cost of S. 106 consultation, unnecessarily delays the process, discourages consideration of indirect and cumulative effects, and complicates coordination with NEPA. The provision for phased ID and evaluation helps, but § 800.4(a) should be revised to make it clear that it is permissible to address eligibility prospectively, and to focus on "types of properties" rather than to identify every single property. The phased identification provisions of the rule are intended to deal with this issue. The Council intends to provide guidance regarding phasing.

Section 800.4(c)(1) is misleading in stating that tribes have "special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them." Their expertise is not in applying the criteria of eligibility, it is in identifying some kinds of historic properties and in identifying effects that might not be apparent to others. The current wording sets up the tribes to overrule decisions made by agencies and SHPOs. The Council clarifies that tribal expertise is not in applying the eligibility criteria per se, but in bringing a special perspective to how a property possesses religious and cultural significance. This reflects the fact that such Tribes are particularly well placed to provide insights and information on those properties of religious and cultural significance to them. It is common sense to reach out to the Tribes regarding these issues.

Requiring eligibility determination from the Keeper when SHPO disagrees with Agency Official determination gives SHPO a veto over the project. The Keeper eligibility process is so lengthy that applicants have no alternative but to go along with the SHPO's position regarding time-sensitive projects. SHPO can delay projects simply by claiming not to have sufficient information. Department of the Interior regulations require a response from the Keeper within 45 days. Those regulations also recognize the concurrent Agency/SHPO determination scheme. See 36 CFR part 63. The section 106 rule does not encourage wrongful delays by any party. Cases where an abuse of the process is suspected can always be brought to the attention of the Federal agency conducting the review and/or the Council.

Proposed rule gives Tribes the de facto ability to designate any property to which they attach religious and cultural significance as a historic property. Tribes can then pressure the Agency Official to take their concerns into account above all others. Proposed rule effectively requires Federal agencies to defer to Indian tribes on what properties are reached by section 106, and give added (if not dispositive) weight to religious considerations in that determination. The Council disagrees. Properties of religious and cultural significance to Tribes must meet the National Register criteria in order to be considered "historic" and subject to section 106 consideration. The fact that a Tribe attaches religious and cultural significance to them does not make them "historic," but neither does it preclude them from meeting the National Register criteria. The Federal agency makes the determination of eligibility, and disputes are ultimately resolved by the Keeper based on the secular National Register criteria. The Tribe is consulted but, again, the ultimate decision in the case of a dispute with the Federal agency finding by a SHPO/THPO, is the Keeper.

The NHPA does not empower the Council to require Agency Officials to obtain a determination of eligibility from the Keeper. In fact the NHPA prohibits "any person or local government" from providing a nomination for inclusion of a property on the Register unless such property is located within a State where there is no SHPO. Moreover, this is redundant with 36 CFR part 63. There is no basis for requiring SHPO concurrence or agreement. Finally, the NHPA expressly prohibits the nomination of any historic property for the Register where the owner objects. 16 U.S.C. 470(a)(6). Such prohibition should be integrated into the proposed rule to reflect that when such objection is lodged with a Federal agency, they may terminate their section 106 review. The comment fails to realize that a determination of eligibility is not the same as a nomination/listing on the National Register. The Council also points out that under the NHPA, an owner's objection to a nomination/listing still can lead to the Secretary of the Interior determining the eligibility of the property. It should also be noted that this rule provides that an owner of an affected property can, and should be, invited as an additional consulting party in the section 106 process. See § 800.2(c)(6) of the rule. Finally, see responses above to the issue of Agency/SHPO concurrence determinations of eligibility.

Various comments comment suggested that in the last sentence, the word "special" should be changed to "unique." The Council disagreed. The word "unique" excludes everyone else and gives the incorrect impression that Tribes have the final word that cannot really be challenged by the Agency. Also, see response above regarding the need of properties of "religious and cultural significance" to Tribes to meet National Register criteria in order to be considered "historic."

Section 800.4(d)

The addition of a 30 day waiting period, even when no historic properties are identified, is unreasonable. Suggest that the waiting period after submission to SHPO/THPO be eliminated consistent with previous regulations. The Council disagreed. This period is necessary so the consulting parties and the Council can review the finding responsibly and object if appropriate. Such review also allows mistakes to be caught in time before they potentially lead to costly litigation.

Move this subsection under § 800.5 and re-title § 800.5 to "Assessment of Effects." The proposed change was rejected since these are outcomes of identification and effect assessments. However, the Council may draft guidance on the topic of assessment of effects.

Section 800.5(a)

A tribal comment stated that the exemption of properties of religious and cultural significance from the demolition by neglect provision (§ 800.5(a)(2)(vi)) is so broadly written that it could lead to the loss of National Register districts in pueblos and other Native communities. This provision had been added at the request of Indian tribes. It specifies that the exception only applies where neglect and deterioration are recognized qualities of the property. A further safety valve is that a "no adverse effect" determination is subjected to review by consulting parties (which would include Tribes that attach religious and cultural significance to the historic property at issue). See § 800.5(c). Lastly, the Council is not aware of this provision having been applied inappropriately or over the objections of Tribes.

Criteria of adverse effect too broad, and encompasses activities of benefit to the public. Accordingly, such activities

are delayed. Examples of such activities are: reclamation of abandoned mines, creation of wetlands, "hazardous material remediation" (§ 800.5(a)(2)(ii)), rehabilitation of historic properties, and provision of handicapped access. Adverse effect criteria are linked specifically to objective National Register criteria published by the National Park Service, which are used to determine characteristics that contribute to a property's historic significance. If those characteristics are adversely affected, then the historic significance is impaired. It is noted that program alternatives under § 800.14 are intended to deal with repetitive or minimal impact situations. Finally, while the listed activities may be of benefit to the public, it does not necessarily follow that such positive activities could not also cause an adverse effect on historic properties. Again, all that the section 106 process requires is that such effects be taken into account. The section 106 process does not prohibit any projects, beneficial or otherwise.

Proposed rule uses impermissibly vague and overbroad terms, in violation of the Due Process Clause. Its definition of "adverse effects" includes those when an undertaking "may" alter "indirectly" "any" of the characteristics making the property eligible in a way that would diminish the integrity of the property's "feeling" or "association." Such definition does not give fair notice as to what it requires, and is not grounded on intelligible principles. This further complicates, expands, and lengthens the process, adding difficulties, costs and uncertainty. As stated above, adverse effect criteria are linked specifically to objective National Register criteria published by the National Park Service. The National Register criteria itself expands on the meaning of its terms and provides various examples. These criteria have been fleshed out through consideration and application countless times, over the years, since the program began, and explained through various guidance documents. For example, see National Register Bulletin 15, "How to Apply the National Register Criteria for Evaluation," which includes definitions of the terms "feeling" and "association."

Criteria of adverse effect should exclude "insignificant" transfers of property. De minimis transfers of property are being subjected to lengthy section 106 process. The rule provides for an avenue, under § 800.14(c), whereby the appropriate agency can pursue an exemption.

The criteria of Adverse Effect is devoid of any limitations on the proximity of an undertaking to a historic site, allowing the SHPO to be inconsistent and subjective when evaluating effects. The standard set forth under section 106 is effect, not proximity. While it is possible that distance separating an undertaking from a particular historic property may remove any effects, such a determination should be made on a case by case basis, and is not suitable for a generalization. Different undertakings simply have different areas of potential effects according to several factors such as the nature of the undertaking itself, the nature of the historic property at issue and topography.

The current and proposed rule do not take into account the fact the cumulative impact of adding a monopole to areas with modern intrusions would not be an adverse effect. The proposed rules, therefore, will lead to consultative gridlock as the expansion of wireless services continues. This and several other issues mentioned by the telecommunications industry in this rulemaking process have been or are in the process of being addressed through ongoing discussions with the industry, the FCC and SHPOs. These discussions commenced before the present rulemaking process. Such ongoing discussions are referred hereinafter as "Telecommunications Working Group."

Section 800.5(b)

Final decision regarding adverse effects is charged on the Agency Official. Council has no authority to impose its determination on this matter. Council may comment on the issue, but the final decision is to be made by the Agency Official. The Council has used its expertise in setting up the criteria of adverse effects on this rule. It therefore has a justifiable role and the expertise in ensuring the correct interpretation of its rule. Section 800.7 of the rule is clear in stating that the Agency Official can terminate consultation on ways to avoid, minimize or mitigate adverse effects, and request Council comments. The Agency Official can then proceed with its undertaking in any way it wants, after taking the Council's expert comments into account.

There is no basis for mandating consultation regarding adverse effects. To the extent that other sections of the NHPA require Agency Official consultation with the SHPO, these provisions are not to be implemented by section 106 regulations of the Council. The Council believes this consultation is reasonable and necessary in that it provides the Federal agency with the information and considerations needed for it to take into account the effects of its undertakings on historic properties. Consulting parties are defined in such a way as to ensure they have the necessary interest and competence in informing Federal agency decisions on historic properties. As elsewhere in the process, consultation ensures that correct and informed decisions are made and that mistakes are not overlooked. See response regarding legal authority, below.

To address agreements like Community Development Block Grant (CDBG) Programmatic Agreements, the Council should add language which recognizes situations where the specific details of future activities are unknown and the consulting parties agree that adverse effects will be avoided through review and standard mitigation measures. Such language can, and many times is, used and provided for in the Programmatic Agreements themselves. There is no need to add this language to the process under the rule to reach such agreements. As stated before, the Council has revised the rule to provide for prototype agreements, which could be particularly helpful in the CDBG context.

Section 800.5(c)

Proposed rule gives Tribes power to require further analysis (and therefore delay) under the process whenever they attach religious or cultural significance to a property. Tribes are provided the same consultative opportunities to review an agency's findings that other consulting parties are provided. The rule only encourages, but clearly does not require, the agency to reach such concurrence. See response above to comments regarding properties of "cultural and religious significance." Also see section 101(d)(6)(B) of the NHPA.

Subsection (c)(1) is directly contrary to NHPA since NHPA only requires documentation when an adverse effect is found. 16 U.S.C. 470(l). This comment misreads the statute. Section 110(l) of the NHPA simply indicates that when no solution to adverse effects is reached and embodied in an agreement in accordance with this rule, the Federal agency must document its decision after considering Council comment. This is completely different than providing the documentation necessary for reviewers to understand agency decisions in the normal section 106 process, which is reasonable and not precluded by anything in the statute.

Subsection (c)(2) must clarify that a finding of adverse effect does not require consultation under section 106. The Council is provided a reasonable opportunity to comment under section 106. The Council disagrees. Section 110(l) of the NHPA explicitly indicates its blessing of the Memorandum of Agreement consultation concept when it states that when no such solution is reached in accordance with this rule, then the agency head must document its decision after considering Council comment. Furthermore, the rule clearly states that once a Federal agency has entered into such consultation, it can terminate and proceed to Council comment.

Regarding § 800.5(c)(2)(i), anytime a consulting party objects to a finding, the Federal agency should notify all consulting parties and consult again with all parties prior to seeking consultation with the Council. Regarding 5(c)(3), the Council should also notify all consulting parties of its determination. Regarding the § 800.5(c)(2)(i) point, the Council clarifies that if consultation with the objecting party leads to changes affecting other parties, the Agency should go back to them. The Council also notes that it would notify all consulting parties regarding its § 800.5(c)(3) determination.

Section 800.6(a)

The regulations grant an unconstrained authority to require mitigation to avoid adverse effects with no constraints on cost and without requiring any nexus between the mitigation and actual adverse effect. Comment is incorrect. The agency can, based on the applicant's position, refuse any mitigation measures and terminate consultation. Furthermore, the rule is quite clear in that the consultation that may lead to an agreement is to avoid, minimize or mitigate the adverse effects on the historic properties.

Rules should provide that any Adverse Effect comment should include recommendations and core criteria for mitigation to reduce the effects to No Adverse Effect. While this is permissible, the Council believed the rule should not require it as a duty of SHPO/THPO at the determination of adverse effect step. Review at that point is intended to focus on identifying whether adverse effects exist, and not to provide a full range of mitigation options.

Section 800.6(b)

Proposed rule inappropriately attempts to require parties to sign an MOA to avoid additional delays from Council comment on the undertaking. Federal Register Council has no authority to require execution of a binding contractual agreement of any kind. Section 110(l) does not mean that the Council may compel the use of MOAs. This is beyond Council authority and must be deleted from the rule. The rule does not require or compel execution of an MOA. Furthermore, section 110(l) of the NHPA explicitly indicates its endorsement of the Memorandum of Agreement (MOA) consultation concept when it states that (1) when no such solution is reached in accordance with this rule, then the agency head must document its decision after considering Council comment, and (2) when such an agreement is reached, it shall govern the undertaking and all its parts.

There is no specific time period for Council review of a MOA when Council is participating in consultation which can significantly lengthen the section 106 compliance process. Regulatory time limits or guidelines (30–45 days) should be promulgated. Similarly, there is no review time specified for Council response to the submission of an executed MOA. Recommend time limit or guidelines of 30 days. The Council consults regarding MOAs but does not "review" them. The Council does not review executed MOAs, so there are no delays of agency action.

Section 800.6(c)

Several comments requested changes to the rule to clarify the issue of invited signatories. The Council agreed that this section needed to be changed. The changes to the rule indicate that the Agency Official is the one that ultimately decides who is an invited signatory, and that the rights to seek amendment or termination of an MOA attach to those that actually sign the MOA.

A comment regarding 36 CFR 800.6(c)(2)(I) supported retention of the permissive "may" in allowing agency to invite an Indian Tribe or Native Hawaiian organization to become a signatory to a MOA, but would find a language such as "should" or "shall" to be unacceptable. Several tribal comments, on the other hand, requested that the tribes be given a signatory right. This was a major issue during the development of the 1999 rule. After careful consideration, the Administration made a policy decision that is reflected in the proposed rule. Indian tribes are not mandatory signatories to an MOA dealing with effects on historic properties off tribal lands. The Council has no new evidence to support changing that position.

SHPOs are given broad discretion to determine appropriate mitigation for an MOA, resulting in the process being unregulated. This comment is incorrect. The Federal agency has the discretion to agree or disagree with SHPO/THPO views regarding an MOA. When an agreement is not reached, the agency goes for Council comment to wrap up the process.

Section 800.7(c)

There is no authority for the Council to dictate to Federal agencies how they consider Council comments, how they document or prepare records of decisions, nor how or whether they notify the public, nor require the agency to provide the Council with the decision prior to approving the undertaking. The NHPA specifically grants the Council the authority to promulgate rules to implement section 106 in its entirety. Section 106 requires Federal agencies to give the Council a reasonable opportunity to comment. Section 110(l) of the NHPA explicitly requires the Federal agency to document its decision made pursuant to section 106. The Council is well within its authority to implement these requirements and determine how such opportunity is provided the Council, and how the required documentation is provided.

Time for Council comment should be limited to 30 days, and the Agency Official could decide to grant an extension if it so desired. The Council believes the 45 day comment period is reasonable, takes into account the reality of staff and Council workload and need for adequate consideration, and reflects a shorter time period than previous rules (the section 106 rule adopted in 1986 set a 60 day period).

Section 800.8(a)

Rule contravenes NEPA by seeking to require processing under NEPA of undertakings that have no significant or no adverse impact on historic properties. The Council emphasizes that the rule clearly does not require NEPA processing for anything. That is something the Federal agency must decide independently.

Rule contravenes NEPA in that it undermines the categorical exclusion provisions of NEPA by requiring section 106 processing for all categorically excluded Federal actions and failing to provide a compatible process for excluding from section 106 those actions that have small or insignificant impacts, thus causing waste of enormous public and private compliance resources struggling with the least measurable and least

important Federal actions. The statement is incorrect. Section 106 of the NHPA covers "undertakings" regardless of NEPA categorical exclusions. The NHPA and NEPA are independent statutes with separate obligations for Federal agencies. Furthermore, § 800.14(c) provides for a way that agencies can request and obtain exemptions.

Section 800.8(c)

***Comments suggested need for* guidance to facilitate use of provisions allowing substitution of NEPA for section 106 process.** The Council is committed to develop such guidance and assist Federal agencies that desire to follow these provisions of the rule.

Any integration of the NEPA process with section 106 should allow EAs as well as EISs to constitute full compliance with section 106. Section 800.8(c) of the rule allows just that when certain reasonable standards are met. Those standards ensure that historic properties are taken into account in a manner consistent with the NHPA.

Council has no authority to prescribe rules regulating Federal agencies' use of NEPA to comply with section 106. Such an approach was rejected during the 1992 amendments. The Council notes that the NEPA coordination provisions of this rule only apply when the Federal agency independently chooses NEPA documents/process to substitute for the regular section 106 process that they would have had to follow otherwise. The Council has the authority to set conditions for an agency to substitute another process for the Council's government-wide rule.

Requirement that the NEPA documents include mitigation measures should be deleted. The Supreme Court has stated repeatedly that NEPA mandates that mitigation measures be discussed, but that there is no requirement that a detailed mitigation plan be adopted. The Council has no authority to attach such a requirement to the NEPA process. Again, the NEPA/106 substitution provisions of this rule apply only when the NEPA process is used to substitute regular section 106 process that the Federal agency would have had to follow otherwise. Nothing in the rule requires adoption of mitigation measures since the option of getting formal Council comments instead is still available.

Section 800.9(a)

It is not the responsibility of the Council to decide whether or not their procedures have been followed regarding Agency determinations. The only Council right is to expect a reasonable opportunity to comment and that its comments will be considered before the agency proceeds with the undertaking. The rule makes it clear that this is not a binding "decision" by the Council, but an advisory opinion (see section 202 of the NHPA). The Council, as the agency promulgating the section 106 rule, has the specific expertise and interest in opining as to whether its rule has been correctly followed.

Section 800.9(b)

The process in § 800.9(b) regarding the Council's determination of a foreclosure lies outside of the Council's authority. A finding of foreclosure is an advisory opinion within the Council's authority (see Section 202 of the NHPA). The Council, as the agency promulgating the section 106 rule, has the specific expertise and interest in opining as to whether its rule has been correctly followed.

Section 800.9(c)

Comments questioned the statutory authority for Council to promulgate regulations implementing section 110(k) of the NHPA. Section 211 of the NHPA authorizes the Council to promulgate regulations to implement section 106 in its entirety. Section 110(k) directly relates to the section 106 and what an agency must do when an applicant's actions may have precluded section 106 review. Moreover, section 110(k) specifies a requirement that the Council be consulted. The rule simply re-states Section 110(k), sets forth how the Council will be consulted, and reminds agencies of their further section 106 responsibilities.

Section 800.9(d)

Council's assertion, under § 800.9(d)(2), that it can participate in individual case reviews, however it deems appropriate, finds no support in any section of the NHPA and should be deleted. The Council changed the rule in response to this comment. The change expressly limits the role of the Council in such reviews to accord with the role already given to the Council under subpart B and parallel to that of SHPO/THPOs.

Section 800.10

A comment questioned the statutory authority for Council to promulgate regulations implementing Section 110 of the NHPA. Section 211 of the NHPA authorizes the Council to promulgate regulations to implement section 106 in its entirety. The Council notes that undertakings affecting National Historical Landmarks (NHLs) are subject to section 106 review. NHLs are "historic properties" listed on the National Register. The provisions of § 800.10 lay out how the Council may participate in the section 106 review of these particularly important historic properties, how the Council may request a report from the Secretary of the Interior pursuant to section 213 of the NHPA, and how the Council will provide a report to the Secretary on the outcome of the consultation.

Section 800.11(a)

NHPA section 470k limits the substance and extent of any documentation requirement dependent upon each Federal agency's authority and funding; therefore the proposed § 800.11 should be revised to clarify that the rules' documentation requirements are not mandatory but are recommended guidelines consistent with NHPA 470k and the Council's advisory role. To better comport with statutory language, § 800.11 was changed by adding language that clarifies that documentation requirements are mandatory but limited "to the extent permitted by law and within available funds." 16 U.S.C. 470k. The documentation provisions remain mandatory since the Council and other reviewers simply cannot comment without a basis, which can only be provided by adequate documents. The Council believes that the document requirements are not only minimal, but should be readily available to any agency as its record supporting its decisions in the process.

When a documentation dispute is presented to the Council, it must be resolved in a timely manner. When documentation disputes are referred to the Council, the Council is committed to expeditiously providing a resolution to them. The resolution provided by the Council will include guidance as to when the relevant party should complete their review of the finding or determination at issue—taking into account how long the party disputing the documentation has had the documentation, particularly in cases where such documentation is deemed by the Council to have been adequate.

Documentation standards are extremely broad, and likely to create confusion. Specific standards should be included that reference and adopt, at a minimum, documentation sufficient to satisfy the definition of "sacred site" in EO 13007 ("any specific, discrete, narrowly delineated location on Federal land that is identified by" an authoritative Indian tribal source). Documentation standards are

adequately specific and far more specific than those of past regulations. The matter about defining "sacred sites" is better handled through guidance. Nevertheless, the Council clarifies once more that sites, sacred or otherwise, must meet the National Register criteria in order to be considered in the section 106 process.

Questions statutory authority for Council to impose extensive documentation requirements. Section 110(l) of the NHPA requires agencies to document their section 106 decisions, but does not authorize Council to elaborate. Section 203 of the NHPA authorizes the Council to obtain information from Federal agencies, but does not require those agencies to provide the information. Section 203 of the NHPA would be meaningless if it authorized the Council to obtain documents from Federal agencies, but did not require such agencies to comply according to the law. Furthermore, the Council is within its statutory authority to promulgate regulations implementing section 106 in its entirety, in setting the rule's reasonable documentation requirements. Documenting decisions not only assures meaningful compliance with the requirement to take into account effects to historic properties, but it produces the necessary information for consulting parties to assist the Federal agency in meeting its duties. Furthermore, the Council would not have a reasonable opportunity to comment on an undertaking without having adequate documentation on the undertaking and relevant historic properties, as provided in this section of the rule.

Section 800.11(c)

It is too cumbersome for the agency to be required to consult the Secretary of the Interior and the Council every time it wishes to withhold information under this provision. This consultative process is set forth and mandated by section 304 of the NHPA. The rule simply outlines a reasonable process for the Council participation required by section 304.

Regarding § 800.11(c)(2), the Agency official should also submit to Council the views of SHPO regarding the confidentiality of information. The Council agreed and changed the rule to reflect this. SHPOs views as to confidentiality and harm to resources are relevant, and confidentiality is not limited to tribal issues.

Section 800.11(d)

Documentation level for a finding of *no Historic Properties Affected* is unreasonable. The Council believes the level of documentation is more than reasonable, if not minimal, since the agency should already have the listed documentation readily on hand in order to have been able to reach such a decision.

Section 800.11(e)

Section 800.11(e)(5) should require that each criteria of adverse effect be explained, whether found applicable or inapplicable, to ensure consistency in agency documentation. The Council disagreed with this proposal. Many criteria may have no relevance whatsoever to a particular project. Nevertheless, the Council believes some guidance may be warranted in the future to promote consistency in agency documentation.

Section 800.12(a)

It is not clear how the regulations apply during rehabilitation work, monitoring the emergency from a cultural resources perspective, or when to implement the regulations during emergency situations. The Council believes the rules are clear that the emergency provisions are triggered when an agency proposes an emergency undertaking in response to a declared disaster. The provisions require notification and a seven day review period.

Section 800.12(d)

Implementation time for emergency procedures should be extended from 30 days for a formally declared event to 90 days in order to allow for limited agency resources to adequately address all the issues that arise from a disaster related event. The longer an implementation time is extended, the lesser the justification for emergency, abbreviated procedures. Furthermore, the rule already allows requests for extensions of time when needed. The Council has not declined any such extension requests.

Section 800.13(b)

Agencies often do not often want to assume a new find to be National Register eligible. To address this, the comment offered a proposed change. The Council believed the suggested concept was useful and incorporated changes to the rule. The changes state that the subject of eligibility can be raised (and be considered by agency) in comments. As explained above, section 106 applies to those properties listed or eligible for listing on the National Register. This change acknowledges the importance of National Register eligibility at this point.

Section 800.13(b)(2) should be removed for the same reason that the data recovery exemption was removed from the 86 regulations. The Council disagreed. A short cut for these post-review discoveries of archaeological resources of value only for their data is necessary. The Council believes that tribal involvement will provide an adequate safeguard.

Section 800.14

The program alternative provisions are too rigid, intimidating and difficult to apply and create a one-size-fits all approach. The revised regulations should make this provision more useful *so that it can be applied more* productively to Federal agencies and industry. What the alternatives under § 800.14 do is to provide vehicles to tailor the section 106 process to the particular needs of each agency, agency program or group of undertakings. While the intent is to provide such flexibility in the final product, it is still essential to maintain the role of the public, preservation officers and other stakeholders in providing necessary input in shaping those products.

Section 800.14(a)

Include a provision for Council monitoring and evaluation of whether Federal agency program alternatives are working or not. Council monitoring of program alternatives should be on a regular basis, including, but not limited to, how agencies implement the "exempted categories" projects. Also, add a provision for the Council to publish a list of acceptable Federal Agency alternative programs and make them available to the public. Monitoring measures would be included, as appropriate, in the alternatives' agreements themselves. Regarding a list of Council approved alternatives, the Council does not need a change to its rule to publish such a list.

Since agency must submit any proposed alternate procedures for review by Council and NCSHPO, requirement for publication in the Federal Register should be eliminated. The Council disagrees. **Federal Register** notice of final adoption of these alternatives is needed to notify the public as to these changes in how Federal agencies comply with section 106.

Regarding all of § 800.14, the Council is granted no rights under the NHPA to be consulted with about Federal agency development of their procedures. Section 110(a)(2) requires consultation *with the Secretary of the Interior*, but not with the Council. Federal agencies

may find consultation with the Council desirable, but it is not required by the statute. The comment simply misreads section 110(a)(2) of the NHPA. That section deals with non-binding procedures that agencies may use to implement the Council's binding, section 106 regulations under 36 CFR part 800. The alternatives under section 800.14 directly modify or substitute for the Council's binding regulations regarding certain programs or undertakings, and therefore require our direct involvement. The Council believes it has the internal experience and expertise to make such evaluations. Also, the diversity of its membership ensures that a balanced perspective is brought to final determinations regarding consistency. Section 211 of the NHPA states that the Council "is authorized to promulgate such rules and regulations as it deems necessary to govern implementation of section 106 * * * in its entirety." Section 110(a)(2) of the NHPA states that the "(Federal agency historic preservation) *program[s]* shall ensure * * * that the agency's procedures for compliance with section 106 * * * are consistent with regulations issued by the Council * * *" (emphasis added). It must be understood, among other things and upon closer examination, that section 110 of the NHPA does not specifically provide for Federal agencies to substitute their programs for the section 106 regulations promulgated by the Council. Through § 800.14 of the rule, the Council is allowing for such substitution, believing this may help agencies in their section 106 compliance. However, the Council will not allow such substitution if the agency procedures are inconsistent with the Council's 106 regulations. The Council, in its expertise, holds that its regulations correctly implement section 106, and that it would therefore be inimical to its mandate and contrary to the spirit and letter of section 100(a)(2)(E) of the NHPA, for the Council to allow inconsistent procedures to substitute the Council's section 106 regulations.

The Council should seek the views of affected SHPOs and notify them of final adoption when an Indian tribe enters into an agreement with the Council to substitute tribal regulations for Council regs. The Council notes that section 101(d)(5) of NHPA already requires such consultation with the affected SHPO, and that the Council would obviously notify such affected SHPO as to a final substitution.

Section 800.14(b)

These regulations require more steps, more paperwork, and therefore more time to process routine CDBG Programmatic Agreements. Under the new regulations, the Council must participate more actively in these highly routine and repetitive agreements; and the Council treats the activities covered by CDBG agreements as "adverse effects." We request Council reconsider its procedures for routine PAs. In response to this comment, the Council agreed to provide a new procedure for routine Programmatic Agreements. See § 800.14(b)(4).

It is not clear that Programmatic Agreements under § 800.14(b)(3) are developed by an agency official in consultation with the SHPO. Additional guidance is needed beyond simply referencing § 800.6. The Council notes that the SHPO and other consulting parties must be consulted, just as they would be consulted for a Memorandum of Agreement under § 800.6.

Section 800.14(c)

The Council should modify the proposed rule to accommodate and promote voluntary habitat conservation efforts under the ESA. It should establish as an "exempted category", exempting from section 106 review, all voluntary incidental take and enhancement of survival permits issued by either FWS or NMFS under section 10 of the ESA. Also, approval of and voluntary participation in a "take limitation" or exemption created under a special conservation rule adopted by either the FWS or NMFS under section 4(d) of the ESA should also be exempted from NHPA review. These and other specific alternatives and exemptions recommended by the commenting public should be decided after the appropriate § 800.14 process is followed, and not through the rulemaking itself. The Council encourages Federal agencies to submit proposed exemptions and other alternatives.

Under § 800.14(c)(5), the Agency Official should submit the views of SHPO/THPO to the Council along with the other required documentation. The Council should also notify SHPO/THPO of the Council decision. In § 800.14(c)(7), SHPO's and others should be able to request that the Council review an Agency's activities to determine if the exemption no longer meets the criteria. The Council decided to change this section to explicitly add SHPO/THPO comments to those that need to be submitted. The Council assures the commenting public that it will notify SHPO/THPOs of final decisions regarding exemption decisions. Finally, the Council notes that anyone can request the Council to conduct a review of a program alternative without need of amendment to the rule.

Section 800.14(f)

Requiring comment from all Indian tribes is unnecessarily broad. Section 800.14(f)(1) should be amended so as to provide an appropriate government-to-government consultation with affected Indian tribes and consultation with Native Hawaiian organizations when a nationwide Programmatic Agreement is being developed, adding language to the effect that "when a proposed program alternative has nationwide applicability, the Agency Official shall identify an appropriate government-to-government consultation with Indian tribes and consultation with Native Hawaiian organizations." The Council agreed with the concept and rationale of the proposed change. It therefore added language to § 800.14(f) regarding tribal consultation for nationwide agreements, while honoring the underlying intent of meaningful consultation with Indian tribes and Native Hawaiian organizations.

Section 800.16(d)

Rule is unclear, and allows area of potential effect for a one acre wetland permit, to encompass entire development site (which could be over one hundred acres). The area of potential effects should be the one acre of wetland. Vagueness of rule leaves applicants vulnerable to high costs and long permit delays. The issue of area of potential effects and wetlands permits is one that needs to be worked out between the Council and the Corps of Engineers. The Council notes that section 106 requires Federal agencies to take into account the effects of undertakings on historic properties. An undertaking is defined by the statute to include a "*project* (or) activity * * * requiring a Federal permit, license or approval." The effects to be considered are those of the "project" that required the permit. Moreover, in most instances the effects of projects are felt by historic properties beyond the immediate footprint of a project. To illustrate, a historic property whose integrity would be affected by increased noise is affected even though it is not itself located on the site of the source of that noise. The Federal agency must take into account such effects. Having said this, the Council understands the need for guidance on the subject of establishing areas of potential effects regarding the

particular concerns reflected in this comment and others. The Council will be developing such guidance.

Definition of APE is too broad, adding expense for surveys (usually borne by applicants), and unlawfully encompassing private or State lands. See answer above. Also, section 106 requires Federal agencies to take into account effects on historic properties regardless of whether they are located in private or public lands.

Section 800.16(e)

To the extent the Council seeks to prescribe a role for SHPOs, this definition should include in the alternative the comments of the SHPO. The comment is incorrect. The term "comment," as use on the rule, means the formal comments by the Council. The SHPO is never entrusted with that responsibility. The SHPO role through the process comes from its assistance responsibilities in the section 106 process (see section 101(b) of the NHPA).

Section 800.16(I)

The definition of effect should be consistent with language used to define area of potential effect (§ 800.16(d)) and the criteria of adverse effect (§ 800.5(a)(1)). The Council agreed and, for consistency, changed the rule so that the "alterations" is used for both definitions.

Section 800.16(w)

Several comments requested the Council to revise the rule to distinguish between section 101(d)(2), NPS approved THPOs and non-101(d)(2) tribes. They strongly recommend that different terms be used for these two types of tribes in order to more clearly reflect their different authorities on tribal lands. The Council agreed and changed the rule accordingly. In summary, the Council (1) deleted the reference to non-101(d)(2) tribes from the definition of "THPOs" on this section of the rule, and (2) revised the language regarding these consulting parties under section of § 800.2(c).

Section 800.16(x)

A definition of "dependent Indian communities" for the purposes of this regulation is needed. Folks need a legal definition from the Council. The Council used the definition of Indian tribes provided by the statute. The Council will bring this issue to the attention of the Department of the Interior and work on clarification.

Section 800.16(y)

The term "undertaking" needs to be better defined within the regulation so as to clearly eliminate actions with no potential to affect historic properties. Section 800.3(a)(1) provides at the beginning of the process that Federal agencies have no further section 106 responsibilities if the undertaking is not a type of activity that has the potential to affect historic properties.

Various comments requested in different forms that the Council should clarify that Federal funding is a condition precedent to the application of the section 106 process. The Council notes that there is case law supporting that position as well as case law stating that funding is not a prerequisite. The Council has maintained the statutory definition of "undertaking," verbatim, in the regulations. The Agency Official is responsible, in accordance with § 800.3(a), for making the determination as to whether a proposed Federal action is an undertaking. As appropriate, an agency should examine the nature of its Federal involvement taking into consideration factors such as the degree of Federal agency control or discretion; the type of Federal involvement or link to the action; and whether or not the action could move forward without Federal involvement. An agency should seek the advice of the Council when uncertain about whether or not its action falls within the definition of an undertaking.

Do not want incidental take permits (ITPs) under the Endangered Species Act to be subject to section 106 review. As stated before, the Council notes that this and other specific alternatives and exemptions should be decided after the appropriate § 800.14 process is followed and not through rulemaking itself. The Council encourages Federal agencies to submit proposed exemptions and other alternatives.

Various comments argued in various forms that Surface Mining Control and Reclamation Act (SMCRA) permits issued by States, after Office of Surface Mining (OSM) delegation of the program, are not subject to the section 106 process. The Council believes that it is the responsibility of the Federal agency, rather than the State, to comply with section 106. The Council intends to continue working with OSM to develop and finalize a solution to this issue.

The proposed rule does not apply to the siting of wireless facilities, since the construction of communications towers does not constitute a Federal undertaking. As stated before, this and several other issues mentioned by the telecommunications industry in this rulemaking process have been or are in the process of being addressed through ongoing discussions with the industry, the FCC and SHPOs. These discussions commenced before the present rulemaking process. Such ongoing discussions are referred hereinafter as "Telecommunications Working Group."

Appendix A

Various comments stated that Council participation in consultation should be mandatory when requested by a tribe, particularly because tribes are not mandatory signatories off tribal lands. The Council disagreed. The Council needs to retain discretion, just as it has in any other Section 106 reviews. Such discretion is necessary not only to allow the Council to manage its limited resources, but also to further encourage the goal of Agency and SHPO/THPO independence in the process. We have no evidence that this discretion is not being exercised appropriately.

The Council should change its rule to allow it to comment on the most important cases, involving the SHPOs/THPOs in an advisory capacity, not a managerial role. The Council believes the rule accomplishes this. Under the rule, the Council only gets involved in some of the cases meeting Appendix A criteria. The rule requires the Council to explain how such criteria is met before entering consultation, and provides SHPOs/THPOs with an advisory role.

General Consultation

THE COUNCIL'S "HANDBOOK ON TREATMENT OF ARCHAEOLOGICAL PROPERTIES" IS WOEFULLY OUT OF DATE AND SHOULD BE UPDATED AS SOON AS POSSIBLE. ALSO "PREPARING AGREEMENT DOCUMENTS" SHOULD BE REVISED TO REFLECT THE CHANGES IN THE NEW REGULATIONS. THE COUNCIL SHOULD ALSO EXPLORE ESTABLISHING PEER REVIEW SYSTEMS IN RESOLVING DISPUTES THAT INVOLVE THE IDENTIFICATION, EVALUATION AND/OR TREATMENT OF ARCHAEOLOGICAL SITES. The Council agrees that the mentioned documents should be updated. Regarding the establishment of peer review systems, such an option could be explored.

Overly burdensome consultation requirements. Commenter cites seven different points of notification or consultation even when there are no historic properties present, and a dozen or more if there should be historic properties, resulting in unnecessary delays for thousands of routine projects. The commenter estimates that implementation and documentation of the numerous consultation points

requires ¼ to ½ FTE on every National Forest in the Southwest. The rule provides for ways to tailor the process. The Council notes that a Programmatic Agreement under Section 800.14 should be suggested to the Forest Service. Such Programmatic Agreements have proved effective in the past in further streamlining and fitting the section 106 process to the particular needs of agency programs. The comment also raised an issue on the number of consultation points for situations where there are no historic properties affected. Consultation is necessary for an agency to learn whether historic properties are present or not, and then whether and how those present would be affected. Section 106, again, requires the effects of undertakings on historic properties be taken into account. For that to happen, there has to be a process for identifying the properties and assessing the effects on such properties. As stated before, Section 800.14 presents several options an agency can pursue to advance an alternative way of complying with Section 106 which better fits the realities of their particular programs.

Some SHPO's have attempted to implement the Council's proposed Part 800 rules by treating the regulations as a springboard for additional, mandatory compliance steps and unreasonable documentation requirements that only serve to delay the review process. Clarify that SHPO's must follow proposed part 800's regulatory deadlines. Please refer to earlier responses regarding the 30 day time limits, above.

Proposed rules discourage SHPOs/THPOs from consulting with private sector companies and individuals seeking consultation regarding their projects. Government to government consultation if invoked by Tribes may prevent historic preservation matters from receiving their full consideration. As stated before, the rule has been changed to facilitate Federal agency authorizations for applicants to initiate the section 106 process. Government-to-government relationships between the Federal Government and Tribes is based on Presidential Memoranda, Executive Order 13084, treaties, and statutes. Furthermore, the Council believes that consultation with Tribes assures full consideration regarding historic properties on tribal lands or of significance to tribes.

Numerous provisions of proposed rule attempt to confer upon SHPO consultation, agreement (i.e., concurrence) or virtual veto powers. Section 106 does not mention any role for the SHPOs, let alone a requirement that the SHPO concur in agency determinations. SHPO's responsibilities, like the Council, are to assist and to advise. Proposed rule confers unauthorized powers on SHPOs and the Council, and result in additional administrative requirements and delays. The SHPO's role is limited in the rule to consulting and advising, based in their responsibilities pursuant to section 101(b)(3) of the NHPA. When a step calls for concurrence, SHPO concurrence can end the process from further evaluation. When the SHPO does not concur, a project is not vetoed; rather, the Federal agency is moved to the next, logical step in the process. Nothing in the rule gives anyone veto power over an undertaking. The Federal agency ultimately decides by itself what to do with the undertaking, once it has complied with its Section 106 responsibilities.

Council should confirm that SHPOs have no legal authority over private parties. Neither the Council nor this rule gives SHPOs the legal authority to require any action from private parties.

Nothing in the NHPA requires that every party that finds preservation to be interesting to be given a formal role in the section 106 process, with the ability to delay or derail Federal undertakings. The Council agrees, and believes that the rule reflects that regarding who are consulting parties and how the Federal agency can control who becomes an additional consulting party.

Proposed rules provide a mechanism for a Federal agency to proceed over the objections of SHPO/THPO or without an MOA, however, the Federal agency and its regulatees would have already paid a steep price for their efforts through project delays, duplicative legal reviews and other expenses associated with earlier consultation with SHPOs, THPOs, and ACHP. Section 106 of the NHPA requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment. Just as with NEPA and other laws, Federal agency compliance with such obligations necessarily requires effort and time. Through various methods, such as time limits and program alternatives (which give Federal agencies the tools to further streamline and adapt the process to their needs), the Council has provided for cutting down such compliance costs.

Federal agencies often have no cultural resources expertise and therefore rely on SHPO to make findings for them. Although Council staff has urged SHPO offices not to be forced into this position, it is just too much work to get agencies to obtain the necessary expertise. This is an important program issue, but not a regulatory one. The Council and the National Park Service should work with agencies in this area.

Additional guidance may be needed to further clarify the roles of participating parties in the consultation process. The Council agrees that such guidance should be developed.

The length of the comment periods are well founded and prudent because they insures that the parties respond in a timely manner. The rule also clarifies and emphasizes opportunities for Tribes, Native American organizations, and the interested public to participate in consultation. The Council agrees.

General Negative

The regulations have strayed from the consultation and advisory process envisioned by Congress for "nationally significant historic sites." It is evidenced by Congress' enactment of section 101(a) of the NHPA that a site does not have to be of "national" significance in order to meet National Register criteria and be considered under section 106 review (sites of State or local significance can meet the criteria as well).

Section 106 process is unnecessary because it duplicates an existing local zoning review/approval process for radio towers (a process that considers the impact that proposed towers might have on nearby historic properties). Therefore, it imposes unnecessary costs on carriers, and those costs are invariably passed on to the consumers. Congress has determined that local governments—not the Federal Government—should resolve such issues as the location, height and design of communications facilities. While certain local zoning measures may address historic preservation concerns, Federal agency undertakings are still subject to section 106. The NHPA does not relieve them of this duty. As stated before, this and several other issues mentioned by the telecommunications industry in this rulemaking process have been or are in the process of being addressed through ongoing discussions with the industry, the FCC and SHPOs. One objective of this exercise is to better coordinate Federal and local review processes. These discussions commenced before the present rulemaking process.

Instead of imposing overly-detailed proscriptive regulations that are difficult to understand and enforce, the Council should work with agencies and others to develop incentive programs that encourage innovative and effective

protection and preservation procedures. These could encourage compliance much more efficiently than the present enforcement model. This can be done pursuant to the program alternatives under § 800.14 of the rule.

Council should suspend this rulemaking, and develop a new rule that contains: (1) Procedures that the Federal and State agencies can process and apply; (2) provisions that assign burdens and responsibilities that non-Federal entities can understand and reasonably support; and (3) an approach to preservation that equitably apportions responsibility and cost, and provides positive incentives for compliance. The Council believes the rule presents reasonable procedures that Federal agencies can process and apply. The vast majority of the thousands of section 106 reviews under the current and past rules have been conducted and concluded by Federal agencies without serious problems. The fact that disagreements sometimes arise regarding certain findings and determinations does not mean the process cannot be applied but, rather, reflects that it is being applied correctly. Disagreements and working out solutions is simply a part of a consultative process. The Council notes that, like section 106 itself, the rule only place requirements on Federal agencies. The incentive for Federal agency compliance, beyond meeting legal obligations set by the NHPA, is the furtherance of the historic preservation policies of the Federal Government, as expressed in the NHPA.

I do not think that the 1999 regulations have resulted in, or will in the foreseeable future result in, much streamlining of the process. The reduction in Council involvement has created a void. SHPOs do not carry sufficient respect to fill that authority void. I recommend that the regulations require the Council be notified as soon as either the Agency official or the SHPO expresses an opinion that an effect will be adverse; and that the Council be a signatory to all MOAs and PAs. The notification requirement is already in the rule (see § 800.6(a)(1)). The Council will not become a signatory to all MOAs, since a decision has been made to streamline the process by relying more on the Federal agency and SHPO/THPO for routine cases.

General Positive

General positive comments are summarized below, without a Council response beyond stating its agreement.

A comment asked that the Council refrain from further restricting public participation or "other consulting party" involvement in any way. It also ask, that the Council not vest any further authority in the SHPO or reduce the involvement of SHPOs, THPOs, and other consulting parties in agency decision making.

Other comments stated that: (1) the elimination of the distinction between "no historic properties" and "no effect" was a move in the right direction; (2) the rule is working well and that positive responses by certain Federal agencies had been noted; (3) the rule is very specific and provides sound guidance for federal agencies and other parties; (4) the rule clearly establishes the roles and responsibilities of the parties; (4) the rule works well and provides an efficient framework for the administration of the Act; (5) project review has been streamlined by reducing the need for Council review; (6) the rule is operating well, has appropriately defined the role of Federal agencies as the responsible party for section 106 compliance, achieves the objective of streamlining the process, and incorporates changes enacted in the 1992 amendments; (7) Federal agencies are beginning to assume their appropriate role as the lead in the process, and the Council can focus on difficult cases and problem agencies; (8) the rules are an improvement over the 1986 regs; (9) the rule offers a constructive framework for consultation among SHPO, tribes and all interested parties.

Miscellaneous

Since implementing NHPA necessarily affects the agencies' regulatees, FCC recommends that the proposed rule include a "reasonable" time period for Federal agencies to develop their own implementing procedures. Federal agencies have always had the authority to develop implementing procedures pursuant to section 110(a)(2)(E). The Council has no role in setting deadlines for Federal agencies to develop these implementing procedures.

The deadlines for response from Council and SHPOs (15 days and 30 days) are reasonable—assuming adequate personnel to handle the workload. Because SHPO's are inadequately funded, they are understaffed to meet these time frames. Therefore, a 30 day review period for the Council and a 45-day review period for SHPOs is recommended. The Council disagrees. The current deadlines adequately balance the project need for expediency and the workloads of the Council and SHPO/THPOs.

General Tribal

In requesting that the role of THPO's and tribal representatives be clarified for those situations affecting properties of religious and cultural significance off tribal land, it is suggested that section 101(d)(2) limits THPO responsibilities and authority to tribal lands and does not require a Federal agency to consult with those tribes regarding properties of religious and cultural significance. The Council disagrees. Section 101(d)(6)(B) of the NHPA requires tribal consultation regarding historic properties of religious and cultural significance. Nothing in the statute makes a distinction that would limit such consultation to tribal lands.

It is inappropriate and illegal for Council to implement 1992 amendments regarding Indian Tribes through its proposed rule. Section 106 itself was not amended, and the Secretary of the Interior is the agency charged with promulgating regulations to implement the tribe-related amendments. The comment misreads the NHPA. The rule appropriately deals with tribal requirements as they directly relate to the section 106 process. The Council is authorized to promulgate rules to govern the implementation of section 106 "in its entirety." This authority necessarily covers all aspects that directly relate to the section 106 process. The 1992 amendments require Federal agencies to consult with tribes and Native Hawaiian Organizations in carrying out their Section 106 responsibilities. While the Department of the Interior provides assistance to tribes and fosters communication among tribes, SHPOs and agencies, it does not oversee the section 106 process nor have the requisite authority. It is noted that the Department of the Interior sits on the Council and voted in favor of adopting this rule.

Several THPOs have begun to request payment of fees for Section 106 consultation and have asserted THPO powers outside of tribal lands. Council could remove uncertainty and avoid delays by clarifying that THPOs are bound by the same rules as SHPOs and THPO authority extends only over tribal lands. This is a topic being addressed by the ongoing Telecommunications Working Group. Once the Council reaches a decision on this matter, it will be disseminated.

Concerned about several THPOs and tribal representatives requesting payment for the section 106 consultation required in the regulations and believes such actions are contrary to the regulations. This issue was raised by the wireless industry, and will be

addressed by the Telecommunications Working Group.

We would not support changes to grant expanded authority to tribes off tribal lands. We strongly support current provisions which enable tribes to participate, as appropriate. The Council agrees with this comment and did not expand the tribal role in this rule.

The proposed rule will impact us resulting in the consultation with Native Hawaiian organizations. The requirement for consultation with Native Hawaiian organizations will require expenditure of time and funds spent on EIS studies. The rule fails to specify which Hawaiian Native organizations (NHO) we would have to consult with, which may be many. The statute requires Federal agencies to conduct such consultation. The rule is not the appropriate venue for identifying specific NHOs. That is the responsibility of the Federal agency based on the potential to affect properties of significance to specific organizations.

E.O. 13084 has language that should be utilized in the section 106 process. EO 13084 addresses the development of Federal agency policies and regulations. The Council rule addresses individual projects and programs, and not these overall policies and rules developed by other agencies.

The regulations took a positive step regarding tribal input and participation. It works when the agency is truly in compliance with the regulations. Need to work on how tribes can be more involved; are legally involved in decision making without a specific agreement; and can be funded to conduct the work demanded by agencies and the regulations. The Council is developing guidance on tribal consultation.

The regulations conflict with the language and purpose of the Act by creating an artificial distinction between tribal properties depending on their location (on or off tribal lands). Tribes are provided lesser consultation rights where traditional cultural properties are located off tribal lands. The rule acknowledges tribal sovereignty on tribal lands, which necessarily distinguishes a tribe's role on and off tribal lands. The rule does not distinguish where properties are located, but only the scope of tribal involvement.

The regulations suggest that tribal governments and the interested public are at the same level of importance. This concept ignores the sovereign status of tribes and, as a result, Federal agencies are disrespecting some tribal treaties. An important statement of the tribal government role is missing. With the public on the same level as tribes, the public can gain access to documents that may compromise the confidentiality provisions of section 106. The Council disagrees. Section 800.2(c)(3) of the rule provides information for Federal agencies regarding sovereignty and the government-to-government responsibility. The public is simply notified and involved as appropriate but, unlike tribes in their land or regarding historic properties of significance to them, is not an entitled consulting party.

Legal Authority

Several comments questioned the Council's legal authority to issue the rule. The main arguments were that: (1) The Council was given advisory functions by the statute, and that the proposed rule transformed the role of the Council from purely advisory to one with substantive regulatory authority over other Federal agencies and parties; (2) the Council could only issue regulations regarding how it issued its comments (from the "reasonable opportunity to comment" provided by section 106); and (3) there was no statutory basis for a rule that dictates how an agency takes into account the effects of its undertakings or the Council's comments.

The Council believes that the rule is properly characterized as one providing a process to be followed. Nowhere does the rule impose an outcome on a Federal agency as to how it will decide whether or not to approve an undertaking, or how. The rule merely provides a process that assures that the Federal agency takes into account the effects of the undertaking on historic properties. It does not impose in any way whatsoever how such consideration will affect the final decision of the Federal agency on the undertaking. The rule does not provide anyone with a veto power over an undertaking.

Furthermore, the Council believes it has the authority to promulgate the present rule. Section 211 of the NHPA states that: "The Council is authorized to promulgate such rules and regulations as it deems necessary to govern the implementation of section 106 of [the NHPA] in its entirety." The phrase "in its entirety" was added by the 1992 amendments to the NHPA. Directly talking to the meaning of the "in its entirety" amendment, the summary of the amendments stated that: "This makes clear that the ACHP has the authority to define not only how agencies will afford the Council a reasonable opportunity to comment, but also how agencies should take effects on historic properties into account in their planning." Congressional Record, Senate, S 3575, March 19, 1991. This amendment was specifically introduced to address the authority issues raised earlier. Thus, it is clear that Congress has given the Council the authority to promulgate rules, such as the present one, setting forth how Federal agencies are to meet all their section 106 responsibilities to take into account the effects of their undertakings on historic properties, as well as to provide the Council with a reasonable opportunity to comment.

Moreover, the rule is solidly based on the requirements of the statute and, as Congress intended, provides a predictable framework which fleshes out those requirements. As stated before, section 106 specifically requires Federal agencies to take into account the effects of their undertakings on historic properties. 16 U.S.C. 470f. The first general step in the process under the rule requires Federal agencies to identify the historic properties that may be affected by the undertaking. 36 CFR 800.4. It is simply impossible for an agency to take into account the effects of its undertaking on historic properties if it does not even know what those historic properties are in the first place.

The second general step in the process is for the Federal agency to assess the effects of the undertaking on the historic property. 36 CFR 800.5. Again, an agency cannot take into account effects on historic properties if it does not first assess the nature of those effects. The Council has utilized its considered expertise on historic preservation to create the criteria of adverse effect that guides the end of this step.

The third general step in the process under the challenged rule is to consult to attempt resolving adverse effects to historic properties (through what is called a Memorandum of Agreement), if it has been determined the effects are actually adverse. 36 CFR 800.6. Such an approach is explicitly sanctioned by the statute under Section 110(l) of the National Historic Preservation Act. 16 U.S.C. 470h–2(l). Specifically, Section 110(l) of the statute states that:

> With respect to any undertaking subject to section 106 which adversely affects any [historic property], *and for which a Federal agency has not entered into an agreement pursuant to regulations issued by the Council, the head of such agency shall document any decision made pursuant to section 106. . . . Where a section 106 memorandum of agreement has been executed with respect to an undertaking,*

such memorandum shall govern the undertaking and all its parts.

Id. (emphasis added). It bears mentioning that this section was amended by Congress after the section 106 rule that went into effect in 1999. The amendment further conformed the statute to that 1999 rule, which was used as the proposal in the present rulemaking. Specifically, section 5(a)(8) of HR 834, amended the language of section 110(l) by striking "with the Council" and inserting "pursuant to regulations issued by the Council."

In the last general step in the process, the Council issues comments to the Federal agencies that fail to resolve adverse effects. Such a step is obviously contemplated in the requirements of section 106 that the Council be given "a reasonable opportunity to comment." 16 U.S.C. 470f.

The rule does provide for consultation with various parties throughout the process. Such consultation requirements with State Historic Preservation Officers, Tribal Historic Preservation Officers and certain federally recognized Indian Tribes and Native Hawaiian Organizations are solidly anchored on statutory requirements that Federal agencies consult with such parties. *See e.g.* 16 U.S.C. 470a(b)(3)(I), 470a(d)(2), and 470a(d)(6)(B). The general public is also given a general role under the rule, although such role does not rise to the level of that of consulting parties. The Council believes this role for the public is reasonable and authorized. The Federal agency's consideration of how its undertaking affects historic properties is enhanced and better informed by the participation of the consulting parties and the general public, for whose enjoyment and enrichment the NHPA seeks to protect historic properties. It must be kept in mind that such public is the one that lives in the communities and areas where the historic properties are located, and therefore may have uniquely informed viewpoints as to such properties. As stated above, the rule specifically states that Federal agencies can use their own procedures for public involvement in lieu of those under subpart B of this rule, so long as they provide adequate opportunities consistent with the rule. Such procedural consistency is no more than what the NHPA requires under 16 U.S.C. 470h–2(a)(2)(E).

Appointments Clause

Some comments argued that the present rulemaking process violates the Appointments Clause of the Constitution. This argument is summarized as follows: (a) The section 106 rule that went into effect in 1999 (1999 rule) was developed and adopted in violation of the Appointments Clause due to the participation of the Chairman of the National Trust on Historic Preservation (the Trust) and the President of the National Conference of State Historic Preservation Officers (NCSHPO) (both of whom are members of the Council not appointed by the President) in the development and adoption of that 1999 rule; and (b) since the content of that 1999 rule was used as the proposed rule in the present rulemaking, the present rulemaking process is incurably tainted and unconstitutional.

The Council strongly disagrees with such arguments. As has been stated before, the Trust and NCSHPO have not participated in any way whatsoever in the deliberations, decisions, votes, or any other Council activities related to this rulemaking. On June 23, 2000, the Council membership, minus the representatives of the Trust and NCSHPO, took a new vote on the adoption of the 1999 rule. It voted 16–0 in favor of the 1999 rule. As has been stated above, that 1999 rule was the culmination of six years of work by the Council members, Council staff, public comments and public meetings.

Again without the participation of the representatives of the Trust and NCSHPO, the Council proceeded to vote unanimously in favor of proceeding with the present rulemaking process, using the text of the 1999 rule as the proposed rule. Many of these Council members (all Presidential appointees) had participated in the drafting and original, unanimous adoption of the 1999 rule on February of 1999. On June 23, 2000, they decided to use that 1999 rule as the proposed rule. On November 17, 2000, after taking into account public comment and changing the proposed rule as they deemed appropriate, these Presidentially appointed Council members (without the participation of the representatives of the Trust and NCSHPO) voted to adopt the final rule now being published.

Any prior involvement in the rule does not represent the exercise of significant authority pursuant to the laws of the United States contemplated by the Appointments Clause. The Presidential appointees considering the draft, proposed rule during the 2000 rulemaking process were at full liberty to vote against it, amend it, or adopt it. In the end, the final decision to move forward with such draft was in their power.

In the present rulemaking, any act that could arguably be deemed an exercise of significant authority has been carried out solely by the Council's Presidential appointees.

Other Legal Issues

Certain comments indicated a belief that the proposed rule violates the Establishment Clause of the Constitution. The arguments stated that to the extent the proposed rule requires Federal agencies to conform their decisionmaking under section 106 based on the "religious and cultural significance" of properties (as determined by Tribes) it results in an excessive entanglement between the government and religion, impermissibly restricts the use of public lands on the basis of religion, and impermissibly establishes or favors religion, in violation of the Establishment Clause.

The Council strongly disagrees. The rule does not require Federal agencies to conform their decisionmaking based on the religious and cultural significance of properties. As stated before, the NHPA and the rule only clarify that properties of religious and cultural significance to Tribes "*may* be determined to be eligible for inclusion on the National Register." section 101(d)(6)(A) of the NHPA. Like any other property of any kind, in order for properties with such significance to be considered in the section 106 process, they must first meet the established, objective, secular criteria of the National Register of Historic Places. The determination as to whether a property meets that criteria is made by the Federal agency in concurrence with the SHPO/THPO or, in the case of disagreement, by the Keeper of the National Register. Furthermore, once a historic property has been so identified, all that Federal agencies are required to do is to take into account the effects of their undertaking on such property. Nothing whatsoever in the rule imposes an obligation on the Federal agency to change, reject or approve an undertaking based on the religious and cultural significance of a property.

The rule and section 101(d)(6) of the NHPA only require consultation with Indian Tribes regarding those historic properties of significance to them. The Federal agency must consult with such Tribes, but is nowhere required to abide by the opinions expressed by the Tribes in such consultations. Furthermore, such consultation provisions are fully justified and reasonable. They do not provide Tribes with a "special treatment," but rather a rational treatment. Just as it would be common sense for a person to consult, for example, with the Navy in order to seek a better understanding of the history of

Pearl Harbor, it is more than rational to go to Tribes to seek a better understanding of historic properties to which they attach a religious and cultural significance. Due to their history and experience with such properties, such Tribes are in a specially advantageous position to provide valuable information about them. At the very least, the Council believes that these Tribal consultation provisions of the rule and of section 101(d)(6) of the NHPA are tied rationally to the fulfillment of the Federal Government's unique obligations towards Tribes. See *Morton* v. *Mancari*, 417 U.S. 535 (1974).

IV. Description of Meaning and Intent of Specific Sections

The following information clarifies the meaning and intent behind particular sections of the final rule.

Subpart A—Purposes and Participants

Section 800.1(b). This section makes clear that references in the section 106 regulations are not intended to give any additional authority to implementing guidelines, policies or procedures issued by any other Federal agency. Where such provisions are cited, they are simply to assist users in finding related guidance, which is non-binding, or requirements of related laws, which may be mandatory depending on the particular law itself.

Section 800.1(c). The purpose of this section is to emphasize the flexibility an Agency Official has in carrying out the steps of the section 106 process, while acknowledging that early initiation of the process is essential and that actions taken to meet the procedural requirements must not restrict the effective consideration of alternatives related to historic preservation issues in later stages of the process.

Section 800.2(a). The term "Agency Official" is intended to include those Federal officials who have the effective decision making authority for an undertaking. This means the ability to agree to such actions as may be necessary to comply with section 106 and to ensure that any commitments made as a result of the section 106 process are indeed carried out. This authority and the legal responsibilities under section 106 may be assumed by non-Federal officials only when there is clear authority for such an arrangement under Federal law, such as under certain programs administered by the Department of Housing and Urban Development. This subsection indicates that the Federal Agency must ensure that the Agency Official "takes . . . financial responsibility for section 106 compliance . . ." This phrase is not to be construed as prohibiting Federal agencies from passing certain section 106 compliance costs to applicants. Such a construction of the regulation would contravene section 110(g) of the NHPA and 16 U.S.C. 469c–2. The intent behind the reference to "financial responsibility" in the regulation is, as stated above, to ensure that the Agency Official has the effective decision making authority for an undertaking.

Section 800.2(a)(1). This reference to the Secretary's professional standards is intended to remind Federal agencies that this independent but related provision of the Act may affect their compliance with section 106.

Section 800.2(a)(2). This provision allows, but does not require, Federal agencies to designate a lead agency for section 106 compliance purposes. The lead agency carries out the duties of the Agency Official for all aspects of the undertaking. The other Federal agencies may assist the lead agency as they mutually agree. When compliance is completed, the other Federal agencies may use the outcome to document their own compliance with section 106 and must implement any provisions that apply to them. This provision does not prohibit an agency to independently pursue compliance with section 106 for its obligations under section 106, although this should be carefully coordinated with the lead agency. A lead agency can sign the Memorandum of Agreement for other agencies, so long as that is part of the agreement among the agencies for creating the lead agency arrangement. It should also be clear in the Memorandum of Agreement.

Section 800.2(a)(4). This section sets forth the general concepts of consultation. It identifies the duty of Federal agencies to consult with other partes at various steps in the section 106 process and acknowledges that consultation varies depending on a variety of factors. It also encourages agencies to coordinate section 106 consultation with that required under other Federal laws and to use existing agency processes to promote efficiency.

Section 800.2(b). The Council will generally not review the determinations and decisions reached in accordance with these regulations by the Agency Official and appropriate consulting parties and not participate in the review of most section 106 cases. However, because the statutory obligation of the Federal agency is to afford the Council a reasonable opportunity to comment on its undertaking's effects upon historic properties, the Council will oversee the section 106 process and formally become a party in individual consultations when it determines there are sufficient grounds to do so. These are set forth in Appendix A. The Council also will provide participants in the section 106 process with its advice and guidance in order to facilitate completion of the section 106 review.

Section 800.2(c). This section sets a standard for involving various consulting parties. The objective is to provide parties with an effective opportunity to participate in the section 106 process, relative to the interest they have to the historic preservation issues at hand.

Section 800.2(c)(1). This section recognizes the central role of the SHPO in working with the Agency Official on section 106 compliance in most cases. It also delineates the manner in which the SHPO may get involved in the section 106 process when a THPO has assumed SHPO functions on tribal lands.

Section 800.2(c)(2). The role of THPO was created in the 1992 amendments to the Act. This section tracks the statutory provision relating to THPO assumption of the SHPO's section 106 role on tribal lands. In such circumstances, the THPO substitutes for the SHPO and the SHPO participates in the section 106 process only as specified in 800.2(c)(1) or as a member of the public. This section also specifies that in those instances where an undertaking occurs on or affects properties on tribal lands and a tribe has not officially assumed the SHPO's section 106 responsibilities on those lands, the Agency Official still consults with the SHPO, but also consults with a representative designated by the Indian tribe. Such designation is made in accordance with tribal law and procedures. However, if the tribe has not designated such a representative, the Agency Official would consult with the tribe's chief elected official, such as the tribal chairman.

Section 800.2(c)(3). This section embodies the statutory requirement for Federal agencies to consult with Indian tribes and Native Hawaiian organizations throughout the section 106 process when they attach religious and cultural significance to historic properties that may be affected by an undertaking. It is intended to promote continuing and effective consultation with those parties throughout the section 106 process. Such consultation is intended to be conducted in a manner that is fully cognizant of the legal rights of Indian tribes and that is sensitive to their cultural traditions and practices.

Section 800.2(c)(3)(i). This subsection has two main purposes. First, it emphasizes the importance of involving Indian tribes and Native Hawaiian organizations early and fully at all stages of the section 106 process.

Second, Federal agencies should solicit tribal views in a manner that is sensitive to the governmental structures of the tribes, recognizing that confidentiality and communication issues may require Federal agencies to allow more time for the exchange of information. Also, this section states that the Agency Official must make a "reasonable and good faith effort" to identify interested tribes and Native Hawaiian organizations. This means that the Agency Official may have to look beyond reservations and tribal lands in the project's vicinity to seek information on tribes that had been historically located in the area, but are no longer there.

Section 800.2(c)(3)(iii). This subsection emphasizes the need to consult with Indian tribes on a government-to-government basis. The Agency Official must consult with the appropriate tribal representative, who must be selected or designated by the tribe to speak on behalf of the tribe. Matters of protocol are important to Indian tribes. Indian tribes and Native Hawaiian organization may be reluctant to share information about properties to which they attach religious and cultural significance. Federal agencies should recognize this and be willing to identify historic properties without compromising concerns about confidentiality. The Agency Official should also be sensitive to the internal workings of a tribe and allow the time necessary for the tribal decision making process to operate.

Section 800.2(c)(3)(iv). This subsection reminds Federal agencies of the statutory duty to consult with Indian tribes and Native Hawaiian organizations whether or not the undertaking or its effects occur on tribal land. Agencies should be particularly sensitive in identifying areas of traditional association with tribes or a Native Hawaiian organizations, where historic properties to which they attach religious and cultural significance may be found.

Section 800.2(c)(3)(v). Some Federal agencies have or may want to develop special working relationships with Indian tribes or Native Hawaiian organization to provide specific arrangements for how they will adhere to the steps in the section 106 process and enhance the participation of tribes and Native Hawaiian organizations. Such agreements are not mandatory; they may be negotiated at the discretion of Federal agencies. The agreements cannot diminish the rights set forth in the regulations for other parties, such as the SHPO, without that party's express consent.

Section 800.2(c)(3)(vi). The signature of tribes is required where a Memorandum of Agreement concerns tribal lands. However, if a tribe has not formally assumed the SHPO's responsibilities under section 101(d)(2) the tribe may waive its signature rights at its discretion. This will allow tribes the flexibility of allowing agreements to go forward regarding tribal land, but without condoning the agreement with their signature.

Section 800.2(c)(4). Affected local governments must be given consulting party status if they so request. Under § 800.3(f)(1), Agency Officials are required to invite such local governments to be consulting parties. This subsection provides for that status and also reminds Federal agencies that some local governments may act as the Agency Official when they have assumed section 106 legal responsibilities, such as under certain programs administered by the Department of Housing and Urban Development.

Section 800.2(c)(5). Applicants for Federal assistance or for a Federal permit, license or other approval are entitled to be consulting parties. Under § 800.3(f)(1), Agency Officials are required to invite them to be consulting parties. Also, Federal agencies have the legal responsibility to comply with section 106 of the NHPA. In fulfilling their responsibilities, Federal agencies sometimes choose to rely on applicants for permits, approvals or assistance to begin the 106 process. The intent was to allow applicants to contact SHPOs and other consulting parties, but agencies must be mindful of their government-to-government consultation responsibilities when dealing with Indian tribes. If a Federal agency implements its 106 responsibilities in this way, the Federal agency remains legally responsible for the determinations. Applicants that may assume responsibilities under a Memorandum of Agreement must be consulting parties in the process leading to the agreement.

Section 800.2(c)(6). This section allows for the possibility that other individuals or entities may have a demonstrated special interest in an undertaking and that Federal agencies and SHPO/THPOs should consider the involvement of such individuals or entities as consulting parties. This might include property owners directly affected by the undertaking, non-profit organizations with a direct interest in the issues or affected businesses. Under § 800.3(f)(3), upon written request and in consultation with the SHPO/THPO and any Indian tribe upon whose tribal lands an undertaking occurs or affects historic properties, an Agency Official may allow certain individuals under § 800.2(c)(6) to become consulting parties.

Section 800.2(d)(1). Public involvement is a critical aspect of the 106 process. This section is intended to set forth a standard that Federal agencies must adhere to as they go through the section 106 process. The type of public involvement will depend upon various factors, including but not limited to, the nature of the undertaking, the potential impact, the historic property, and the likely interest of the public. Confidentiality concerns include those specified in section 304 of the Act and legitimate concerns about proprietary information, business plans and privacy of property owners.

Section 800.2(d)(2). This subsection is intended to set the notice standard. Notice, with sufficient information to allow meaningful comments, must be provided to the public so that the public can express its views during the various stages and decision making points of the process.

Section 800.2(d)(3). It is intended that Federal agencies have flexibility in how they involve the public, including the use of NEPA and other agency planning processes, as long as opportunities for such public involvement are adequate and consistent with subpart A of the regulations.

Subpart B—The section 106 Process

Section 800.3. This new section is intended to encourage Federal agencies to integrate the section 106 process into agency planning at its earliest stages.

Section 800.3(a). The determination of whether or not an undertaking exists is the Agency Official's determination. The Council may render advice on the existence of an undertaking, but ultimately this remains a Federal agency decision.

Section 800.3(a)(1). This section explains that if there is an undertaking, but it is not a type of activity that has the potential to affect a historic property, then the agency is finished with its section 106 obligations. There is no consultation requirement for this decision.

Section 800.3(a)(2). This is a reminder to Federal agencies that adherence to the standard 106 process in Subpart B is inappropriate where the undertaking is governed by a program alternative established pursuant to § 800.14.

Section 800.3(b). This section does not impose a mandatory requirement on Federal agencies. It emphasizes the benefit of coordinating compliance with related statutes so as to enhance

efficiency and avoid duplication of efforts, but the decision is up to the Agency Official. Agencies are encouraged to use the information gathered for these other processes to meet section 106 needs, but the information must meet the standards in these regulations.

Section 800.3(c). This sets forth the responsibility to properly identify the appropriate SHPO or THPO that must be consulted. If the undertaking is on or affects historic properties on tribal lands, then the agency must determine what tribe is involved and whether the tribe has assumed the SHPO's responsibilities for section 106 under section 101(d)(2) of the Act. A list of such tribes is available from the National Park Service.

Section 800.3(c)(1). This section reiterates that the tribe may assume the role of the SHPO on tribal land and tracks the language of the Act in specifying how certain owners of property on tribal lands can request SHPO involvement in a section 106 case in addition to the THPO.

Section 800.3(c)(2). This section is the State counterpart to Federal lead agencies and has the same effect. It allows a group of SHPOs to agree to delegate their authority under these regulations for a specific undertaking to one SHPO.

Section 800.3(c)(3). This section reinforces the notion that the conduct of consultation may vary depending on the agency's planning process, the nature of the undertaking and the nature of its effects.

Section 800.3(c)(4). This section makes it clear that failure of an SHPO/THPO to respond within the time frames set by the regulation permit the agency to assume concurrence with the finding or to consult about the finding or determination with the Council in the SHPO/THPO's absence. It also makes clear that subsequent involvement by the SHPO/THPO is not precluded, but the SHPO/THPO cannot reopen a finding or determination that it failed to respond to earlier.

Section 800.3(d). This section specifies that, on tribal lands, the Agency Official consults with both the Indian tribe and the SHPO when the tribe has not formally assumed the responsibilities of the SHPO under section 101(d)(2) of the Act. It also allows the section 106 process to be completed even when the SHPO has decided not to participate in the process, and for the SHPO and an Indian tribe to develop tailored agreements for SHPO participation in reviewing undertakings on the tribe's lands.

Section 800.3(e). This section requires the Agency Official to decide early how and when to involve the public in the section 106 process. It does not require a formal "plan," although that might be appropriate depending upon the scale of the undertaking and the magnitude of its effects on historic properties.

Section 800.3(f). This is a particularly important section, as it requires the Agency Official at an early stage of the section 106 process to consult with the SHPO/THPO to identify those organizations and individuals that will have the right to be consulting parties under the terms of the regulations. These include local governments, Indian tribes and Native Hawaiian organizations and applicants for Federal assistance or permits, especially those who may assume a responsibility under a Memorandum of Agreement (see § 800.6(c)(2)(ii)). Others may request to be consulting parties, but that decision is up to the Agency Official.

Section 800.3(g). This section makes it clear that an Agency Official can combine individual steps in the section 106 process with the consent of the SHPO/THPO. Doing so must protect the opportunity of the public and consulting partes to participate fully in the section 106 process as envisioned in § 800.2.

Section 800.4(a). This section sets forth the consultative requirements involved in the scoping efforts at the beginning stages of the identification process. The Agency Official must consult with the SHPO/THPO in fulfilling the steps in subsections (1) through (4). This section emphasizes the need to consult with the SHPO/THPO at all steps in the scoping process. It also highlights the need to seek information from Indian tribes and Native Hawaiian organizations with regard to properties to which they attach religious and cultural significance, while being sensitive to confidentiality concerns. Where Federal agencies are engaged in an action that is on or may affect ancestral, aboriginal or ceded lands, Federal agencies must consult with Indian tribes and Native Hawaiian organizations with regard to historic properties of traditional religious and cultural significance on such lands.

Section 800.4(b). This section sets out the steps an Agency Official must follow to identify historic properties. It is close to the section 106 process under the 1986 regulations, with increased flexibility of timing and greater involvement of Indian tribes and Native Hawaiian organizations in accordance with the 1992 amendments to the Act.

Section 800.4(b)(1). This section on level of effort required during the identification processes has been added to allow for flexibility. It sets the standard of a reasonable and good faith effort on behalf of the agency to identify properties and provides that the level of effort in the identification process depends on numerous factors including, among others listed, the nature of the undertaking and its corresponding potential effects on historic properties.

Section 800.4(b)(2). This new section is also intended to provide Federal agencies with flexibility when several alternatives are under consideration and the nature of the undertaking and its potential scope and effect has therefore not yet been completely defined. The section also allows for deferral of final identification and evaluation if provided for in an agreement with the SHPO/THPO or other circumstances. Under this phased alternative, Agency Officials are required to follow up with full identification and evaluation once project alternatives have been refined or access has been gained to previously restricted areas. Any further deferral of final identification would complicate the process and jeopardize an adequate assessment of effects and resolution of adverse effects.

Section 800.4(c). This section sets out the process for determining the National Register eligibility of properties not previously evaluated for historic significance.

Section 800.4(c)(2). This section provides that if an Indian tribe or Native Hawaiian organization disagrees with a determination of eligibility involving a property to which it attaches religious and cultural significance, then the tribe can ask the Council to request that the Agency Official obtain a determination of eligibility. The Council retains the discretion as to whether or not it should make the request of the Agency Official. This section was intended to provide a way to ensure appropriate determinations regarding properties, located off tribal lands, to which tribes attach religious and cultural significance.

Section 800.4(d)(1). This section describes the closure point in the section 106 process where no historic properties are found or no effects on historic properties are found. Consulting parties must be specifically notified of the determination, but members of the public need not receive direct notification; the Federal agency must place its documentation in a public file prior to approving the undertaking, and provide access to the information when requested by the public. Once the consulting parties are notified, the SHPO/THPO has 30 days to object to the determination. The Council may also

object on its own initiative within the time period. Lack of such objection within the 30 day period means that the agency need not take further steps in the Section 106 process.

Section 800.4(d)(2). This section requires that the Federal agency proceed to the adverse effect determination step where it finds that historic properties may be affected or the SHPO/THPO or Council objects to a no historic properties affected finding. The agency must notify all consulting parties.

Section 800.5(a). This section provides for Indian tribe and Native Hawaiian organization consultation where historic properties to which they attach religious and cultural significance are involved. This section also requires the Agency Official to consider the views of consulting parties and the public that have already been provided to the Federal agency.

Section 800.5(a)(1). This section codifies the practice of the Council in considering both direct and indirect effects in making an adverse effect determination. This section allows for consideration of effects on the qualifying characteristics of a historic property that may not have been part of the property's original eligibility evaluation. The last sentence in this section is intended to amplify the indirect effects concept, similar to the NEPA regulations, which calls for consideration of such effects when they are reasonably foreseeable effects.

Section 800.5(a)(2)(ii). The list of examples of adverse effects has been modified by eliminating the exceptions to the adverse effect criteria. However, if a property is restored, rehabilitated, repaired, maintained, stabilized, remediated or otherwise changed in accordance with the Secretary's standards, then it will not be considered an adverse effect.

Section 800.5(a)(2)(iii). This subsection, along with § 800.5(a)(2)(I), would encompass recovery of archeological data as an adverse effect, even if conducted in accordance with the Secretary's standards. This acknowledges the reality that destruction of a site and recovery of its information and artifacts is adverse. It is intended that in eliminating data recovery as an exception to the adverse effect criteria, Federal agencies will be more inclined to pursue other forms of mitigation, including avoidance and preservation in place, to protect archeological sites.

Section 800.5(a)(2)(iv). This section tracks the National Register criteria regarding the relation of alterations to a property's use or setting to the significance of the property.

Section 800.5(a)(2)(v). This section tracks the language of the National Register criteria as it pertains to the property's integrity.

Section 800.5(a)(2)(vi). This section acknowledges that where properties of religious and cultural significance to Indian tribes or Native Hawaiian organizations are involved, neglect and deterioration may be recognized as qualities of those properties and thus may not necessarily constitute an adverse effect.

Section 800.5(a)(2)(vii). If a property is transferred leased or sold out of Federal ownership with proper preservation restrictions, then it will not be considered an adverse effect. Transfer between Federal agencies is not an adverse effect per se; the purpose of the transfer should be evaluated for potential adverse effects, so that they can be considered before the transfer takes place.

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

Section 800.5(b). This section allows SHPO/THPO's the ability to suggest changes in a project or suggest conditions so that adverse effects can be avoided and thus result in a no adverse effect determination. It is also written to emphasize that a finding of no adverse effect is only a proposal when the Agency Official submits it to the SHPO/THPO for review. This provision also acknowledges that the practice of "conditional No Adverse Effect determinations" is acceptable.

Section 800.5(c). The Council will not review "no adverse effect" determinations on a routine basis. The Council will intervene and review no adverse effect determinations if it deems it appropriate based on the criteria listed in Appendix A or if the SHPO/THPO or another consulting party and the Federal agency disagree on the finding and the agency cannot resolve the disagreement. The SHPO/THPO and any consulting party wishing to disagree to the finding must do so within the 30-day review period. If Indian tribes or Native Hawaiian organizations disagree with the finding, they can request the Council's review directly, but this must be done within the 30 day review period. If a SHPO/THPO fails to respond to an Agency Official finding within the 30 day review period, then the Agency Official can consider that to be SHPO/THPO agreement with the finding. When a finding is submitted to the Council, it will have 15 days for review; if it fails to respond within the 15 days, then the Agency Official may assume Council concurrence with the finding. When it reviews no adverse effect determinations, the Council will limit its review to whether or not the criteria have been correctly applied.

Section 800.5(d). Agencies must retain records of their findings of no adverse effect and make them available to the public. This means that the public should be given access to the information, subject to FOIA and other statutory limits on disclosure such as section 304 of the NHPA, when they so request. Failure of the agency to carry out the undertaking in accordance with the finding requires the Agency Official to reopen the section 106 process and determine whether the altered course of action constitutes an adverse effect. A finding of adverse effect requires further consultation on ways to resolve it.

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

Section 800.6(a)(2). This section allows for the entry of new consulting parties if the agency and the SHPO/THPO (and the Council, if participating) agree. If they do not agree, it is desirable for them to seek the Council's opinion on the involvement of the consulting party. Any party, including applicants, licensees or permittees, that may have responsibilities under a Memorandum of Agreement must be invited to participate as consulting parties in reaching the agreement.

Section 800.6(a)(3). This section specifies the Agency Official's

obligation to provide project documentation to all consulting partes at the beginning of the consultation to resolve adverse effects. Particular note should be made of the reference to the confidentiality provisions.

Section 800.6(a)(4). The Federal agency must provide an opportunity for members of the public to express their views on an undertaking. The provision embodies the principles of flexibility, relating the agency effort to various aspects of the undertaking and its effects upon historic properties. The Federal agency must provide them with notice such that the public has enough time and information to meaningfully comment. If all relevant information was provided at earlier stages in the process in such a way that a wide audience was reached, and no new information is available at this stage in the process that would assist in the resolution of adverse effects, then a new public notice may not be warranted. However, this presumes that the public had the opportunity to make its views known on ways to resolve the adverse effects.

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

Section 800.6(b). If the Council is not a part of the consultation, then a copy of the Memorandum of Agreement must be sent to the Council so that the Council can include it in its files to have an understanding of a Federal agency's implementation of section 106. This does not provide the Council an opportunity to reopen the specific case, but may form the basis for other actions or advice related to an agency's overall performance in the section 106 process.

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

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

Section 800.6(c). This section details the provisions relating to Memoranda of Agreement. This document evidences an agency's compliance with section 106 and the agency is obligated to follow its terms. Failure to do so requires the Agency Official to reopen the section 106 process and bring it to suitable closure as prescribed in the regulations.

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

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

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

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

Section 800.7. This section specifies what happens when the consulting parties cannot reach agreement. Usually when consultation is terminated, the Council renders advisory comments to the head of the agency, which must be considered when the final agency decision on the undertaking is made.

Section 800.7(a)(1). This section requires that the head of the agency or an Assistant Secretary or officer with major department-wide or agency-wide responsibilities must request Council comments when the Agency Official terminates consultation. Section 110(l) of the NHPA requires heads of agencies to document their decision when an agreement has not been reached under section 106. If the agency head is responsible for documenting the decision, it is appropriate that the same individual request the Council's comments.

Section 800.7(a)(2). This section allows the Council and the Agency Official to conclude the section 106 process with a Memorandum of Agreement between them if the SHPO terminates consultation.

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

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

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

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

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

Section 800.8. This major section guides how Federal agencies can coordinate the section 106 process with NEPA compliance. It is intended to allow compliance with section 106 to be incorporated into the NEPA documentation process while preserving the legal requirements of each statute.

Section 800.8(a)(1). This section encourages agencies to coordinate NEPA and section 106 compliance early in the planning process. It emphasizes that impacts on historic properties should be considered when an agency makes evaluations of its NEPA obligations, but makes clear that an adverse effect

finding does not automatically trigger preparation of an EIS.

Section 800.8(a)(2). This section encourages consulting parties in the section 106 process to be prepared to consult with the Agency Official early in the NEPA process.

Section 800.8(a)(3). This section encourages agencies to include historic preservation issues in the development of various NEPA assessments and documents. This is essential for effective coordination between the two processes. It is intended to discourage agencies from postponing consideration of historic properties under NEPA until later initiation of the section 106 process.

Section 800.8(b). This section notes that a project, activity or program that falls within a NEPA categorical exclusion may still require section 106 review. An exclusion from NEPA does not necessarily mean that section 106 does not apply.

Section 800.8(c). This section offers Federal agencies an opportunity for major procedural streamlining when NEPA and section 106 both apply to a project. It allows the agency, when specific standards are met, to substitute preparation of an EA or an EIS for the specific steps of the section 106 process set out in these regulations.

Section 800.8(c)(1). This section lists the standards that must be adhered to when developing NEPA documents that are intended to incorporate 106 compliance. They are intended to ensure that the objectives of the section 106 process are being met even though the specific steps of the process are not being followed.

Section 800.8(c)(2). This section provides for Council and consulting party review of the agency's environmental document within NEPA's public comment review time frame. Consulting parties and the Council may object prior to or within this time frame to adequacy of the document.

Section 800.8(c)(3). If there is an objection to the NEPA document, the Council has 30 days to state whether or not it agrees with the objection. If the Council agrees with the objection, the Agency Official must complete the section 106 process through development of a Memorandum of Agreement or obtaining formal Council comment (§ 800.6–7). If it does not, then the Agency Official can complete its review under § 800.8.

Section 800.8(c)(4). This subsection explains how Agency Officials using NEPA coordination must finalize their section 106 compliance for those cases where an adverse effect is found. The Agency must document the proposed mitigation measures. A binding commitment with the proposed measures must be adopted. In the case of a FONSI, the binding commitment must be in the form of an MOA, drafted in accordance with § 800.6(c). Although the regulations do not send Agency Officials back to § 800.6(b) (regarding consultation towards an MOA), Agency Officials are reminded of the standards they must still follow under § 800.8(c)(1), and specifically the mitigation measures' consultation under § 800.8(c)(1)(v). In the case of an EIS, although a Memorandum of Agreement under § 800.6(c) is not required, an appropriate binding commitment must still be adopted. Finally, the subsection also clarifies the Agency Official's obligation to ensure that its approval of the undertaking is conditioned accordingly.

Section 800.8(c)(5). This section requires Federal agencies to supplement their NEPA documents or abide by §§ 800.3 through 800.6 in the event of a change in the proposed undertaking that alters the undertaking's impact on historic properties.

Section 800.9. This section delineates the methods the Council will use to oversee the operation of the section 106 process. The Council draws upon its general advisory powers and specific provisions of the NHPA to conduct these actions.

Section 800.9(a). This section emphasizes the right of the Council to provide advice at any time in the process on matters related to the section 106 process.

Section 800.9(b). A foreclosure means that an agency has gone forward with an undertaking to such an extent that the Council can not provide meaningful comments. A finding of foreclosure by the Council means that the Council has determined that the Federal agency has not fulfilled its section 106 responsibilities with regard to the undertaking. Such a finding does not trigger any specific action, but represents the opinion of the Council as the agency charged by statute with issuing the regulations that implement section 106.

Section 800.9(c). This section reiterates the requirements of section 110(k) of the Act added in 1992. It also provides a process by which the Council will comment if the Federal agency decides that circumstances may justify granting the assistance. If after considering the comments, the Federal agency does decide to grant the assistance, then the Federal agency must comply with section 106 for any historic properties that still may be affected. This does not require duplication of consultation that may have already taken place with the Council in the course of addressing 110(k), but is intended to ensure that the agency has meaningful consultation with the Council as to mitigating adverse effects if the agency decides to proceed with approving the undertaking.

Section 800.9(d). As the Council reduces its involvement in routine cases, it will be focusing its efforts more and more on agency programs and overall compliance with the section 106 process. The NHPA authorizes the Council to obtain information from Federal agencies and make recommendations on improving operation of the section 106 process. If the Council finds that an agency or a SHPO/THPO has not carried out its section 106 responsibilities properly, it may enter the section 106 process on an individual case basis to make improvement. The Council may also review agency operations and performance and make specific recommendations for improvement under section 202(a)(6) of the Act.

Section 800.10. This section provides a process for how Federal agencies must afford the Council a reasonable opportunity to comment on historic landmarks. It is largely unchanged from the process under previous regulations.

Section 800.11. This section sets forth the requirements for documentation at various steps in the section 106 process. It makes documentation requirements clearer and promotes agency use of documentation prepared for other planning requirements.

Section 800.11(a). The section allows for the phasing of documentation requirements when an agency is conducting phased identification and evaluation. The Council can advise on the resolution of disputes over adherence to documentation standards. However, the ultimate responsibility for compiling adequate documentation rests with the agency. During the consideration of any disputes over documentation, the process is not formally suspended. However, agencies should resolve significant disputes before going forward too far in the section 106 process in order to avoid subsequent delays.

Section 800.11(b). This section allows for the use of documents prepared for NEPA or other agency planning processes to fulfill this provision as long as those documents meet the standards in this section.

Section 800.11(c). This section is intended to protect the rights of private property owners with regard to proprietary information, and Indian

tribes and Native Hawaiian organizations with regard to properties to which they attach religious and cultural significance. This section emphasizes that the regulations are subject to any other Federal statutes which protect certain kinds of information from full public disclosure. The role of the Secretary and the process of consultation with the Council are based on the statutory requirements of section 304 of the Act.

Section 800.11(d)–(f). These sections specify the documentation standards for various findings or actions in the section 106 process. They are incrementally more detailed as the historic preservation issues become more substantial or complex. Each is intended to provide basic information so that a third-party reviewer can understand the basis for an agency's finding or proposed decision.

Section 800.12. This section deals with emergency situations and generally follows the approach of previous regulations.

Section 800.12(a). This section encourages Federal agencies to develop procedures describing how the Federal agency will take into account historic properties during certain emergency operations, including imminent threats to life or property. The nature of the consultation required in developing such procedures will vary, depending upon the extent of actions covered by the procedures. The procedures must be approved by the Council if they are to substitute for Subpart B.

Section 800.12(b). If there are no agency procedures for taking historic properties into account during emergencies, then the Federal agency may either follow a previously-developed Programmatic Agreement or notify the Council, SHPO/THPO and, where appropriate, an Indian tribe or Native Hawaiian organization concerned with potentially affected resources. If possible, the Federal agency should provide these parties 7 days to comment.

Section 800.12(c). This section permits a local government that has assumed section 106 responsibilities to use the provisions of § 800.12(a) and (b). However, if the Council or an SHPO/THPO objects, the local government must follow the normal section 106 process.

Section 800.12(d). A Federal agency may use the provisions in § 800.12 only for 30 days after an emergency or disaster has been declared, unless an extension is sought.

Section 800.13. This section deals with resources discovered after section 106 review has been completed.

Section 800.13(a). This section emphasizes the utility of developing Programmatic Agreements to deal with discoveries of historic properties which may occur during implementation of an undertaking. If there is no Programmatic Agreement to deal with discoveries, and the Agency Official determines that other historic properties are likely to be discovered, then a plan for how discoveries will be addressed must be included in a no adverse effect finding or a Memorandum of Agreement.

Section 800.13(b)(1). This section states the procedures that must be followed when construction has not yet occurred or an undertaking has not yet been approved. Because a Federal agency has more flexibility at this stage, adherence to the consultative process as set forth in § 800.6 is appropriate.

Section 800.13(b)(2). This section provides that where an archeological site has been discovered and where the Agency Official, SHPO/THPO and any appropriate Indian tribe or Native Hawaiian organization agree that it is of value solely for the data that it contains, the Agency Official can comply with the Archeological and Historic Preservation Act instead of the procedures in this subpart.

Section 800.13(b)(3). This section sets forth the procedures that must be followed when the undertaking has been approved and construction has commenced. Development of actions to resolve adverse effects and notification to the SHPO/THPO and the Council within 48 hours of the discovery are required. Comments from those parties are encouraged and the agency must report the actions it ended up taking to deal with the discovery.

Section 800.13(c). This section allows an agency to make an expedited field judgment regarding eligibility of properties discovered during construction.

Subpart C—Program Alternatives

Section 800.14. This section lays out a variety of alternative methods for Federal agencies to meet their section 106 obligations. They allow agencies to tailor the section 106 process to their needs.

Section 800.14(a). Alternate procedures are a major streamlining measure that allows tailoring of the section 106 process to Agency programs and decisionmaking processes. The procedures would substitute in whole or in part for the Council's section 106 regulations. As procedures, they would include formal Agency regulations, but would also include departmental or Agency procedures that do not go through the formal rulemaking process. Procedures must be developed in consultation with various parties as set forth in the regulations. The public must have an opportunity to comment on Alternate procedures. If the Council determines that they are consistent with its regulations, the alternate procedures may substitute for the Council's regulations. In reviewing alternate procedures for consistency, the Council will not require detailed adherence to every specific step of the process found under the Council's regulations. The Council, however, will look for procedures that afford historic properties consideration equivalent to that afforded by the Council's regulations and that meet the requirements of section 110(a)(2)(E) of the Act. If an Indian tribe has substituted its procedures for the Council's regulations pursuant to section 101(d)(5) of the NHPA, then the Federal agency must follow the agreement with the Council and the tribe's substitute regulations for undertakings on tribal lands.

Section 800.14(b). This section retains the concept of Programmatic Agreements. The circumstances under which a Programmatic Agreement is appropriate are specified. The section places Programmatic Agreements into two general categories: those covering agency programs and those covering complex or multiple undertakings. The section on Agency programs makes clear that the President of NCSHPO must sign a nationwide agreement when NCSHPO has participated in the consultation. If a Programmatic Agreement concerns a particular region, then the signature of the affected SHPOs/THPOs is required. An individual SHPO/THPO can terminate its participation in a regional Programmatic Agreement, but the agreement will remain in effect for the other states in the region. Only NCSHPO can terminate a nationwide Programmatic Agreement on behalf of the individual SHPOs. Language is included to recognize tribal sovereignty while providing flexibility to Federal agencies and tribes when developing Programmatic Agreements. While it does not prohibit the other parties from executing a Programmatic Agreement, the language does limit the effect of the agreement to non-tribal lands unless the tribe executes it. However, the language also authorizes multiple Indian tribes to designate a representative tribe or tribal organization to participate in consultation and sign a Programmatic Agreement on their behalf. Requirements for public involvement and notice are included. The section on complex or multiple undertakings ties

back to § 800.6 for the process of creating such programmatic agreements.

Section 800.14(c). Exemptions are intended to remove from section 106 compliance those undertakings that have foreseeable effects on historic properties which are likely to be minimal. Section 214 of the NHPA gives the Council the authority to allow for such exemptions. This section sets forth the criteria, drawn from the statute, for exemptions and a process for obtaining (and terminating) an exemption.

Section 800.14(d). Standard treatments provide a streamlined process by which the Council can establish certain acceptable practices for dealing with a category of undertakings, effects, historic properties, or treatment options. A standard treatment may modify the application of the normal section 106 process under certain circumstances or simplify the steps or requirements of the regulations. This section sets forth the process for establishing a standard treatment and terminating it.

Section 800.14(e). Program comments are intended to give the Council the flexibility to issue comments on a Federal program or class of undertakings rather than comment on such undertakings on a case-by-case basis. This section sets forth the process for issuing such comments and withdrawing them. The Federal agency is obligated to consider, but not necessarily follow, the Council's comments. If it does not, the Council may withdraw the comment, in which case the agency continues to comply with section 106 on a case-by-case basis.

Section 800.14(f). The requirement for consultation program alternatives with Indian tribes and Native Hawaiian organizations is provided for in this section. It is an overlay on each of the Federal program alternatives set forth in § 800.14(a)–(e). It provides for government-to-government consultation with Indian tribes.

Section 800.15. Tribal, State and Local Program Alternatives. This section is presently reserved for future use. The Council will proceed with the review of tribal applications for substitution of tribal regulations for the Council's section 106 regulations on tribal lands, pursuant to section 101(d)(5) of the Act, on the basis of informal procedures. With regard to State agreements, the Council will keep in effect any currently valid State agreements until revised procedures for State agreements take effect or until the agreement is otherwise terminated.

Section 800.16. Definitions. This section includes new definitions to respond to identified needs for clarification and to reflect statutory amendments.

The term "Agency" is defined for ease of reference. It tracks the statutory definition in the NHPA.

The definition of "approval of the expenditure of funds" clarifies the intent of this statutory language as it appears in section 106 of the NHPA. This definition addresses the timing of section 106 compliance. A Federal agency must take into account the effects of its actions and provide the Council a reasonable opportunity to comment before the Agency decides to authorize funds, not just before the release of those funds. The intent of this provision is to emphasize the necessitate for compliance with section 106 early in the decision making process.

The definition of "area of potential effects" acknowledges that the determination of the area potential effects often depends on the nature and scale of the undertaking and the associated effects.

The definition of "comment" makes it clear that the term refers to the formal comments of the Council members.

The definition of "consultation" describes the nature and goals of this critical aspect of the section 106 review process.

The term "day" was defined to clarify the running of time periods.

The term "effect" is defined because, even though the "no effect" step is not in the rule, the concept of an undertaking's effect is still a part of the "historic properties affected" determination.

"Foreclosure" is a term that has always been a part of the section 106 process. The term describes the finding that is made by the Council when an Agency action precludes the Council from its reasonable opportunity to comment on an undertaking.

The term "head of the Agency" is defined in light of the 1992 amendments in section 110(l) that require that the head of an Agency document a decision where a Memorandum of Agreement has not been reached for an undertaking.

"Indian tribe" is defined exactly as in section 301(4) of the NHPA.

"Native Hawaiian organization" is defined exactly as in section 301(17) of the NHPA.

"Tribal Historic Preservation Officer" is the tribal official who has formally assumed the SHPO's responsibilities under section 101(d)(2) of the NHPA.

"Tribal lands" is defined exactly as in section 301(14) of the NHPA.

"Undertaking" is defined exactly as in section 301(7) of the statute. The Agency Official is responsible, in accordance with § 800.3(a), for making the determination as to whether a proposed Federal action is an undertaking. As appropriate, an agency should examine the nature of its Federal involvement taking into consideration factors such as the degree of Federal agency control or discretion; the type of Federal involvement or link to the action; and whether or not the action could move forward without Federal involvement. An agency should seek the advice of the Council when uncertain about whether or not its action falls within the definition of an undertaking. The 1986 regulatory definition of undertaking included new and continuing projects, activities, or programs and any of their elements not previously considered under section 106. It is intended that the new definition includes such aspects of a project, activity, or program as undertakings.

Appendix A. Criteria for Council Involvement in Reviewing Individual section 106 Cases

This appendix sets forth the criteria that will guide Council decisions to enter certain section 106 cases. As § 800.2(b)(1) states, the Council will document that the criteria have been met and notify the parties to the section 106 process as required. Council involvement in section 106 cases is not automatic once a criterion has been met. The Council retains discretion as to whether or not to enter such a case. Likewise, it is not essential that all criteria be met. The point of the criteria is to ensure that the Council has made a thoughtful decision to enter the section 106 process and to give agencies, SHPOs/THPOs and other section 106 participants a clear understanding of the kind of cases that warrant Council involvement.

V. Impact Analysis

The Regulatory Flexibility Act

The Council certifies that the final rule will not have a significant economic impact on a substantial number of small entities. Although comments on the proposed rule questioned the validity of such certification, the rule in its proposed and final versions imposes mandatory responsibilities on only Federal agencies. As set forth in section 106 of the NHPA, the duties to take into account the effect of an undertaking on historic resources and to afford the Council a reasonable opportunity to comment on that undertaking are Federal agency duties. Indirect effects on small entities, if any, created in the

course of a Federal agency's compliance with section 106 of the NHPA, must be considered and evaluated by that Federal agency.

The Paperwork Reduction Act

The final regulations do not impose reporting or recordkeeping requirements or the collection of information as defined in the Paperwork Reduction Act.

The National Environmental Policy Act

In accordance with 36 CFR part 805, the Council initiated the NEPA compliance process for the Council's regulations implementing section 106 of the NHPA prior to publication of the proposed rule in the **Federal Register** on September 13, 1996. On July 11, 2000, through a notice of availability on the **Federal Register** (65 FR 42850), the Council sought public comment on its Environmental Assessment and preliminary Finding of No Significant Impact. The Council has considered such comments, and has confirmed its finding of no significant impact on the human environment. A notice of availability of the Environmental Assessment and Finding of No Significant Impact has been published in the **Federal Register**.

Executive Orders 12866 and 12875

The Council is exempt from compliance with Executive Order 12866 pursuant to implementing guidance issued by the Office of Management and Budget's Office of Information and Regulatory Affairs in a memorandum dated October 12, 1993. The Council also is exempt from the documentation requirements of Executive Order 12875 pursuant to implementing guidance issued by the same OMB office in a memorandum dated January 11, 1994. The rule does not mandate State, local, or tribal governments to participate in the section 106 process. Instead, State, local, and tribal governments may decline to participate. State Historic Preservation Officers do advise and assist Federal agencies, as appropriate, as part of their duties under section 101(b)(3)(E) of the NHPA, as a condition of their Federal grant assistance. In addition, in accordance with Executive Order 12875, the rule includes several flexible approaches to consideration of historic properties in Federal agency decision making, such as those under § 800.14 of the rule. The rule promotes flexibility and cost effective compliance by providing for alternate procedures, categorical exemptions, standard treatments, program comments, and programmatic agreements.

The Unfunded Mandates Reform Act of 1995

The final rule implementing section 106 of the NHPA does not impose annual costs of $100 million or more, will not significantly or uniquely affect small governments, and is not a significant Federal intergovernmental mandate. The Council thus has no obligations under sections 202, 203, 204 and 205 of the Unfunded Mandates Reform Act.

Executive Order 12898

The final rule implementing section 106 of the NHPA does not cause adverse human health or environmental effects, but, instead, seeks to avoid adverse effects on historic properties throughout the United States. The participation and consultation process established by this rule seeks to ensure public participation—including by minority and low-income populations and communities—by those whose cultural heritage, or whose interest in historic properties, may be affected by proposed Federal undertakings. The section 106 process is a means of access for minority and low-income populations to participate in Federal decisions or actions that may affect such resources as historically significant neighborhoods, buildings, and traditional cultural properties. The Council considers environmental justice issues in reviewing analysis of alternatives and mitigation options particularly when section 106 compliance is coordinated with NEPA compliance. Guidance and training is being developed to assist public understanding and use of this rule.

Memorandum Concerning Government-to-Government Relations With Native American Tribal Governments

The Council has fully complied with this Memorandum. A Native American/Native Hawaiian representative has served on the Council. As better detailed in the preamble to the rule adopted in 1999, the Council has consulted at length with Tribes in developing the substance of what became the proposed rule in this rulemaking. The rule enhances the opportunity for Native American involvement in the section 106 process and clarifies the obligation of Federal agencies to consult with Native Americans. The rule also enhances the Government-to-Government intentions of the memorandum.

Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The Council will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective January 11, 2001.

List of Subjects in 36 CFR Part 800

Administrative practice and procedure, Historic preservation, Indians, Intergovernmental relations.

For the reasons discussed in the preamble, the Advisory Council on Historic Preservation amends 36 CFR chapter VIII by revising part 800 to read as follows:

PART 800—PROTECTION OF HISTORIC PROPERTIES

Subpart A—Purposes and Participants

Subpart B—The Section 106 Process

Subpart C—Program Alternatives

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

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 how Federal agencies meet these statutory responsibilities. The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.

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

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

§ 800.2 Participants in the Section 106 process.

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

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

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

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

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

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

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

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

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

(1) *State historic preservation officer.*

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

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

(2) *Indian tribes and Native Hawaiian organizations.*

(i) *Consultation on tribal lands.*

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

(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 act, the agency official shall consult with a representative designated by such Indian tribe in addition to the SHPO regarding undertakings occurring on or affecting historic properties on its tribal lands. Such Indian tribes have the same rights of consultation and concurrence that the THPOs are given throughout subpart B of this part, except that such consultations shall be in addition to and on the same basis as consultation with the SHPO.

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

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

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

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

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

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

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

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

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

(d) *The public.*

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

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

also provide views on their own initiative for the agency official to consider in decisionmaking.

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

Subpart B—The section 106 Process

§ 800.3 Initiation of the section 106 process.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(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.

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

§ 800.4 Identification of historic properties.

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

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

(2) Review existing information on historic properties within the area of potential effects, including any data

concerning possible historic properties not yet identified;

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

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

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

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

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

(c) *Evaluate historic significance.*

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

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

(d) *Results of identification and evaluation.*

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

(2) *Historic properties affected.* If the agency official finds that there are historic properties which may be affected by the undertaking or the SHPO/THPO or the Council objects to the agency official's finding under paragraph (d)(1) of this section, 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.

§ 800.5 Assessment of adverse effects.

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

(1) *Criteria of adverse effect.* An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all

qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

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

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

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

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

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

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

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

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

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

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

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

(1) *Agreement with finding.* Unless the Council is reviewing the finding pursuant to § 800.5(c)(3), the agency official may proceed if the SHPO/THPO agrees with the finding. The agency official shall carry out the undertaking in accordance with § 800.5(d)(1). Failure of the SHPO/THPO to respond within 30 days from receipt of the finding shall be considered agreement of the SHPO/THPO with the finding.

(2) *Disagreement with finding.*

(i) If the SHPO/THPO or any consulting party disagrees within the 30-day review period, it shall specify the reasons for disagreeing with the finding. The agency official shall either consult with the party to resolve the disagreement, or request the Council to review the finding pursuant to paragraph (c)(3) of this section.

(ii) 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 the finding pursuant to paragraph (c)(3) of this section.

(iii) If the Council on its own initiative so requests within the 30-day review period, the agency official shall submit the finding, along with the documentation specified in § 800.11(e), for review pursuant to paragraph (c)(3) of this section. A Council decision to make such a request shall be guided by the criteria in appendix A to this part.

(3) *Council review of findings.* When a finding is submitted to the Council pursuant to paragraph (c)(2) of this section, the agency official shall include the documentation specified in § 800.11(e). The Council shall review the finding and notify the agency official of its determination as to whether the adverse effect criteria have been correctly applied within 15 days of receiving the documented finding from the agency official. The Council shall specify the basis for its determination. The agency official shall proceed in accordance with the Council's determination. If the Council does not respond within 15 days of receipt of the finding, the agency official may assume concurrence with the agency official's findings and proceed accordingly.

(d) *Results of assessment.*

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

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

§ 800.6 Resolution of adverse effects.

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

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

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

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

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

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

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

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

is conducted in accordance with paragraph (b)(2) of this section.

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

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

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

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

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

(b) *Resolve adverse effects.*

(1) *Resolution without the Council.*

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

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

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

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

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

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

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

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

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

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

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

(2) *Invited signatories.*

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

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

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

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

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

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

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

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

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

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

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

§ 800.7 Failure to resolve adverse effects.

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

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

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

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

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

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

(c) *Comments by the Council.*

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

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

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

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

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

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

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

§ 800.8 Coordination With the National Environmental Policy Act.

(a) *General principles.*

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

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

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

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

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

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

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

(ii) Identify historic properties and assess the effects of the undertaking on such properties in a manner consistent with the standards and criteria of §§ 800.4 through 800.5, provided that the scope and timing of these steps may be phased to reflect the agency official's

consideration of project alternatives in the NEPA process and the effort is commensurate with the assessment of other environmental factors;

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

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

(2) *Review of environmental documents.*

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

(ii) Prior to or within the time allowed for public comment on the document, a SHPO/THPO, an Indian tribe or Native Hawaiian organization, another consulting party or the Council may object to the agency official that preparation of the EA, DEIS, or EIS has not met the standards set forth in paragraph (c)(1) of this section or that the substantive resolution of the effects on historic properties proposed in an EA, DEIS, or EIS is inadequate. If the agency official receives such an objection, the agency official shall refer the matter to the Council.

(3) *Resolution of objections.* Within 30 days of the agency official's referral of an objection under paragraph (c)(2)(ii) of this section, the Council shall notify the agency official either that it agrees with the objection, in which case the agency official shall enter into consultation in accordance with § 800.6(b)(2) or seek Council comments in accordance with § 800.7(a), or that it disagrees with the objection, in which case the agency official shall continue its compliance with this section. Failure of the Council to respond within the 30 day period shall be considered disagreement with the objection.

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

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

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

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

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

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

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

(c) *Intentional adverse effects by applicants.*

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

(2) *Consultation with the Council.* When an agency official determines, based on the actions of an applicant, that section 110(k) is applicable and that circumstances may justify granting the assistance, the agency official shall notify the Council and provide documentation specifying the circumstances under which the adverse effects to the historic property occurred and the degree of damage to the integrity of the property. This documentation shall include any views obtained from the applicant, SHPO/THPO, an Indian tribe if the undertaking occurs on or affects historic properties on tribal lands, and other parties known to be interested in the undertaking.

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

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

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

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

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

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

§ 800.10 Special requirements for protecting National Historic Landmarks.

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

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

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

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

§ 800.11 Documentation standards.

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

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

(c) *Confidentiality.*

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

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

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

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

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

(2) A description of the steps taken to identify historic properties, including, as appropriate, efforts to seek information pursuant to § 800.4(b); and

(3) The basis for determining that no historic properties are present or affected.

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

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

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

(3) A description of the affected historic properties, including information on the characteristics that qualify them for the National Register;

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

(5) An explanation of why the criteria of adverse effect were found applicable or inapplicable, including any conditions or future actions to avoid, minimize or mitigate adverse effects; and

(6) Copies or summaries of any views provided by consulting parties and the public.

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

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

(1) A description and evaluation of any alternatives or mitigation measures that the agency official proposes to resolve the undertaking's adverse effects;

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

(3) Copies or summaries of any views submitted to the agency official concerning the adverse effects of the undertaking on historic properties and alternatives to reduce or avoid those effects; and

(4) Any substantive revisions or additions to the documentation provided the Council pursuant to § 800.6(a)(1).

§ 800.12 Emergency situations.

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

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

(1) Following a programmatic agreement developed pursuant to § 800.14(b) that contains specific provisions for dealing with historic properties in emergency situations; or

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

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

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

§ 800.13 Post-review discoveries.

(a) *Planning for subsequent discoveries.*

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

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

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

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

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

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

Register eligibility and proposed actions, and then carry out appropriate actions. The agency official shall provide the SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council a report of the actions when they are completed.

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

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

Subpart C—Program Alternatives

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

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

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

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

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

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

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

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

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

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

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

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

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

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

provisions of subpart B of this part for each individual undertaking.

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

(c) *Exempted categories.*

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

(i) The actions within the program or category would otherwise qualify as "undertakings" as defined in § 800.16;

(ii) The potential effects of the undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse; and

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

(2) *Public participation.* The agency official 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 agency official 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 agency official shall notify and consider the views of the SHPOs/THPOs on the exemption.

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

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

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

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

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

(d) *Standard treatments.*

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

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

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

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

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

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

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

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

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

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

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

(i) If the Council comments, the agency official shall take into account the comments of the Council in carrying out the undertakings within the category and publish notice in the **Federal**

Register of the Council's comments and steps the agency will take to ensure that effects to historic properties are taken into account.

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

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

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

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

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

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

§ 800.16 Definitions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(t) *Programmatic agreement* means a document that records the terms and

conditions agreed upon to resolve the potential adverse effects of a Federal agency program, complex undertaking or other situations in accordance with § 800.14(b).

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

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

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

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

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

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 following criteria. However, the Council will not always elect to participate even though one or more of the criteria may be met.

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

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

Dated: December 4th, 2000.

John M. Fowler,

Executive Director.

[FR Doc. 00–31253 Filed 12–11–00; 8:45 am]

BILLING CODE 4310–10–P

ATTACHMENT 4

PROFESSIONAL QUALIFICATION STANDARDS

NATIONAL PARK SERVICE PROFESSIONAL QUALIFICATION STANDARDS

The National Park Service published these Professional Qualification Standards as part of the larger Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation. These requirements are those used by the National Park Service, as published in the Code of Federal Regulations, 36 CFR Part 61.

The qualifications define minimum education and experience required to perform identification, evaluation, registration, and treatment activities. In some cases, additional areas or levels of expertise may be needed, depending on the complexity of the task and the nature of the historic properties involved. In the following definitions, a year of full-time professional experience need not consist of a continuous year of full-time work but may be made up of discontinuous periods of full-time or part-time work adding up to the equivalent of a year of full-time experience.

History

The minimum professional qualifications in history are a graduate degree in history or closely related field; or a bachelor's degree in history or closely related field plus one of the following:

1. At least two years of full-time experience in research, writing, teaching, interpretation, or other demonstrable professional activity with an academic institution, historical organization or agency, museum, or other professional institution; or

2. Substantial contribution through research and publication to the body of scholarly knowledge in the field of history.

Archeology

The minimum professional qualifications in archeology are a graduate degree in archeology, anthropology, or closely related field plus:

1. At least one year of full-time professional experience or equivalent specialized training in archeological research, administration or management;

2. At least four months of supervised field and analytic experience in general North American archeology; and

3. Demonstrated ability to carry research to completion.

In addition to these minimum qualifications, a professional in prehistoric archeology shall have at least one year of full-time professional experience at a supervisory level in the study of archeological resources of the prehistoric period.

A professional in historic archeology shall have at least one year of full-time professional experience at a supervisory level in the study of archeological resources of the historic period.

Architectural History

The minimum professional qualifications in architectural history are a graduate degree in architectural history, art history, historic preservation, or closely related field, with coursework in American architectural history; or a bachelor's degree in architectural history, art history, historic preservation or closely related field plus one of the following:

1. At least two years of full-time experience in research, writing, or teaching in American architectural history or restoration architecture with an academic institution, historical organization or agency, museum, or other professional institution; or

2. Substantial contribution through research and publication to the body of scholarly knowledge in the field of American architectural history.

Architecture

The minimum professional qualifications in architecture are a professional degree in architecture plus at least two years of full-time experience in architecture; or a State license to practice architecture.

Historic Architecture

The minimum professional qualifications in historic architecture are a professional degree in architecture or a State license to practice architecture, plus one of the following:

1. At least one year of graduate study in architectural preservation, American architectural history, preservation planning, or closely related field; or

2. At least one year of full-time professional experience on historic preservation projects.

Such graduate study or experience shall include detailed investigations of historic structures, preparation of historic structures research reports, and preparation of plans and specifications for preservation projects.

ATTACHMENT 5

SUGGESTIONS FOR MOA WRITING

SUGGESTIONS FOR MOA WRITING*

Since an MOA document binds its parties to do or refrain from specified actions, it is vital that the document be clear, consistent, understandable, and subject to as little misinterpretation as possible. The following suggestions are offered to help preparers of such documents avoid ambiguities that may cause problems in implementation.

Be sure to identify the undertaking clearly

The undertaking that is the subject of the agreement document should be clearly identified in the document, in a manner consistent with the way the undertaking is identified in the supporting documentation submitted to the Council. In an MOA, the undertaking is usually identified in the first "Whereas" clause, as shown in Figures 3 and 4 in Part V of this publication, "Standard Memorandum of Agreement Formats."

In a letter making an NAE determination, the undertaking is usually identified in the text of the letter with reference to accompanying documentation. The identification is usually similar to the following text:

> We have determined that our installation rehabilitation program, described in the enclosed Installation Rehabilitation Program Plan dated March 29, 1992, will have no adverse effect . . . .

Identify the responsible agency

Since the Federal agency responsible for the undertaking is also responsible for ensuring that the terms of the agreement document are carried out, it is vital for that agency to be identified clearly in the document. Where an agency's regional office or field office is the responsible party, and therefore signs the agreement document, this should be clearly indicated. For example:

WHEREAS, the Rhode Island State Office of the Bureau of Land Management has determined . . . .

Assign duties only to signatory or concurring parties

An agreement document cannot impose obligations on parties that do not sign it. Therefore, if an agreement document says that "Party X will carry out action Y," Party X must sign the document as a consulting or concurring party. Where Party X is the applicant for or recipient of Federal assistance, permit, or license, and is not a signatory, the agreement document must bind the Federal agency responsible for the assistance, permit, or license to ensure that Party X carries out the duties assigned it. For example:

The Corps of Engineers will require the applicant to carry out the following:

Or

The Corps of Engineers will ensure that the following measures are carried out:

Beware the use of passive voice

An example of the use of passive voice is the statement: "Building X will be rehabilitated in accordance with the Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings." The statement gives no indication as to who will rehabilitate the building. It indicates only that somehow, mysteriously, the building will be rehabilitated. No one is assigned responsibility, and the party who actually has responsibility could, if so inclined, deny that such responsibility had legally been assigned to him or her.

There are two ways to remedy this problem. The first, naturally, is to use the active voice and say:

> "Agency A will rehabilitate Building X in accordance with suchandso standards."

The alternative is to specify that:

"Agency A will ensure that the following [conditions or stipulations] are carried out," and then say "Building X will be rehabilitated . . . ."

The former approach is desirable when it is certain who will actually carry out the specified activity. The latter is preferable when the party ultimately responsible for the activity is known, but the party who will actually do it--for example, one of several applicants for Federal assistance or a contractor not yet selected--is not known.

Include all agreed-upon provisions

An agreement document should be comprehensive, including all the items agreed to by the parties involved in its preparation, either in the text of the document or by reference. The fact that an agency has stated that it will do something in a context other than the agreement document may be found later to have little force if the commitment is not referenced in the document itself. For example, if an agency says in an Environmental Impact Statement that it will take (or will not take) particular actions with respect to a historic property, this statement should be reiterated or referenced in the relevant Section 106 agreement document.

Remember the "cold" reader

An agreement document should be clear to the "cold" (outside) reader. It should always be remembered that an agreement document may be scrutinized by a court of law, and must be able to withstand such scrutiny. Each sentence should be straightforward and to the point, and written in language that can be easily understood. If specialized terms are used they should be defined. Terms that are meaningful only to the parties preparing the agreement should be avoided or rephrased to be meaningful to others.

Identify shorthand references

The full name of each entity involved in an agreement document should be spelled out the first time the entity is referred to, with the acronym or other shorthand referent (Council, SHPO, Bureau, etc.) placed in parentheses or brackets immediately following the name. Thereafter the acronym or other shorthand can be used throughout the document. For example:

> The Bureau of Land Management (BLM) has consulted with the Rhode Island State Historic Preservation Officer (SHPO) . . . .

Structure the document logically

An agreement document should be organized in a clear, structured form. For example, if several historic properties are being dealt with in different ways, the conditions or stipulations addressing each should be grouped together, rather than scattered throughout the document. Similarly, if activities that have been agreed upon will occur in sequence, that sequence should be reflected in the document. For example, if a building will be documented, then moved, and then rehabilitated, a condition or stipulation providing for documentation should come before one for moving, which should precede one for rehabilitation.

Identify properties clearly and completely

In the case of a PA, it is likely that the historic properties actually subject to effect will not be known, so they cannot be identified in the document itself. In an NAE determination or MOA, however, the properties to which the document refers should be clearly identified.

If the document does not cover all historic properties subject to effect by the undertaking, it should specify which such properties are not covered. In the latter instance, documentation accompanying the agreement document should specify why all historic properties are not covered, and how Section 106 has been or will be complied with

in respect to those properties not covered by the document.

The properties to which an MOA applies are usually specified in the "Whereas" clauses. For example:

> WHEREAS, Agency A has determined that its Installation Y rehabilitation project will have an effect upon Building X . . . .

Properties are usually similarly specified in letters making determinations of NAE:

> Agency A has determined that, subject to the following conditions, its Installation Y rehabilitation project will have no adverse effect on Building X.

Where multiple properties are involved, the agreement document should make clear which conditions or stipulations refer to which properties. For example:

> Agency A will rehabilitate Building X in accordance with suchandso standards.

Or

> Agency A will ensure that archeological site 53BB782 is excavated and reported in accordance with the attached "Research Design for the Excavation of Archeological Site 53BB782" . . . .

In some cases an MOA may address both known historic properties and some that have not yet been identified. For example, an MOA might address rehabilitation of a historic building, but also provide for monitoring ground disturbance in the event a suspected but unverified archeological site existed under the building. Similarly, an MOA covering a highway construction project might cover both identified historic properties subject to effect by the construction itself, and not-yet fully identified properties in larger areas where the presence of the highway would be likely to stimulate growth.

In such a case stipulations establishing a process for identifying and treating properties not yet fully identified should be included. (For further discussion and examples of such stipulations see page IV-131, "Monitoring disturbance of archeological sites"; "Archeological survey"; and "Archeological plan implementation." The fact that unidentified historic properties might be affected should be acknowledged in the "Whereas" clauses, for example:

> WHEREAS, Agency A has determined that its Installation Y rehabilitation project will have an effect upon Building X and possibly on other historic properties . . . .

Cover the whole undertaking

Each agreement document should cover all the effects of the subject undertaking on all historic properties, so that compliance with Section 106 is unambiguously attained for the entire undertaking. Consulting parties should try to avoid using multiple agreement documents for different aspects of the same undertaking, or for different types or groups of properties affected by the same undertaking.

Provide complete citations

Plans, standards, and guidelines to be used in carrying out activities under an agreement should be clearly and accurately identified in the agreement document, with full legal citations. For example:

> Agency A will rehabilitate Building X in accordance with the "Plan for the Rehabilitation of Building X" by Roger A. Rehab, dated March 29, 1993, and attached hereto as Appendix D.

Or

> Agency A will rehabilitate Building X in accordance with the recommended treatments in the Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings, U.S. Department of the Interior, National Park Service, 1983.

If an agency anticipates that a guideline to be cited may be revised before the agreement document is implemented, and the agency wants the revised guideline to be followed, this can be stated in the following form:

> Agency A will rehabilitate Building X in accordance with the recommended treatments in the Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings U.S. Department of the Interior, National Park Service, 1983 (Standards and Guidelines), subject to any pertinent revisions that the Secretary of the Interior may make in the Standards and Guidelines prior to finalization of rehabilitation plans.

A similar form may be used if an agency refers to draft guidelines, but the agency anticipates that the guidelines will become final before the agreement is implemented and desires that the final, rather than the draft, guidelines be followed. For example:

> Agency A will rehabilitate Building X in accordance with the Standards for Rehabilitating Historic X-Type Buildings in the State of Rhode Island, Rhode Island SHPO, draft dated March 29, 1992 Standards for Rehabilitation, subject to any pertinent revisions that the Rhode Island SHPO may make in the Standards for Rehabilitation prior to finalization of rehabilitation plans.

Use consistent terminology

Decide at the outset what terms to use for things, and use them consistently throughout. For example, don't refer to something as an "undertaking" in one paragraph and a "project" in another, or to the Bureau of Land Management as the "Bureau" in one place and "BLM" in another, or to something as a "historic property" in one place and a "historic site" in another.

Use terms that are consistent with statutory definitions where applicable

Where statutory definitions exist, their use is preferred. For example, "historic property" is defined at Section 301(5) of NHPA, and unless there is some very good reason to do otherwise, that definition should be used in preference to such alternatives as "historic site" or "cultural resource."

Define terms

Unusual or specialized terms should be defined, as should terms that have a particular meaning with reference to the undertaking covered by the agreement document. For example, if the document provides for something to be done throughout an undertaking's area of potential effects [see 36 CFR (185) 800.2(c)], that area should be clearly defined, with an appropriate map attached or referenced in the document. An optional "Whereas" clause may be provided, which refers to appended definitions. Of course, if no terms are used that need to be defined, no such appendix or clause need be included.

Think ahead

An agreement document is prospective: it describes actions that an agency agrees to perform in the future. No one can anticipate everything that may happen in the course of an undertaking's future implementation, but the drafter should think about possibilities and try to provide for them in the document. Especially if the undertaking will take a long time to begin or complete, the agreement document should provide for periodic review and possible revision in the event conditions changebefore the agreement is fully implemented. In the context of such an undertaking changes are also likely in personnel, so it is particularly important that the agreement document be clear, complete, and comprehensible to an unfamiliar reader who may have to implement or interpret it years after it was executed.

Include all statutory authorities

One purpose of an agreement document is to show unambiguously that the Federal agency involved has met its pertinent historic preservation responsibilities, in the event of litigation or other challenge. Accordingly, it is important not to leave any relevant statutory authorities out of the agreement document. For example, if the property involved is aNational Historic Landmark (NHL), the agreement document should make it plain that by carrying out the agreement's terms, the agency is complying with Section 110(f) of NHPA, as well as with Section 106. Similarly, if the agency proposes leasing or exchanging a historic property, or entering into a contract for its management, the agreement document should refer to Section 111 of NHPA as well as to Section 106.

* This document is excerpted from guidance material prepared by the Advisory Council on Historic Preservation. The full text of ACHP's guidance document is available on-line at the following address: http://www.achp.gov/agreement.html

ATTACHMENT 6
EXAMPLE MEMORANDA OF AGREEMENT

EXAMPLE 6-A
ATLANTIC STEEL

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

PROGRAMMATIC AGREEMENT AMONG THE U.S. ENVIRONMENTAL PROTECTION AGENCY AND THE GEORGIA STATE HISTORIC PRESERVATION OFFICER REGARDING IMPLEMENTATION OF THE ATLANTIC STEEL REDEVELOPMENT PROJECT IN ATLANTA, GEORGIA

WHEREAS, the U.S. Environmental Protection Agency (EPA) is involved in the undertaking known as the Atlantic Steel Redevelopment Project (hereafter Project), consisting of proposed remediation and redevelopment of an approximately 138-acre former steel mill site currently owned by Atlantic Steel Industries, Inc. in Atlanta, Georgia; the proposed redevelopment includes high and mid-rise residential areas, retail areas, hotels, office space, and parking; project plans include a new 17th Street Bridge that would cross Interstate 75/85 and other related road improvements as shown in the conceptual development plan provided in Appendix A; and

WHEREAS, the EPA is preparing an Environmental Assessment (EA) for the Atlantic Steel Redevelopment Project, in accordance with the National Environmental Policy Act of 1969 (NEPA); EPA is involved with this project through its Project XL Program, which stands for "eXcellence and Leadership" and encourages companies and communities to come forward with new approaches that have the potential to advance environmental goals more effectively and efficiently than have been achieved using traditional regulatory tools (see Appendix A); and

WHEREAS, Atlantis 16th, L.L.C., a developer in Atlanta, is participating with EPA in its Project XL and is the primary developer responsible for implementation of the redevelopment plan; and

WHEREAS, the EPA has the responsibility to ensure that the conditions of this Agreement will be implemented; and

WHEREAS, the EPA has identified the former steel mill (hereafter Atlantic Steel) currently occupied by Atlantic Steel Industries, Inc., as a property eligible for listing in the National Register; and

WHEREAS, Atlantic Steel Industries, Inc., Atlantis 16th, L.L.C., the Georgia Department of Natural Resources, Environmental Protection Division, and EPA have determined, after consideration of avoidance and other minimization alternatives, that demolition of the former steel mill is a necessary component of environmental remediation and redevelopment of the site; and

WHEREAS, the EPA has determined that demolition of buildings associated with the remediation of Atlantic Steel constitutes an adverse effect on this historic property; however, until final project plans are developed, primarily those related to off-site aspects of the redevelopment project, it is

not possible at this time to fully assess the affects to historic properties not contained within the Atlantic Steel site, but within the area of potential effects; and

WHEREAS, the EPA has consulted with the Georgia State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (Council) pursuant to 36 CFR Part 800.14(b) of the regulations implementing Section 106 of the NHPA; and

WHEREAS, the EPA has identified the Atlanta History Center (AHC) and the Atlanta Urban Design Commission (AUDC) as potential consulting parties in accordance with 36 CFR 800.2(a)(4) which have been invited to concur in this Agreement; and

WHEREAS, the EPA has conducted public notification and public involvement about the Project, including planned efforts to identify historic properties, through its Project XL and NEPA scoping and environmental analysis process for the Project, as encouraged by 36 CFR 800.2(a)(4); and

WHEREAS, consultation revealed that Atlantic Steel Industries, Inc., has, over a period of several years, taken several measures to preserve its heritage at various off-site locations (see Appendix B), including: preservation of selected structures, machinery, and buildings by transfer or sale to various museums, including the Atlanta History Center, The Railroad Museum in Savannah, the Southeastern Railway Museum in Duluth, Georgia, and the Carter Machine Company in Toccoa, Georgia; preservation of company documentary records, photographs, engineering drawings, and other related documents through transfer to the Atlanta History Center for storage and display; support of other interpretive efforts including two books documenting the company's history and a professional photographic exhibit at Georgia Institute of Technology in 1999; plans for creation of a permanent exhibition space celebrating the company's history in the redevelopment plan; and plans for the integration of selected tools and pieces of machinery in the redevelopment plan (see Appendix B); and

WHEREAS, the agencies and organizations listed in Appendix C have been identified as potentially interested parties and either have been contacted by the EPA as part of its scoping process under NEPA or will be contacted shortly in accordance with 36 CFR 800.3(f) in order to identify potential consulting parties and invite their participation in the Section 106 process; specific coordination with Indian tribes and additional public involvement are discussed in the Stipulations below; and

WHEREAS, for the purposes of this Agreement, the definitions found at 36 CFR 800.16 are applicable; and

NOW, THEREFORE, the EPA, the SHPO, and the Council agree that the Project will be implemented in accordance with the following stipulations:

STIPULATIONS

The EPA will ensure that the following measures are carried out:

I. ADMINISTRATIVE STIPULATIONS

A. Professional Qualifications: All studies conducted under the terms of this Agreement will be carried out or directly supervised by appropriately trained persons who meet the Secretary of the Interior's Professional Qualification Standards (48 Fed. Reg. 44738) for the particular field of study in which they are working. Should the EPA hire new personnel for the purposes of implementing the terms of this Agreement, the EPA shall forward copies of the professional qualifications of such persons to the SHPO for its review. The SHPO shall provide written comments within ten days.

B. The signing and concurring parties to this Agreement agree to perform their respective obligations, including the execution and delivery of any documents or approvals as may be necessary or appropriate, in a timely fashion consistent with the terms and provisions of this Agreement.

Where a specific number of days is specified for review and comment and/or approval, comments shall be provided in written form within the specified number of days following receipt of the documents. Failure to respond within this time frame will constitute concurrence on the part of the reviewing party.

II. TREATMENT OF HISTORIC PROPERTIES

A. Treatment of Atlantic Steel Site (On-Site Properties)

1. Photographic Recordation Plan

The EPA, in consultation with the SHPO, AHC, and AUDC staff, will develop and implement a photographic recordation plan for Atlantic Steel prior to demolition and site remediation activities. The plan shall include large-format photographic recordation that will be performed by a professional photographer experienced in performing Historic American Building Survey (HABS)/Historic American Engineering Record (HAER) photographic documentation to National Park Service standards. The photographic recordation plan will be developed by the EPA and submitted to the SHPO for review and approval, and to the AHC and AUDC staff for review and comment. All reviewing parties shall provide written comments or acceptance of the photographic recordation plan within ten days after receipt. Demolition of any part of Atlantic Steel will not begin until the

recordation plan has been approved by the SHPO. It is anticipated that the recordation plan will include a phased approach of photographic documentation to allow Atlantic Steel Industries, Inc. and Atlantis 16th, L.L.C. to demolish certain buildings, while others are still being recorded and documented. All photographic products for a specific building or group of buildings will be presented to the SHPO for review and approval prior to the demolition of such building or group of buildings. SHPO shall provide comments or acceptance of the photographs within five days after receipt.

2. Outreach and Public Education

The EPA and Atlantis 16th, L.L.C. shall ensure that information gathered in accordance with stipulations contained in this Agreement and related to the history of the Atlantic Steel site is used to produce public information materials. EPA and Atlantis 16th, L.L.C., in consultation with the SHPO, AHC, and AUDC staff, will develop and implement an outreach and public education plan for the Atlantic Steel Redevelopment project. The plan will focus on public education approaches that benefit preservation in a larger context and the community as a whole. At a minimum, the following will be considered:

– Development of oral history of Atlantic Steel site
– Development of a visitor's center/interpretive center as part of the redevelopment plan
– Educational video and other publications documenting various aspects of Atlantic Steel and/or its changes through history
– Reuse and/or relocation of either historic buildings, machinery, or steel making products to be part of either on-site or off-site exhibits
– Publication of appropriate research material

B. Treatment of Other Historic Properties (Off-Site Properties) Identified During the Section 106 Process

Any other historic properties, not located on the Atlantic Steel site, determined to experience an adverse effect from the Project will be addressed in accordance with 36 CFR 800 and as stated below in Item III (Continuation of the Section 106 Process for the Project).

III. CONTINUATION OF THE SECTION 106 PROCESS FOR THE PROJECT

The EPA will comply with the requirements of 36 CFR 800 regarding public involvement, identification of historic properties, effects assessment, and treatment of properties that

may experience an adverse effect from the Project.

A. Historic Architectural Resources

"Historic architectural resources" include buildings, structures, objects, districts and landscapes listed in, or eligible for listing in, the National Register of Historic Places. The EPA will assess the potential for historic architectural resources within the Project's area of potential effects in accordance with 36 CFR 800. This will include on-site examination by a professional architectural historian meeting the qualification standards contained in 36 CFR 61, Appendix A, review of existing historic maps, previous historic investigations in the Project vicinity, and other pertinent documentary data. The EPA shall submit to the SHPO and AUDC staff, for review and comment, an Identification/Effects Assessment Report for the Project. The report will include discussions of: Description of the Undertaking; Area of Potential Effect (APE); Efforts to Identify Historic Properties; Affected Historic Properties; and Adverse Effects. All reviewing parties shall provide written comments within ten days after receipt. The EPA shall consult with the SHPO, the concurring parties, and any other consulting parties to develop treatment strategies for historic architectural resources that will be adversely affected by the Project. Resolution of any adverse effects will follow 36 CFR 800.6. EPA anticipates development of specific Memorandum of Understanding (MOU) to document how the adverse effects will be resolved. The MOU will be developed within the context of this Agreement and will serve as the instrument by which all parties will agree to final resolution of any adverse effects.

B. Archeological Resources

"Archeological resources" include prehistoric or historic archeological resources listed in, or eligible for listing in, the National Register of Historic Places. The EPA will assess the potential for archeological resources within the Project's area of physical disturbance in accordance with 36 CFR 800. This will include on-site examination by a professional archeologist meeting the qualification standards contained in 36 CFR 61, Appendix A and review of existing geophysical data, historic maps, previous archeological investigations in the Project vicinity, and other pertinent documentary data. Results will be submitted to the SHPO and pertinent consulting parties for review and comment. The SHPO shall provide written comments within ten days after receipt. Any potential subsurface testing and evaluation of significance will be determined through subsequent consultation in accordance with 36 CFR 800. The EPA shall consult with the SHPO and any identified consulting parties to develop treatment strategies for any archeological resources that will be adversely affected by the Project. Resolution of any adverse effects will follow 36 CFR 800.6. EPA anticipates development of specific Memorandum of Understanding (MOU) to document how the adverse effects will

be resolved. The MOU will be developed within the context of this Agreement and will serve as the instrument by which all parties will agree to final resolution of any adverse effects.

IV. TRIBAL COORDINATION

EPA has identified the Indian tribes listed in Appendix C as groups that might attach religious and cultural significance to historic properties in the area of potential effects. In accordance with 36 CFR 800.4(a)(4), EPA will solicit any information from these tribes to assist the agency in identifying properties which may be of religious and cultural significance to them and may be eligible for the National Register. Based on the results of this coordination, EPA will complete an effects assessment and identify treatment of these properties to determine if they may experience an adverse effect from the Project. Further coordination with the Indian tribes will follow 36 CFR 800.4 through 36 CFR 800.6. Should any issues of concern be raised by Indian tribes about the identification of, evaluation of or assessment of effects on these historic properties, EPA will notify the Council of these concerns and invite their participation in the 106 process.

V. PUBLIC PARTICIPATION

A. Continuation of Public Outreach

EPA and Atlantis 16th, L.L.C. have participated in a number of public stakeholder meetings to discuss the project. EPA and Atlantis 16th, L.L.C. have also participated in meetings with an Environmental Justice Focus Group and several meetings regarding the proposed bridge at the invitation of the City of Atlanta and/or the Georgia Department of Transportation and the Atlanta Regional Commission. EPA received valuable feedback on the project from national and local environmental and transportation groups and other interested organizations and individuals, as part of its Project XL and NEPA scoping processes.

The EPA will integrate consideration of Project effects on historic properties into its NEPA environmental analysis process. The EPA will hold public meetings for purposes of fulfilling requirements of NEPA and NHPA and will include updates on the status of the identification and evaluation process for historic properties. Future public notices shall inform the public of their opportunity to comment pursuant to Section 106 of the NHPA.

B. Review of Public Objections

At any time during implementation of the measures stipulated in this Agreement should a member of the public raise an objection to any such measure or its manner of implementation, the EPA shall take the objection into account and consult as

needed with the objecting party, pertinent consulting parties, and the SHPO to resolve the objection.

VI. AMENDMENTS

Any party to this Agreement may request that it be amended, whereupon the parties will consult in accordance with 36 CFR Part 800.13 to consider such amendment.

VII. DISPUTE RESOLUTION

Should the SHPO object within 20 days to any plans/specifications provided for review or any actions proposed pursuant to this Agreement, the EPA shall consult with the SHPO to resolve the objection. If the EPA determines that the objection cannot be resolved, the EPA shall forward all documentation relevant to the dispute to the Council. Within 30 days after receipt of all pertinent documentation, the Council will provide the EPA with recommendations which the EPA will take into account, in accordance with 36 CFR 800.6(c)(2), in reaching a final decision regarding the dispute. The EPA shall report its final decision to the Council within 15 days.

Any recommendation or comment provided by the Council will be understood to pertain only to the subject of the dispute; the EPA's responsibility to carry out all actions under this agreement that are not the subject of the dispute will remain unchanged.

VIII. FAILURE TO CARRY OUT THE TERMS OF THIS AGREEMENT

In the event that the EPA does not carry out the terms of this agreement, the EPA will comply with 36 CFR 800.4 through 36 CFR 800.6 with regard to the Project.

IX. SIGNATORIES

Execution and implementation of this Programmatic Agreement evidences that the EPA has afforded the Council a reasonable opportunity to comment on the Atlantic Steel Redevelopment Project and that the EPA has taken into account the Project's effects to historic properties.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION IV

By: Heinz Mueller Date: 12/13/99
Name: Heinz Mueller
Title: Chief, Office of Environmental Assessment

GEORGIA STATE HISTORIC PRESERVATION OFFICER

By: W. Ray Luce Date: 12/13/99
Name: W. Ray Luce
Title: Division Director and Deputy State Historic Preservation Officer

CONCUR:

~~JACOBY DEVELOPMENT, INC.~~ ATLANTIS 16TH L.L.C.

By: James J. Jacoby Date: 12-17-99
Name: James J. Jacoby
Title: President

ATLANTA HISTORY CENTER

By: Michael Rose Date: 12/30/99
Name: Michael Rose
Title: Interim Director, Atlanta History Center Archives

ATLANTA URBAN DESIGN COMMISSION

By: Karen Huebner Date: 12/16/99
Name: Karen Huebner
Title: Executive Director

17th Street Extension and Atlantic Steel Redevelopment Project

SECTION 1
NEED AND PURPOSE FOR ACTION

1.1 PROJECT OVERVIEW

Jacoby Atlantic Redevelopment, L.L.C. (hereafter referred to as JAR), a developer in Atlanta, Georgia, has proposed remediation and redevelopment of approximately 135 acres near Atlanta's central business district (Figure 1-1). The property to be redeveloped is the site of the former steel mill owned by Atlantic Steel Industries, Inc. (Atlantic Steel). In 1998, the property was rezoned by the City of Atlanta from Heavy Industrial to Central Area Commercial/Residential–Conditional (mixed use, with conditions). JAR purchased the property from Atlantic Steel in December 1999. The proposed development includes a mix of residential and business uses. The planned redevelopment is expected to include two million square feet of general office, one and a half million square feet of retail and entertainment uses, two million square feet of high tech offices, 2,400 residential units, and 1,000 hotel rooms.

In addition to the site redevelopment, project plans include construction of a multi-modal (cars, pedestrians, bicycles, transit) bridge and interchange at 17th Street that would cross Interstate 75/85 (I-75/85) and provide access to the site as well as a connection to Midtown Atlanta and the nearby Arts Center Metropolitan Atlanta Rapid Transit Authority (MARTA) Station. Roadway improvements would include extension of the existing 17th Street from West Peachtree Street (U.S. 19/S.R. 9) in Midtown Atlanta, heading west on new alignment over I-75/85, through the development, and connecting with Northside Drive (U.S. 41/S.R. 3) at Bishop Street. Additional improvements include modifications to the existing I-75 and I-85 southbound ramps to 14th Street to provide access to the new bridge and the site; construction of a new northbound off-ramp from I-75/85 to 17th Street; reconstruction of the 14th Street Bridge to accommodate the new northbound off-ramp; and intersection improvements along 16th Street, 14th Street, and Northside Drive. The entire project study area is approximately bounded by Peachtree Street on the east, 14th Street to the south, Bishop Street to the north, and Northside Drive to the west.

The project also would include operation of a transit shuttle system that would circulate between the MARTA Arts Center Station and the Atlantic Steel site via exclusive bus lanes that would cross the proposed 17th Street Bridge and continue along 17th Street through the Atlantic Steel development. Transit stops would be located throughout the Atlantic Steel site, providing service within a quarter mile of the highest employment, retail, and residential concentrations. It is anticipated that a dedicated shuttle bus pull-off would be provided on West Peachtree Street, to allow passengers direct access to the MARTA Arts Center Station.

1.2 AGENCY INVOLVEMENT

The U.S. Environmental Protection Agency (EPA) became involved with this project through its Project XL Program. Project XL, which stands for "eXcellence and Leadership," encourages companies and communities to come forward with new approaches that have the potential to advance environmental goals more effectively and efficiently than have been achieved using traditional regulatory tools. JAR is participating in Project XL for the Atlantic Steel redevelopment because neither the 17th Street Extension nor the associated I-75/85 access ramps would be able to proceed without the regulatory flexibility being allowed by EPA under its XL Program. The specific regulatory flexibility includes the consideration of the entire redevelopment project, including the 17th Street Extension, as a Transportation Control Measure (TCM) - (see Section 1.3 for more detail).

EPA, in cooperation with the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), Georgia Department of Transportation (GDOT), MARTA, and the City of Atlanta has prepared this Environmental Assessment (EA) as part of EPA's regulatory decision on approval of this redevelopment project as a TCM. The EA is also intended to fulfill applicable National Environmental Policy Act of 1969 (NEPA) requirements associated with other federal actions on the Project, specifically in order that the transportation components of the project may become eligible for federal funding. The EA has been prepared in accordance with NEPA, as amended; EPA's "Policy and Procedures for Voluntary Preparation of National Environmental Policy Act Documents" (63 FR 58045), generally following the procedures set out at 40 CFR Part 6, Subparts A through D; and the U.S. Department of Transportation's "Environmental Impact and Related Procedures" (23 CFR 771). In addition, the EA has been prepared in accordance with provisions of the Council on Environmental Quality regulations, other NEPA requirements and policies, and any applicable state and local laws, regulations, and ordinances.

The EA is a summary and culmination of planning efforts associated with the development of concept alternatives, design traffic study, preliminary engineering analysis, and environmental impacts assessment, all of which have been completed with opportunities for public comment and agency coordination, as part of the NEPA process as well as EPA's Project XL.

1.3 REGULATORY FRAMEWORK

The City of Atlanta is currently out of compliance with federal air quality conformity requirements because it has failed to demonstrate that its transportation activities will not exacerbate existing air quality problems or create new air quality problems in the region. The Clean Air Act (CAA) generally prohibits construction of new transportation projects that use federal funds or require federal approval in areas where compliance with conformity requirements has lapsed. However, the CAA includes provisions for the creation of transportation control measures in non-attainment areas, such as Atlanta. TCMs are defined as "...measures with the purpose of reducing emissions or concentrations of air pollutants from transportation sources by reducing vehicle use or

17TH STREET EXTENSION & ATLANTIC STEEL REDEVELOPMENT PROJECT
FULTON COUNTY, GDOT PROJECT NH-7141-00(900)

NEED AND PURPOSE STATEMENT

The proposed redevelopment of the Atlantic Steel site would reduce overall emissions associated with new development in the Atlanta region by promoting smart growth principles, including brownfield redevelopment, certain on-site design elements, and the development of transportation infrastructure that encourages the use of transit and non-motorized modes of travel. The 17th Street Extension and Bridge are a part of the transportation infrastructure that is necessary to support the redevelopment of the Atlantic Steel site and maintain acceptable overall mobility in Midtown Atlanta.

The project as proposed would accomplish the following:

- Transform a brownfield site into a mixed use community of retail, residential, and commercial uses that would be more compatible with surrounding land uses
- Incorporate certain site design elements (e.g., residential and employment density, mixed use, on-site transit proximity, and street connectivity) and transportation infrastructure (e.g., sidewalks, bike paths, transit stops) that encourage the use of transit and non-motorized modes of travel that serve to reduce overall emissions
- Provide a new multi-modal bridge to reconnect the Atlantic Steel site with the urban fabric of Midtown and serve as a new "Gateway" into the heart of Downtown Atlanta
- Reduce congestion and improve traffic flow along 10th and 14th Streets by providing a new east-west connection across the Downtown Connector
- Provide new mass transit linkage to MARTA Arts Center Station to allow for a high transit ridership and internal trip capture on-site that would be unattainable in single land use developments of the size of Atlantic Steel

EXAMPLE 6-B
MURRAY SMELTER

Advisory Council On Historic Preservation

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

May 4, 2000

Mr. Bill Yellowtail
Regional Director
Region 8
U.S. Environmental Protection Agency
999 18th Street
Denver, CO 80202-2466

Dear Mr. Yellowtail:

Enclosed is the fully-executed Memorandum of Agreement for the Murray Smelter Site, including Murray smoke stacks, a historic property eligible for the National Register of Historic Places. This letter constitutes the Council's additional advisory comments in accordance with 36 CFR Section 800.7(b) of the Council's regulations regarding the manner in which EPA consulted with the Council and other parties to comply with Section 106 of the National Historic Preservation Act for this project.

The Council first became acquainted with the Murray smelter site because of complaints by the Utah State Historic Preservation Officer's (SHPO) staff about EPA's inconsistent and confusing determinations under the Council's regulations and difficulties gaining basic information about the project. The SHPO was concerned also because EPA was proceeding with clean-up activities that were adversely affecting historic properties eligible for the National Register of Historic Places. Not long after the complaints about EPA, in June 1999, EPA staff initiated formal consultation with the Council on Superfund activities affecting Murray smoke stacks, which are a portion of the larger Murray Superfund site and all part of the same Superfund consent decree. The Council elected to participate in this consultation because of the significant role of the smoke stacks in Murray's identity as a distinctive community with an important industrial history and because of the considerable controversy surrounding the proposed demolition. Preference for stabilizing and cleaning up the historic stacks rather than demolishing them was voiced by the local community, including the Murray Historic Preservation Board and Utah Heritage Foundation. Also, we were concerned about EPA's problems in complying with Section 106 on the overall Superfund site, including whether EPA had segmented the smoke stacks from the larger project for the purposes of Section 106 compliance.

The Council believes that meaningful Section 106 consultation with EPA on the Murray smelter

MEMORANDUM OF AGREEMENT (MOA)

Among the Environmental Protection Agency, the Utah State Historic Preservation Officer and the Advisory Council on Historic Preservation Regarding the Demolition of the Murray Smelter Smoke Stacks Murray Smelter Superfund Site, Murray, Utah

WHEREAS, the United States Environmental Protection Agency Region VIII (EPA) has determined that the demolition of the Murray Smelter smokestacks, which are part of the Superfund or CERCLA (Comprehensive Environmental Response, Compensation and Liability Act of 1980) Site, is an adverse impact on the historic structures; and

WHEREAS, the National Historic Preservation Act, 16 U.S.C. §§470 et seq., has been identified as an applicable relevant and appropriate requirement (ARAR) pursuant to the NCP, 40 C.F.R. § 300.415; and

WHEREAS, EPA has consulted with the Utah State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (Council) pursuant to Section 106 of the National Historic Preservation Act (NHPA) (26 U.S.C. 470) and implementing regulations 36 CFR 800; and

WHEREAS, Murray City (local government), Hi-Ute-Buehner (responsible party), Chimney Ridge L.L.C. (developer and current landowner), Murray Historic Preservation Board (Board), Asarco (CERCLA responsible party), and interested public have participated in the consultation regarding the terms of this agreement;

NOW THEREFORE, the EPA, the SHPO, and the Council agree that the undertaking shall be implemented in accordance with following stipulations in order to mitigate the effect of the undertaking on historic properties.

Stipulations

EPA will ensure the following measures are carried out:

1) The diameter of the base and the height of the oven door (or smokestack archway) of the taller (north) stack will be incorporated into the architecture of the plaza area or other area of the development. Other characteristics of either smokestack may also be used in the development.

2) At least three plaques will be placed in the development. The plaques will interpret the smokestack details used in the plaza under stipulation 1 above or will commemorate the history of the smelter. The plaques will be bronze (estimated at $4,000 each), unless the Board representative identified in stipulation 3 below agrees that another material, as proposed by the Chimney Ridge L.L.C., is appropriate.

3) A citizen representative of the Board will be involved in the development of plaza details under stipulation 1 and the drafting and placement of the interpretive signs under number stipulation 2 above. The representative will be a citizen member of the Board to be selected by the Board with input from Chimney Ridge L.L.C. The role of the representative will be advisory and will relate only to the work done for stipulations 1 and 2.

4) The results of intensive level surveys completed under direction of Chimney Ridge L.L.C. for several buildings that were located in the area of the planned development will be provided to the Board. The surveys and any accompanying report will be provided to the Board by May 1, 2000.

5) Asarco will provide the Board a copy of the report prepared by an archeologist on activities completed during the remediation of the entire Superfund site. The report will be provided to the Board by Asarco by May 1, 2000. The report will likely include drawings and photographs that were completed by an archeologist during the remediation of the Superfund site. Asarco has already provided the Board materials in Asarco's possession that relate to the design, operation, and role for the smelter for the Board's use in the preservation of the smelter history.

6) Hi-Ute-Buehner will provide a total of $89,500 to Murray City for use in supporting the development of an educational video, models, development of museum exhibit(s), and miscellaneous items related to the smokestacks and the Murray smelter (smelter). Hi-Ute Buehner shall provide payment full amount to Murray City by May 1, 2000. The Board will determine the distribution of the funds among the various activities and how the activities will be implemented. The funds will be used for the activities described below:

(a) support the development of a short (20 to 30 minute) video about the smelter which is currently in production under Murray City oversight;

(b) development of a permanent table top model depicting the smelter;

(c) development of a portable hands-on model which illustrates the changes in the smelter site from prior to 1870 to the present day;

(d) establishment of a smelter exhibit in a museum or location to be determined by the Board or Murray City; and

(e) development of a brochure that illustrates the locations, physical descriptions, and processes of smelter operations.

Each of the activities may be funded in whole or in part until the funds have been expended. If all the activities have been funded and there is still money left, it can be used to purchase, preserve, or renovate a historic building that will house smelter related displays or artifacts.

7) Murray City will provide appropriate accounting for the expenditure of the funds provided by Hi-Ute Buehner. Beginning on May 1, 2001, Murray will provide to EPA an annual report describing the expenditure of the funds. A final report is due six months after the last funds are expended and should include a full accounting of all expenditures, as well as an audit by an independent auditing firm. Murray City is responsible for ensuring that the funds are spent on the specified activities. Hi-Ute Buehner has met its obligations under stipulation 6 by providing the funding required to Murray City. Misuse of the funds does not impact the fulfilment of said obligation. Murray City will also provide the Council and the SHPO copies of the above reports.

8) If Chimney Ridge L.L.C. decides to sell the property before developing it, Chimney Ridge L. L. C. will place a deed restriction on the property requiring future development to include the requirements of Stipulations 1 and 2.

9) Chimney Ridge, L.L.C. agrees that if it builds an office complex on the Murray Smelter Site, it will allow, at no cost to the other parties, exhibit of smelter history materials in the lobby of the office complex. Chimney Ridge, L.L.C. shall determine the quantity of artifacts, display design, and layout of the materials.

Dispute Resolution

If the SHPO or the Council object within 15 days to any actions proposed pursuant to the MOA, the EPA shall consult with the objecting party to resolve the objection. If the EPA determines the objection cannot be resolved, the EPA shall request the further comments of the Council or SHPO and forward documentation relevant to the objection to the other parties. Within 30 days after receipt of all pertinent documentation, the Council or the SHPO will either: 1) provide the EPA with recommendations, which the

EPA shall take into account in reaching a final decision regarding the objection; or 2) notify the EPA that it will comment pursuant to 36 CFR 800.7 with reference only to the subject of the objection.

If at any time during the implementation of the measures stipulated in this MOA, an objection is raised by a member of the public, the EPA shall take the objection into account and consult as needed with the objecting party, the Board, Murray City, the SHPO, and the Council in an attempt to resolve the objection.

Amendment

Any party to this MOA may propose to the other parties that it be amended, whereupon the parties will consult in accordance with 36 CFR Part 800.6 (c)(7) to consider such an amendment.

Termination

Any of the consulting parties to this MOA may terminate it by providing thirty (30) days notice to the other parties, provided that the parties will consult during the period prior to termination to seek agreement on amendments or other actions that will avoid termination. In the event of termination, EPA, in consultation with the Council and the SHPO, will determine how to implement EPA's responsibilities under Section 106 in a manner consistent with applicable provisions of 36 CFR Part 800.

Execution of this MOA by the EPA, the SHPO, and the Council, and implementation of its terms evidences that EPA has afforded the Council an opportunity to comment on the proposed project and its effect on the historic nature of the smoke stacks, that EPA has taken into account the effects of the undertaking on the historic properties, and is appropriately implementing the requirements of Section 106 of NHPA.

Consulting Parties:

Environmental Protection Agency, Region VIII

By: Max H Dodson 4/5/00

Max H. Dodson, Assistant Regional Administrator Date
Ecosystems Protection and Remediation

Utah State Historic Preservation Officer

By: _____ 4/5/2000
Wilson G. Martin, Deputy — Date
State Historic Preservation Office
Advisory Council on Historic Preservation

By: _____ 5/4/00
John Fowler, Executive Director — Date
Advisory Council on Historic Preservation

Concurring Parties:

By: _____ 4/4/00
Murray City — Date

ATTEST:
_____
City Recorder

MURRAY CITY, STATE OF UTAH ★ CORPORATE SEAL ★

APPROVED AS TO FORM:
_____
City Attorney

By: _____ 4/5/00
Chimney Ridge L.L.C. — Date

EXAMPLE 6-C
ROEBLING STEEL

MEMORANDUM OF AGREEMENT
BETWEEN
U. S. ENVIRONMENTAL PROTECTION AGENCY
AND NEW JERSEY STATE HISTORIC PRESERVATION OFFICER
FOR
THE ROEBLING STEEL COMPANY SITE,
ROEBLING, NEW JERSEY,
SUBMITTED TO THE ADVISORY COUNCIL ON HISTORIC PRESERVATION
PURSUANT TO 36 CFR 800.6(a)

WHEREAS, the U.S. Environmental Protection Agency (USEPA) will implement a remedial action (the Project) for the Roebling Steel Company Site in Roebling, New Jersey; and

WHEREAS, the Roebling Steel Company Site was added to the USEPA's National Priorities List of Superfund sites in 1983 (a map of the property showing the location and designation of the buildings at the Site is included as Attachment A to this Agreement), and USEPA's remedial action for this Superfund site includes, but is not limited to, the following actions: decontamination, demolition, and on-site management of selected demolition debris for contaminated buildings that are structurally unsound (referred to as Type A Buildings); decontamination of contaminated buildings that are structurally sound (referred to as Type B Buildings); asbestos decontamination of structurally sound and otherwise uncontaminated buildings (referred to as type C Buildings); removal and off-site disposal of both contaminated process dust and liquid and solid wastes from the equipment, above-ground tanks, pits, sumps, and underground piping; removal and decontamination of equipment, tanks, and scrap metal prior to recycling; removal of underground storage tanks, along with all tank contents and any surrounding impacted soil; and

WHEREAS, the USEPA has conducted several cultural resources investigations of the Roebling Steel Company Site, and consequently has determined, in consultation with the NJSHPO, that the Roebling Steel Company Site at Roebling (a.k.a. Kinkora) is eligible for inclusion in the National Register of Historic Places (NRHP); and

WHEREAS, the USEPA and the NJSHPO have determined that the Project will have an adverse effect on the eligible Roebling Steel Company Site; and

WHEREAS, the USEPA has consulted with the New Jersey State Historic Preservation Officer (NJSHPO) and the Advisory Council on Historic Preservation (ACHP), pursuant to 36 CFR 800, the regulations implementing Section 106 of the National Historic Preservation Act of 1966 (NHPA), as amended (16 U.S.C. 470f); and

WHEREAS, the Roebling Historical Society and the Township of Florence have participated in the consultation and have been invited to concur in this Memorandum of Agreement;

NOW, THEREFORE, the USEPA and the NJSHPO agree that the Project will be implemented in accordance with the following stipulations to satisfy the USEPA's Section 106 responsibilities for the Project.

STIPULATIONS

The USEPA will ensure that the following measures are carried out.

1. USEPA has recorded the Roebling Steel Company Site to the standards and guidelines of the Historic American Engineering Record (HAER) of the National Park Service (NPS). Copies of the recordation shall be sent to the New Jersey State Archives, the Township of Florence, and the Roebling Historical Society. Copies of this documentation with original photographs shall be given to the NJSHPO. The USEPA has ensured that all documentation specified by HAER is completed and approved by HAER prior to the demolition of Type A Buildings.

2. USEPA has prepared documentation to provide assistance to the NJSHPO for the Roebling Steel Company Site's nomination for listing on the New Jersey and National Registers of Historic Places. A list of these reports is included as Attachment B to this Agreement.

3. Decontamination of Type B and Type C Buildings shall be undertaken with particular emphasis on treatment methods that will achieve appropriate cleanup standards. During the remediation of these buildings, Rehabilitation Standard 7 of the Secretary of the Interior's Standards for the Treatment of Historic Properties (36 CFR 68.3 (b)(i)) will be considered to the maximum extent practicable.

4. Building designations (Types A, B, and C) that need to be changed due to further structural deterioration, worker health and safety issues, further evaluation of reuse potential, and the results of the treatability studies for finding an effective decontamination method, will be submitted to NJSHPO for review and comment with respect to preservation concerns. If the NJSHPO does not comment within 30 days of receipt of the building designation changes, the USEPA will assume that the NJSHPO concurs with the changes.

5. The USEPA shall prepare a Historic Structure Report (HSR) for the Main Gate House following the NJSHPO's "Historic Structure Reports & Preservation Plans, A Preparation Guide." The USEPA will submit the HSR to the NJSHPO for a 30-day review period. If the NJSHPO does not provide comments within 30 days of receipt of the report, the USEPA will assume NJSHPO concurrence with the report.

6. The USEPA shall stabilize the Main Gate House, which can then be utilized as a local museum, to facilitate public education and outreach. The USEPA, in consultation with the Roebling Historical Society, will develop design plans for the stabilization of the building. The design plans will be based on the HSR, and shall be consistent with the recommended approaches in the Secretary of the Interior's Standards for the Treatment of Historic Properties (U.S. Department of the Interior, National park Service, 1995). The USEPA will submit the design plans to the

NJSHPO for review and comment with respect to historic considerations. If the NJSHPO does not comment within 30 days of receipt of the design plans, the USEPA will assume NJSHPO concurrence with the plans.

7. The USEPA shall identify significant historic equipment and artifacts associated with the site. These pieces of equipment and artifacts shall be appropriately decontaminated and stored in a secure building on-site. Decontamination will be undertaken with emphasis on treatment methods that will achieve appropriate cleanup standards and meet Standard 7 to the maximum extent practicable. The following equipment shall remain in place if it is feasible to do so without damaging the equipment during remediation: the prestressing machinery, tools, and equipment in Buildings 92 and 93, sample sections of the connecting rail track, the freight elevator in Building 16, and an appropriate portion of the remaining Morgan wire-rod rolling mill in Building 86. The aforementioned list of equipment and artifacts shall be submitted to the NJSHPO for review. If the NJSHPO does not provide comments within 30 days of receipt of the list, the USEPA will assume NJSHPO concurrence with the list.

8. The USEPA shall identify a qualified repository or repositories to house Historic Records including architectural and engineering drawings, maps, historic papers, pamphlets, and photographs that contain information about the construction of the buildings, the manufacturing process and products, and the administration of the plant. The repository shall have as part of its mission, the preservation and dissemination of information on industrial sites in the United States. Furthermore, the repository shall have in place curation methods for the records (in accordance with 36 CFR 79) and means for the public and scholars to access these records.

9. The USEPA has prepared Recommended Preservation Guidelines for those buildings that are not demolished, and for selected equipment and artifacts that remain at the site. The guidelines will be applicable to future use and new construction. They will become effective after the completion of the remedial action, and will be implementable by the future owner(s) of the Site. These guidelines are included as Attachment C to this Agreement.

10. The USEPA has initiated a program of community relations activities at the Site in association with its Superfund action (a list of these activities is included as Attachment D to this Agreement). As part of a continuing public outreach effort, the USEPA shall make available to the NJSHPO, local historical societies, and other prospective users, the HAER documentation and other cultural resources-related studies completed as part of the USEPA's Superfund action. Continuing public education and outreach programs, will include assistance in the development of an on-site museum (see Stipulation 6). As part of its public education effort, the USEPA will continue to provide site access to individuals interested in preparing oral histories of their experiences working at the Roebling steel facility, and in using these histories as part of public outreach programs. Further, the USEPA will continue to provide site access and assistance to individuals for purposes related to the development of appropriate projects on the industrial, architectural, and cultural history of the site. The USEPA and the NJSHPO will assist local historical organizations in the dissemination of the resulting materials and publications to the local community and statewide.

OBJECTIONS, AMENDMENTS, AND DISPUTE RESOLUTION

1. Should the NJSHPO or other signatory to this Agreement object within thirty (30) days to any action proposed pursuant to this agreement, USEPA shall consult with the objecting party to resolve the objection. If the USEPA determines that the objection cannot be resolved, the USEPA shall request the further comments of the Council pursuant to 36 CFR 800.6(b). Any Council comment provided in response will be taken into account by the USEPA in accordance with 36 CFR 800.6(c)(2) with reference only to the subject of the dispute; the USEPA's responsibility to carry out all actions under this agreement that are not the subjects of this dispute will remain unchanged.

2. Any party to this Agreement may propose to the other parties that it be amended, whereupon the parties will consult in accordance with 36 CFR 800.5(e) to consider such an amendment.

Execution of this Memorandum of Agreement by the USEPA and NJSHPO, its subsequent acceptance by the ACHP, and implementation of its terms is evidence that USEPA has afforded the ACHP an opportunity to comment on the Project and its effects on historic properties, and that the USEPA has taken into account the effect of the undertaking on historic properties.

ENVIRONMENTAL PROTECTION AGENCY

By: _____ Date: _____

NEW JERSEY HISTORIC PRESERVATION OFFICE (SHPO)

By: _____ Date: _____
Dorothy P. Guzzo, Deputy State Historic Preservation Officer

ADVISORY COUNCIL ON HISTORIC PRESERVATION

By: _____ Date: _____

ROEBLING HISTORICAL SOCIETY

By: _____ Date: _____

FLORENCE TOWNSHIP, NEW JERSEY

By: _____ Date: _____

RECOMMENDED
HISTORIC PRESERVATION GUIDELINES

XI. RATIONALE

The proposed remedial action will result in an adverse effect on the National Register-eligible Roebling Steel Company Site; that is the demolition of the Type A buildings, the removal and loss of potentially significant historic artifacts throughout the Site, and potential damage to Type B and C buildings and significant site features as a result of the remediation process. Various mitigation measures have been incorporated into a Memorandum of Agreement between the U.S. Environmental Protection Agency and the New Jersey Historic Preservation Officer for the Site. Among these measures is the development of the Recommended Preservation Guidelines. These guidelines are applicable to future use of the remaining buildings and new construction, and will become effective upon completion of the remedial action. It is anticipated that implementation of these guidelines will be the responsibility of the future owner(s) of the Site.

II. RECOMMENDED GUIDELINES

A. All future site development and reuse should comply with the *Secretary of the Interior's Standards for the Treatment of Historic Properties* (1995). This document, with its associated terminology, is considered to be an integral part of these guidelines. Key and contributing buildings and historic site features should be treated as follows: key buildings should be designated for preservation and rehabilitation for compatible uses in any proposed redevelopment plans. Demolition of key buildings should be avoided if feasible. Key buildings, contributing buildings, and historic site features should have a high priority for preservation and rehabilitation for compatible new uses in any proposed redevelopment plan. Demolition of contributing buildings should be avoided, unless it is determined and documented that they are structurally unsound or inappropriate for adaptive reuse. Demolition of non-contributing buildings would be permissible.

B. The standards recognize a number of aspects of the treatment of historic properties, including preservation, rehabilitation, and new construction.

1. Preservation - All interim work prior to the full rehabilitation of buildings, structures, significant site features, and selected equipment and artifacts should comply with the *Secretary of the Interior's Standards for the Treatment of Historic Properties* (1995). Additionally, prior to undertaking work on any buildings or site features, a Preservation Plan, following the guidelines detailed in "Historic Structure Reports and Preservation Plans: Planning Documents for Historic Properties" (New Jersey State Historic

Preservation Office, 1997), should be developed and shall provide the basis for the proposed work.

2. Rehabilitation - All rehabilitation and redevelopment activities should follow the *Secretary of the Interior's Standards for the Treatment of Historic Properties* (1995) to preserve those portions and features of the complex which convey its historic, cultural, and architectural values. Any rehabilitation proposed for B and C buildings should be for compatible new uses that allow the buildings to retain their historic character. Additionally, prior to undertaking work on any B and C buildings or significant site features, a Rehabilitation Plan for Preservation should be developed that shall provide the basis for the proposed work.

3. New Construction - The construction of additions, new buildings, and new site features should comply with the *Secretary of the Interior's Standards for the Treatment of Historic Properties* (1995), Rehabilitation Standard 9: "New additions, exterior alterations or related new construction will not destroy historic materials, features and spatial relationships that characterize the property. The new work will be differentiated from the old and will be compatible with the historic materials, features, size, scale and proportion, and massing to protect the integrity of the property and its environment;" and with the *Secretary of the Interior's Standards for the Treatment of Historic Properties (1995)*, Standard 10: "New additions and adjacent or related new construction will be undertaken in such a manner that, if removed in the future, the essential form and integrity of the historic property and its environment would be unimpaired."

C. The design of preservation, rehabilitation, and new construction work should maintain the district's historic industrial character and ensure its uniformity despite varied uses. New safety features and appropriate design treatments would be permissible.

1. Buildings

Windows - Wherever possible, existing historic windows should be retained and rehabilitated, including lintels and bluestone sills. Replacement windows and alterations for energy efficiency should be compatible with the historic windows in design and materials.

Doors - Wherever possible, existing historic doors should be retained and rehabilitated. Replacement doors and alterations for safety and egress requirements should be compatible with the historic character of the buildings.

Masonry - Surfaces should be cleaned with appropriate low-pressure washing techniques to avoid damage; high pressure washing (over 500 psi) and sandblasting should be prohibited. Replacement masonry should be compatible with the original in size, color, and texture. Repointing should match the original in color, porosity, strength, elasticity, texture, and tooling. Masonry should not be painted or stuccoed unless originally so treated.

Exterior Details - Historic hardware, light fixtures, cast iron, sheet metals, and slate roofing should be rehabilitated where possible. Replacement components should be compatible with the original design and materials.

Interior Spaces and Details - Reuse of significant interior spaces should preserve their original design, scale, and detailing, as, for example, in Buildings 6, 16, and 21. Significant industrial features such as timber and steel framing, railings, lighting, cranes, and belt drive or other integral machinery, should be preserved *in-situ*.

Paint - New paint colors and finishes on exterior wood or metal and significant interior details should replicate the original or use historically appropriate treatments.

Signage - Historic signage should be preserved. The design, scale and color of new signage should harmonize with the site's historic industrial architecture.

2. Structures, Millyards, and Site Components

Structures - Water towers, yard cranes, and flag pole should be preserved *in-situ*.

Millyards - Key areas reflecting the historic character of the complex, such as the entrance road east of the Main Gate House paved with Belgian block, should be retained as open space and an extension of the Main Gate House.

Roads - Redevelopment of the complex should be compatible with the site's historic transportation patterns and relationship to the Delaware River and the adjacent Village. Major road ways should be preserved.

Paving - Belgian block paving should be retained and incorporated with new site improvements. Asphalt should be removed from the Belgian block paving wherever possible.

Lighting and Outdoor Furniture - Historic exterior lighting should be preserved wherever possible. New streetlights, exterior lighting, and outdoor

furniture should be compatible with the district's historic industrial character.

Parking - Parking areas and garages should be compatible in location, scale, design, and materials with the historic character of the complex.

III. INSTITUTIONAL CONTROLS

The appropriate body within the local governmental framework should put into place institutional controls to ensure the implementation of the following procedures:

A. Preservation Guidelines - All interim and redevelopment work should follow the above Preservation Guidelines to promote the preservation and adaptive re-use of the remaining buildings and the overall historic site context.

B. Review of Proposed Redevelopment - All plans for the preservation and rehabilitation of the buildings and the redevelopment of the overall Site should be reviewed by the New Jersey State Historic Preservation Officer.

C. Consultation with Relevant Parties - Any proposals for redevelopment of the complex and conversion of the buildings to new uses should be developed in consultation with Florence Township, the Roebling Historical Society, and the residents of the Roebling Village Historic District.

ATTACHMENT D

COMMUNITY RELATIONS ACTIVITIES

Fact sheets and Updates:

- March 1989 Superfund Update - EPA to Conduct Investigation of Roebling Steel Site
- December 1990 Facts - EPA to Conduct Removal and Remedial Actions at the Roebling Steel Superfund Site.
- January 1990 Superfund Update - EPA Invites Public comment on Interim Action.
- January 1990 Superfund Update - Proposed Plan.
- November 1991 Superfund Update.
- August 1992 Superfund Update.
- August 1994 Superfund Update.
- September 1995 Superfund Update.
- July 1996 Superfund Update.
- October 1998 Superfund Update.

Public Meetings and Availability Sessions:

- Public meeting on March 21, 1989, availability session on March 22, 1989.
- Public meeting on January 18, 1990.
- Public meeting on July 25, 1991.
- Public availability session in August 1992.
- Town council meeting in September 1995.
- Public meeting in September 1995.
- Press conference with Carol Browner & Senator Lautenberg in September 1995.
- Public meeting in July 1996.
- National Park Service (NPS) public meeting on historic preservation activities in August 1997.

Other Public Related Activities:

- Provided access for an artist commissioned by the NJ State Council on the Arts in August 1993.
- Sampled Mansfield Township residents' private wells in April 1995.
- Site visit with NJDOH, ATSDR, and BCHD in November 1995.
- Coordination with BCHD to perform community lead screening in January 1990, April 1995, September 1995.
- Site tours for township officials and prospective purchasers occur frequently, with the first request in April 1997.
- Site meeting with the local officials, Roebling Historical Society (RHS) and State Historic Preservation Officer (SHPO) in October 1998.
- Site visit with the RHS to select relevant equipment and artifacts for the future museum, which took place in October 1998.
- Site tour for all members of the RHS took place in December 1998.
- Provided site-related documents and site visits for students from University of Virginia School of Architecture in February 1997 and January 1999.

EXAMPLE 6-D
AMBER MILLING

MEMORANDUM OF AGREEMENT
AMONG THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND THE PENNSYLVANIA STATE HISTORIC PRESERVATION OFFICE

Harvest States Cooperatives/Amber Milling Company Division and Lackawanna County Railroad Authority Proposed Flour Milling Facility, Monroe County, PA

WHEREAS, Harvest States Cooperatives/Amber Milling Company Division and the Lackawanna County Railroad Authority (the Project Sponsors), have applied to the Pennsylvania Department of Environmental Protection (PaDEP) for an NPDES Permit, which has been issued as PA S10S042, pursuant to the Pennsylvania Clean Streams Law, 35 P.S. §§691.1 *et seq.* and Section 402 of the Federal Clean Water Act, 33 U.S.C. §1342, for stormwater discharges associated with the construction and operation of a proposed Flour Milling Facility in Mt. Pocono Borough and Pocono, Coolbaugh, and Tobyhanna Townships, Monroe County, Pennsylvania (the Amber Milling Project or the Undertaking), the terms and conditions of which NPDES Permit are incorporated herein by reference;

WHEREAS, PaDEP is responsible for the issuance of NPDES permits under a delegation from the U.S. Environmental Protection Agency, pursuant to Section 402(b) of the Federal Clean Water Act, 33 U.S.C. §1342(b);

WHEREAS, the United States Environmental Protection Agency (EPA), in consultation with the Pennsylvania State Historic Preservation Officer (SHPO) has determined that the Amber Milling Project will have an effect upon the Pocono Manor Historic District (Historic District), a district included in the National Register of Historic Places (Register), and the Lackawanna, Delaware & Western Railroad, a property eligible for inclusion in the Register, pursuant to 36 C.F.R. Part 800, regulations implementing Section 106 of the National Historic Preservation Act (16 U.S.C. §470f);

WHEREAS, the Project Sponsors have developed and submitted to EPA and the SHPO two reports prepared by Carter van Dyke Associates, entitled *Visual and Historic Impact of Proposed Mill* and *Mitigation Plan for the Proposed Mill* (collectively, the Mitigation Plan), and in response to the Mitigation Plan, the SHPO raised concerns which were subsequently addressed, and the SHPO has determined that the Mitigation Plan is adequate and addresses the concerns of the SHPO with respect to potential impacts of the Amber Milling Project on the Historic District;

WHEREAS, by letter dated April 14, 1997, and in accordance with 36 C.F.R. §800.5(e), EPA advised the SHPO that, after consulting with the SHPO and after considering the views of interested persons, EPA has found that the Amber Milling Project will have an adverse effect on the Historic District, and the EPA requested consultation with the SHPO regarding ways to avoid or reduce the effects on the Historic District;

MEMORANDUM OF AGREEMENT AMONG THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND THE PENNSYLVANIA STATE HISTORIC PRESERVATION OFFICE

WHEREAS, pursuant to 36 C.F.R. §800.5(e), EPA notified and invited all identified and appropriate interested parties, including the Permit applicants, the SHPO, and others entities, to participate in the consultation process;

WHEREAS, the documentation required by 36 C.F.R. §800.8(b)(1)-(4) has been prepared including a report entitled "Section 106 Analysis of Criteria of Effect and Adverse Effect, and Proposed Mitigation Measures" and associated Exhibits; and

WHEREAS, PaDEP, the County of Monroe, Harvest States Cooperatives, the Lackawanna County Railroad Authority, Mount Pocono Borough, and Ireland Hotels, Inc. (d/b/a Pocono Manor Inn and Golf Resort) participated in the consultation process; and those parties (including PaDEP, Harvest States Cooperatives, and the Lackawanna County Railroad Authority) who are committed to implement actions pursuant to the "Stipulations" set forth below have concurred in this Memorandum of Agreement;

NOW, THEREFORE, the Advisory Council, EPA and the Pennsylvania SHPO agree that the Undertaking shall be implemented in accordance with the following stipulations in order to take into account the effect of the undertaking on historic properties.

Stipulations

EPA and the SHPO will ensure that the following measures are carried out:

1. By signing this Memorandum of Agreement, intending to be legally bound, the Project Sponsors agree to the following:

   (a) Harvest States Cooperatives shall construct and maintain all building structures of the Amber Milling Project which may be viewed above the treeline in a color to be determined by the Harvest States Cooperatives' historic/landscape architect consultant, in consultation with the SHPO. The SHPO shall review and approve this determination as well as the Undertaking's final design plans. The roofing material and leg tower shall be painted to match the chosen final concrete color.

   (b) In order to limit the generation and propagation of noise from the Amber Milling Project, Harvest States Cooperatives shall implement the design elements and operating practices described in the *Visual and Historic Impact of Proposed Mill*

prepared by Carter van Dyke Associates, including (1) the conduct of material load and off-loading activities within enclosed structures; and (2) the installation and use, to the maximum extent practicable, of an hydraulic progressioner for movement of rail car units within the site. Harvest States Cooperatives shall operate the Amber Milling Project in compliance with all applicable local noise control ordinances.

(c) To the maximum extent feasible, the Project Sponsors shall install outdoor lights below 40 feet above ground level, and shall (as necessary) direct such lighting and provide shades, deflectors and buffers to minimize propagation at night of illumination and glare in the direction of the Historic District. The SHPO shall have the authority to review and approve the Project Sponsors' determination in this regard.

(d) The Project Sponsors shall cooperate with the County of Monroe, the Monroe County Historical Society, and other interested parties in the development, printing and distribution of an interpretative flyer/brochure with respect to the historic development of Pocono Manor, including the historic character of the railroad and other area enterprises, in the development of the Poconos and area industries, as described in the Mitigation Plan; and Harvest States Cooperatives (on behalf of the Project Sponsors) shall commit funding of up to $10,000 for the initial development, printing and distribution of such interpretative flyer/brochure. The text and layout of the brochure shall be reviewed and approved by the SHPO.

(e) Harvest States Cooperatives shall construct and maintain the building structures and install and operate the milling facility equipment in accordance with the fire safety designs approved by the Pennsylvania Department of Labor and Industry and in accordance with the good operating and housekeeping practices required for a food processing facility. Such designs and operating practices shall include the following elements:

(i) Installation of a sophisticated dust collection and filtration system.

MEMORANDUM OF AGREEMENT AMONG THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND THE PENNSYLVANIA STATE HISTORIC PRESERVATION OFFICE

(ii) Maintenance of high standards of housekeeping required for a food processing facility in order to minimize dust accumulation on horizontal surfaces.

(iii) Ongoing inspection of the facility to assure avoidance of dust accumulations.

(iv) Construction of all major building elements using reinforced concrete or steel construction.

(v) Use on Conveyor systems of plastic buckets and other materials that are not prone to generate sparks.

(vi) Installation on conveyor systems are of alignment sensors to assure proper belt alignment, tied to a central computer processor capable of triggering shutdown of the conveyor in the event of misalignment.

(vii) Installation on conveyor systems of heat sensors on all metal bearings, which through the central computer processors will trigger a conveyor shutdown if bearing heat increases beyond tolerance limits.

(viii) Equipping of the facility with a full sprinkler system.

(xi) Installation of on-site storage tank, holding 250,000 gallons of water, or alternatively an adequate supply of water from a public utility, sufficient to provide pressure and fire control water supply.

(x) Installation of high-level blowout panels at the top of buildings to safely dissipate any explosive/compressive events.

2. The Project Sponsors shall, upon request by the SHPO, prepare a report on all activities carried out pursuant to Stipulation 1 of this Memorandum of Agreement, and shall provide a copy of such report to the Advisory Council, EPA, and, upon request, to other interested parties.

MEMORANDUM OF AGREEMENT AMONG THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND THE PENNSYLVANIA STATE HISTORIC PRESERVATION OFFICE

3. If stipulations 1(a) through 1(e) above have not been implemented by July 1, 1999, the Advisory Council, EPA and the SHPO shall review implementation of the terms of this Memorandum of Agreement and determine whether revisions are needed. If revisions are needed, the parties to this Agreement shall consult in accordance with 36 C.F.R. Part 800 to make such revisions.

4. Dispute Resolution. Should the SHPO object within seven (7) days to any plans submitted for SHPO review pursuant to this agreement, EPA shall consult with the SHPO to resolve the objection. If EPA determines that the objection cannot be resolved, EPA shall request further comments of the Council pursuant to 36 C.F.R. § 800.6(b). Any Council comment provided in response to such a request shall be taken into account by EPA in accordance with 36 C.F.R. § 800.6(c)(2) with a reference only to the subject of the dispute; EPA's responsibility to carry out all actions under this agreement that are not the subjects of the dispute will remain unchanged.

Execution of this Memorandum of Agreement by the Advisory Council, EPA and the Pennsylvania SHPO, and implementation of its terms, evidence that EPA has afforded the Council an opportunity to comment on the Amber Milling Project and its effects on historic properties, and that EPA has taken into account the effects of the Undertaking on historic properties.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

By: _____ Date: 8/8/97
Name: JOHN FOWLER
Title: EXECUTIVE DIRECTOR

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

By: _____ Date: 8-7-97
Name: Historic Preservation Officer
Title:

MEMORANDUM OF AGREEMENT AMONG THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND THE PENNSYLVANIA STATE HISTORIC PRESERVATION OFFICE

PENNSYLVANIA STATE HISTORIC PRESERVATION OFFICER

By: Brenda Barrett Date: Aug 8, 1997
Name:
Title: D-SHPO

The undersigned parties concur in the Memorandum of Agreement:

HARVEST STATES COOPERATIVES/AMBER MILLING COMPANY DIVISION

By: R. Timothy Weston Date: August 8, 1997
Name: R. TIMOTHY WESTON
Title: ATTORNEY IN FACT

LACKAWANNA COUNTY RAILROAD AUTHORITY

By: R. Timothy Weston Date: August 8, 1997
Name: R. TIMOTHY WESTON
Title: ATTORNEY IN FACT

PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

By: Glenn E. Maurer Date: August 15, 1997
Name: GLENN E. MAURER
Title: Director, Bureau of Water Quality Protection

**MEMORANDUM OF AGREEMENT
AMONG THE ADVISORY COUNCIL ON HISTORIC PRESERVATION,
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND
THE PENNSYLVANIA STATE HISTORIC PRESERVATION OFFICE**

3. If stipulations 1(a) through 1(e) above have not been implemented by July 1, 1999, the Advisory Council, EPA and the SHPO shall review implementation of the terms of this Memorandum of Agreement and determine whether revisions are needed. If revisions are needed, the parties to this Agreement shall consult in accordance with 36 C.F.R. Part 800 to make such revisions.

4. Dispute Resolution. Should the SHPO object within seven (7) days to any plans submitted for SHPO review pursuant to this agreement, EPA shall consult with the SHPO to resolve the objection. If EPA determines that the objection cannot be resolved, EPA shall request further comments of the Council pursuant to 36 C.F.R. § 800.6(b). Any Council comment provided in response to such a request shall be taken into account by EPA in accordance with 36 C.F.R. § 800.6(c)(2) with a reference only to the subject of the dispute; EPA's responsibility to carry out all actions under this agreement that are not the subjects of the dispute will remain unchanged.

Execution of this Memorandum of Agreement by the Advisory Council, EPA and the Pennsylvania SHPO, and implementation of its terms, evidence that EPA has afforded the Council an opportunity to comment on the Amber Milling Project and its effects on historic properties, and that EPA has taken into account the effects of the Undertaking on historic properties.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

By: _____ Date: 8/8/97
Name: John Fowler
Title: Executive Director

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

By: _____ Date: _____
Name:
Title:

MEMORANDUM OF AGREEMENT AMONG THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND THE PENNSYLVANIA STATE HISTORIC PRESERVATION OFFICE

4. Dispute Resolution. Should the SHPO object within seven (7) days to any plans submitted for SHPO review pursuant to this agreement, EPA shall consult with the SHPO to resolve the objection. If EPA determines that the objection cannot be resolved, EPA shall request further comments of the Council pursuant to 36 C.F.R. § 800.6(b). Any Council comment provided in response to such a request shall be taken into account by EPA in accordance with 36 C.F.R. § 800.6(c)(2) with a reference only to the subject of the dispute; EPA's responsibility to carry out all actions under this agreement that are not the subjects of the dispute will remain unchanged.

Execution of this Memorandum of Agreement by the Advisory Council, EPA and the Pennsylvania SHPO, and implementation of its terms, evidence that EPA has afforded the Council an opportunity to comment on the Amber Milling Project and its effects on historic properties, and that EPA has taken into account the effects of the Undertaking on historic properties.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

By:_____ Date:_____
Name:
Title:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

By: Roy E. Denmark Jr. Date: 8-7-97
Name: ROY E. DENMARK JR
Title: REGION III HISTORIC PRESERVATION OFFICER

PENNSYLVANIA STATE HISTORIC PRESERVATION OFFICER

By:_____ Date:_____
Name:
Title:

MEMORANDUM OF AGREEMENT
AMONG THE ADVISORY COUNCIL ON HISTORIC PRESERVATION,
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND
THE PENNSYLVANIA STATE HISTORIC PRESERVATION OFFICE

PENNSYLVANIA STATE HISTORIC PRESERVATION OFFICER

By: Brenda Barrett Jr. Date: August 8, 1997
Name:
Title: Deputy SHPO

The undersigned parties concur in the Memorandum of Agreement:

HARVEST STATES COOPERATIVES/AMBER MILLING COMPANY DIVISION

By:_____ Date:_____
Name:
Title:

LACKAWANNA COUNTY RAILROAD AUTHORITY

By:_____ Date:_____
Name:
Title:

PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

By:_____ Date:_____
Name:
Title:

Power of Attorney

Know All Men By These Presents,

I, Garry A. Pistoria, as the Group Vice President of HARVEST STATES COOPERATIVES, a Minnesota cooperative association ("Harvest States"), and as President of Harvest States Cooperatives/Amber Milling Company Division, having the appropriate authority to bind Harvest States, and to make such appointments, has made, constituted and appointed, and by these presents does make, constitute and appoint R. Timothy Weston, 240 North Third Street, Harrisburg, PA 17101-1507, my true and lawful Attorney, for me and in my name, place and stead, to execute, as fully as I could do if personally present in the name of Harvest States to execute and deliver, as fully as I could do if personally present, that Memorandum of Agreement Among the Advisory Council on Historic Preservation, the United States Environmental Protection Agency and the Pennsylvania State Historic Preservation Office related to the Harvest States Cooperatives/Amber Milling Company Division and Lackawanna County Railroad Authority Proposed Flour Milling Facility, Monroe County, PA., and I do hereby ratify and confirm whatsoever my said attorney shall lawfully do or cause to be done by virtue hereof.

This Special Power of Attorney shall continue in force and may be accepted and relied upon by any person to whom it is presented, despite my purported revocation of it or my death, until actual written notice of such revocation or death is received by such person.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 7th day of August, 1997.

ATTEST:

Joanne Burmeister
Assistant Secretary

HARVEST STATES COOPERATIVES

By: Garry A Pistoria
Garry A Pistoria
Group Vice President, Harvest States Cooperatives
President, Harvest States Cooperatives/Amber Milling Company Division

ACKNOWLEDGEMENT

STATE OF MINNESOTA :

:

COUNTY OF RAMSEY :

On this the 7th day of August, 1997, before me, a Notary Public, the undersigned officer, personally appeared Garry A. Pistoria, who acknowledged himself to be the Group Vice President of Harvest States Cooperatives, a Minnesota cooperative association, and the President of Harvest States Cooperatives/Amber Milling Company Division and that he as such Group Vice President of Harvest States Cooperatives and as President of Harvest States Cooperatives/Amber Milling Company Division, being authorized to do so, executed the foregoing Special Power of Attorney, for the purposes therein contained by signing his name as Group Vice President of Harvest States Cooperatives and President of Harvest States Cooperatives/Amber Milling Company Division.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

Esther I. Longseth

Notary Public

ESTHER I. LONGSETH
NOTARY PUBLIC - MINNESOTA
WASHINGTON COUNTY
My Comm. Expires Jan. 31, 2000

Power of Attorney

Know All Men By These Presents,

I, Lawrence C. Malski, as the Executive Director of the Lackawanna County Railroad Authority (the "Authority"), a Pennsylvania municipal authority, having the appropriate authority to bind the Authority, and to make such appointments, has made, constituted and appointed, and by these presents does make, constitute and appoint R. Timothy Weston, 240 North Third Street, Harrisburg, PA 17101-1507, my true and lawful Attorney, for me and in my name, place and stead, to execute, as fully as I could do if personally present in the name of the Authority to execute and deliver, as fully as I could do if personally present, that Memorandum of Agreement Among the Advisory Council on Historic Preservation, the United States Environmental Protection Agency and the Pennsylvania State Historic Preservation Office related to the Harvest States Cooperatives/Amber Milling Company Division and Lackawanna County Railroad Authority Proposed Flour Milling Facility, Monroe County, PA., and I do hereby ratify and confirm whatsoever my said attorney shall lawfully do or cause to be done by virtue hereof.

This Special Power of Attorney shall continue in force and may be accepted and relied upon by any person to whom it is presented, despite my purported revocation of it or my death, until actual written notice of such revocation or death is received by such person.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 7th day of August, 1997.

ATTEST:

Nadine Swanson

Nadine Swanson
My Commission CC632486
Expires March 31, 2001

LACKAWANNA COUNTY RAILROAD AUTHORITY

By: Lawrence C. Malski

Lawrence C. Malski, Executive Director

Produced Pennsylvania AZ# 21 658-731

ACKNOWLEDGEMENT

STATE OF FLORIDA :

COUNTY OF Broward :

On this the 7th day of August, 1997, before me, a Notary Public, the undersigned officer, personally appeared Lawrence C. Malski, who acknowledged himself to be the Executive Director of the Lackawanna County Railroad Authority, a Pennsylvania municipal authority, and that he as such Executive Director, being authorized to do so, executed the foregoing Special Power of Attorney, for the purposes therein contained by signing his name as Executive Director of the Lackawanna County Railroad Authority.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

Nadine Swanson
Notary Public

Nadine Swanson
My Commission CC632488
Expires March 31, 2001

HA-42927.01

MEMORANDUM OF AGREEMENT (DRAFT 6/2/00)
FOR RECOVERY OF SIGNIFICANT INFORMATION AND MITIGATION OF ADVERSE EFFECTS

IN COMPLIANCE WITH THE
COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980,
AS AMENDED, 42 U.S.C. § 9601 ET SEQ. ("CERCLA")
AND SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT OF 1966,
AS AMENDED, 16 U.S.C. § 470F ("NHPA")

FOR:	**EASTERN SURPLUS COMPANY SUPERFUND SITE**, MEDDYBEMPS, MAINE
UNDERTAKING:	FEDERAL ENVIRONMENTAL CLEANUP OF HAZARDOUS WASTE SITE
STATE:	MAINE
AGENCY:	UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

1. Whereas, the United States Environmental Protection Agency ("EPA") has determined that its environmental cleanup activities at the Eastern Surplus Company Superfund Site (the "Site") have, and will continue to have, adverse effects upon the archaeological resources located within Archaeological Site 96.02 (as named by the Maine Historic Preservation Commission in its prehistoric site survey files), portions of which have been determined to be eligible for listing on the National Register of Historic Places; and

2. Whereas, in accordance with 36 C.F.R. Part 800, EPA acknowledges and accepts the advice and conditions outlined in the Advisory Council on Historic Preservation's "Recommended Approach for Consultation on the Recovery of Significant Information from Archaeological Sites," published in the Federal Register on May 18, 1999, with an effective date of June 17, 1999 (the "Published Guidance"); and

3. Whereas, EPA has consulted with the Maine Historic Preservation Commission, which is the designated State Historic Preservation Officer ("SHPO") in accordance with NHPA, in order to comply with NHPA and its regulations, 36 C.F.R. Part 800 (the "Section 106 Process"); and

4. Whereas, EPA has identified as other consulting parties in the Section 106 process the following: the Passamaquoddy Tribe (Indian Township and Pleasant Point); the Site property owners (Terrell L. & Lisa J. Lord and Harry J. Smith, Jr.); the State of Maine (the Department of Environmental Protection and the Maine State Museum); and the Town of Meddybemps, Maine, and has invited the Passamaquoddy Tribe to sign this Memorandum of Agreement ("Agreement") as an invited signatory; and

5. Whereas, EPA has consulted with the Passamaquoddy Tribe, which attaches religious, and cultural significance to Archaeological Site 96.02 (by virtue of its location and setting, and the archaeological materials found there), and which requests active participation in any future archaeological work at Archaeological Site 96.02 and in the future management of the Site; and

EXAMPLE 6-E
EASTERN SURPLUS

MEMORANDUM OF AGREEMENT
FOR RECOVERY OF SIGNIFICANT INFORMATION AND MITIGATION OF ADVERSE EFFECTS

IN COMPLIANCE WITH THE
COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980,
AS AMENDED, 42 U.S.C. § 9601 ET SEQ. ("CERCLA")
AND SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT OF 1966,
AS AMENDED, 16 U.S.C. § 470F ("NHPA")

FOR:	**EASTERN SURPLUS COMPANY SUPERFUND SITE**, MEDDYBEMPS, MAINE
UNDERTAKING:	FEDERAL ENVIRONMENTAL CLEANUP OF HAZARDOUS SUBSTANCE SITE
STATE:	MAINE
AGENCY:	UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

1. Whereas, the United States Environmental Protection Agency ("EPA") has determined that its environmental cleanup activities at the Eastern Surplus Company Superfund Site (the "Site") have, and will continue to have, adverse effects upon the archaeological resources located within Archaeological Site 96.02 (as named by the Maine Historic Preservation Commission in its prehistoric site survey files), portions of which have been determined to be eligible for listing on the National Register of Historic Places; and

2. Whereas, in accordance with 36 C.F.R. Part 800, EPA acknowledges and accepts the advice and conditions outlined in the Advisory Council on Historic Preservation's "Recommended Approach for Consultation on the Recovery of Significant Information from Archaeological Sites," published in the Federal Register on May 18, 1999, with an effective date of June 17, 1999 (the "Published Guidance"); and

3. Whereas, EPA has consulted with the Maine Historic Preservation Commission, which is the designated State Historic Preservation Officer ("SHPO") in accordance with NHPA, in order to comply with NHPA and its regulations, 36 C.F.R. Part 800 (the "Section 106 Process"); and

4. Whereas, EPA has identified as other consulting parties in the Section 106 Process the following: the Passamaquoddy Tribe (Indian Township and Pleasant Point); the Site property owners (Terrell L. & Lisa J. Lord and Harry J. Smith, Jr.); the State of Maine (the Department of Environmental Protection and the Maine State Museum); and the Town of Meddybemps, Maine, and has invited the Passamaquoddy Tribe to sign this Memorandum of Agreement ("Agreement") as an invited signatory; and

5. Whereas, EPA has consulted with the Passamaquoddy Tribe, which attaches religious, and cultural significance to Archaeological Site 96.02 (by virtue of its location and setting, and the archaeological materials found there), and which requests active participation in any future archaeological work at Archaeological Site 96.02 and in the future management of the Site; and

6. Whereas, EPA reached an agreement with the SHPO concerning the extent of the Archaeological Site 96.02, the effects of the environmental cleanup activities on Archaeological Site 96.02, and the areas designated for archaeological investigations[1]; and

7. Whereas, EPA has completed field work and preliminary analysis associated with Phase I and Phase II investigations of Archaeological Site 96.02; and

8. Whereas, EPA and the SHPO have determined that portions of Archaeological Site 96.02 are eligible for National Register listing because these areas meet the National Register Criteria, 36 C.F.R. § 60.4, in particular, the Ceramic Period and Laurentian Archaic Contexts guiding National Register eligibility determinations for prehistoric archaeological sites in Maine[2]; and

9. Whereas, EPA has met in consultation with representatives of the Passamaquoddy Tribe (Indian Township and Pleasant Point), including with the Tribal Governors on June 25, 1999 and with the Tribal Governors and the Passamaquoddy Joint Council on July 14, 1999, concerning the findings and determinations made during the Section 106 Process; and

10. Whereas, EPA through its CERCLA public outreach process has provided the public with information about the environmental cleanup activities and their effects on historic properties at the Site and has given the public the opportunity to provide comment and input; and

11. Whereas, in accordance with 36 C.F.R. § 800.6(a)(1), EPA notified the Advisory Council on Historic Preservation (the "Advisory Council") of the adverse effects to Archaeological Site 96.02, and the Advisory Council accepted EPA's invitation to participate in consultation; and

12. Whereas, EPA, the Advisory Council, the SHPO, and the Passamaquoddy Tribe agree that it is in the public interest for EPA to implement environmental cleanup activities to address the contamination of hazardous substances at the Site and that there are no practicable alternatives to the cleanup approach selected by EPA in the July 1998 and May 1999 Action

---

[1]Details of this agreement are documented in a letter dated June 25, 1999 from the SHPO to EPA and in letters dated June 24, 1999 from EPA to Governor Richard Stevens of the Passamaquoddy Tribe's Indian Township Tribal Government and Governor Richard Doyle of the Passamaquoddy Tribe's Pleasant Point Tribal Government.

[2]The areas that have been determined to be eligible for listing are identified in the attached Site map (see Attachment 1).

Memorandums that would have fewer adverse effects on the archaeological resources located within Archaeological Site 96.02; and

13. Whereas, EPA, the Advisory Council, the SHPO, and the Passamaquoddy Tribe agree that it is unavoidable that aspects of the Archaeological Site have been, and will continue to be, adversely affected as a result of EPA's environmental cleanup activities; and

14. Whereas, EPA, the Advisory Council, the SHPO, and the Passamaquoddy Tribe agree that EPA has made best efforts to minimize adverse effects on the archaeological resources located within Archaeological Site 96.02; and

15. Whereas, EPA, the Advisory Council, the SHPO, and the Passamaquoddy Tribe agree that the recovery of significant archaeological information from the Site will be done in accordance with the Published Guidance; and

16. Whereas, to the best knowledge and belief of EPA, the Advisory Council, the SHPO, and the Passamaquoddy Tribe, no human remains, associated or funerary objects or sacred objects, or cultural patrimony, as defined in the Native American Graves Protection and Repatriation Act (25 U.S.C. § 3001), are expected to be encountered in the archaeological work; and

17. Whereas, the ownership and disposition of the archaeological artifacts recovered from Archaeological Site 96.02 are anticipated to be resolved by Passamaquoddy Tribe, the State of Maine and the Robert Abbe Museum of Stone Age Antiquities in an agreement or agreements outside of this Agreement;

Now, therefore, EPA shall ensure that the following terms and conditions will be implemented in a timely manner and with adequate resources in compliance with CERCLA and NHPA.

TERMS AND CONDITIONS

1. EPA shall develop a mitigation plan based upon CERCLA remedial design parameters for the Site and the research design for the recovery of archaeological data. The mitigation plan shall be developed in consultation with the SHPO and the Passamaquoddy Tribe.

2. EPA shall ensure that all archaeological research will be carried out pursuant to this Agreement under the direct supervision of a person or persons meeting at a minimum the Secretary of Interior's Professional Qualifications Standards for Historians and Archaeologists (48 Federal Register 44738-44739, September 29, 1983) and listed on the Maine level 2

approved list for prehistoric archaeologists, and that there is an opportunity for at least one member of the Passamaquoddy Tribe to be employed during the entire period of field investigations.

3. The mitigation plan shall include, at a minimum: additional archaeological field investigations, extending over approximately 200 square meters; reports addressing the scientific and cultural value of the recovered materials; and generation of popular reporting materials to transmit the findings to the public. The evaluation of the cultural value of the recovered materials will be performed by consulting with appropriate experts, including members of the Passamaquoddy Tribe. The mitigation plan shall require EPA to provide an on-Site public educational exhibit and to install appropriate signs to notify the public of any land use restrictions and the significance of Archaeological Site 96.02. The mitigation plan shall also require EPA to place a soil cover over existing soils in the National Register eligible areas to protect remaining portions of the Archaeological Site and establish appropriate grades for erosion control.

4. EPA shall ensure that, if any human remains or funerary objects are discovered at the Site in the course of the archaeological work, the human remains and funerary objects will remain undisturbed unless threatened by construction or erosion, and the archaeological activity will relocate out of the immediate vicinity.

5. EPA shall ensure that original records associated with the Phase I through Phase III archaeological excavations at the Site will be curated at a repository meeting the standards set forth in 36 C.F.R. Part 79. EPA shall ensure that copies of completed professional and popular reports will be provided to the SHPO and the Passamaquoddy Tribe.

6. EPA shall include in the Site's remedial action Record of Decision a requirement to implement land use restrictions which will prevent development and any other ground disturbance that would adversely affect the cultural or historical resources at the Site, except any ground disturbance resulting from environmental cleanup or mitigation activities.

7. Modification, amendment, or termination of this Agreement as necessary shall be accomplished by the signatories in the same manner as this Agreement.

8. Should any party to this Agreement object at any time to the manner in which the terms of the Agreement are implemented, EPA shall consult with the objecting party to resolve the objection. If EPA determines that the objection cannot be resolved, EPA shall forward all documentation relevant to the dispute to the Advisory Council in accordance with 36 C.F.R. § 800.2(b)(2). Upon receipt of adequate documentation, the Advisory Council will either:

a. provide EPA with recommendations, which EPA will take into account in

reaching a final decision regarding the dispute; or

b. notify EPA that it will comment pursuant 36 C.F.R. § 800.7(c), and proceed to comment. Any Advisory Council comment provided in response to such a request will be taken into account by EPA in accordance with 36 C.F.R. § 800.7(c)(4) with reference to the subject of the dispute.

Any recommendation or comment provided by the Advisory Council will be understood to pertain only to the subject of the dispute; EPA's responsibility to carry out all actions under this Agreement that are not the subjects of the dispute will remain unchanged.

9. This Agreement will be null and void if its terms are not carried out within five (5) years from the date of its execution, unless the signatories agree in writing to an extension for carrying out its terms.

The UNDERSIGNED PARTY enters into this Memorandum of Agreement for Recovery of Significant Information and Mitigation of Adverse Effects, relating to the Eastern Surplus Company Superfund Site.

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: 6/29/2000

Patricia L. Meaney
Director
Office of Site Remediation & Restoration
EPA New England
U.S. Environmental Protection Agency
1 Congress Street, Suite 1100
Boston, Massachusetts 02114-2023

The UNDERSIGNED PARTY enters into this Memorandum of Agreement for Recovery of Significant Information and Mitigation of Adverse Effects, relating to the Eastern Surplus Company Superfund Site.

FOR THE ADVISORY COUNCIL ON HISTORIC PRESERVATION

Date: 7/24/00

John M. Fowler
Executive Director
Advisory Council on Historic Preservation
The Old Post Office Building
1100 Pennsylvania Avenue, N.W. #809
Washington, DC 20004

The UNDERSIGNED PARTY enters into this Memorandum of Agreement for Recovery of Significant Information and Mitigation of Adverse Effects, relating to the Eastern Surplus Company Superfund Site.

FOR THE MAINE HISTORIC PRESERVATION COMMISSION

Date: 6/29/00

Earle G. Shettleworth, Jr.
Director
Maine Historic Preservation Commission
55 Capitol Street
65 State House Station
Augusta, Maine 04333

The UNDERSIGNED PARTY enters into this Memorandum of Agreement for Recovery of Significant Information and Mitigation of Adverse Effects, relating to the Eastern Surplus Company Superfund Site.

FOR THE PASSAMAQUODDY TRIBE

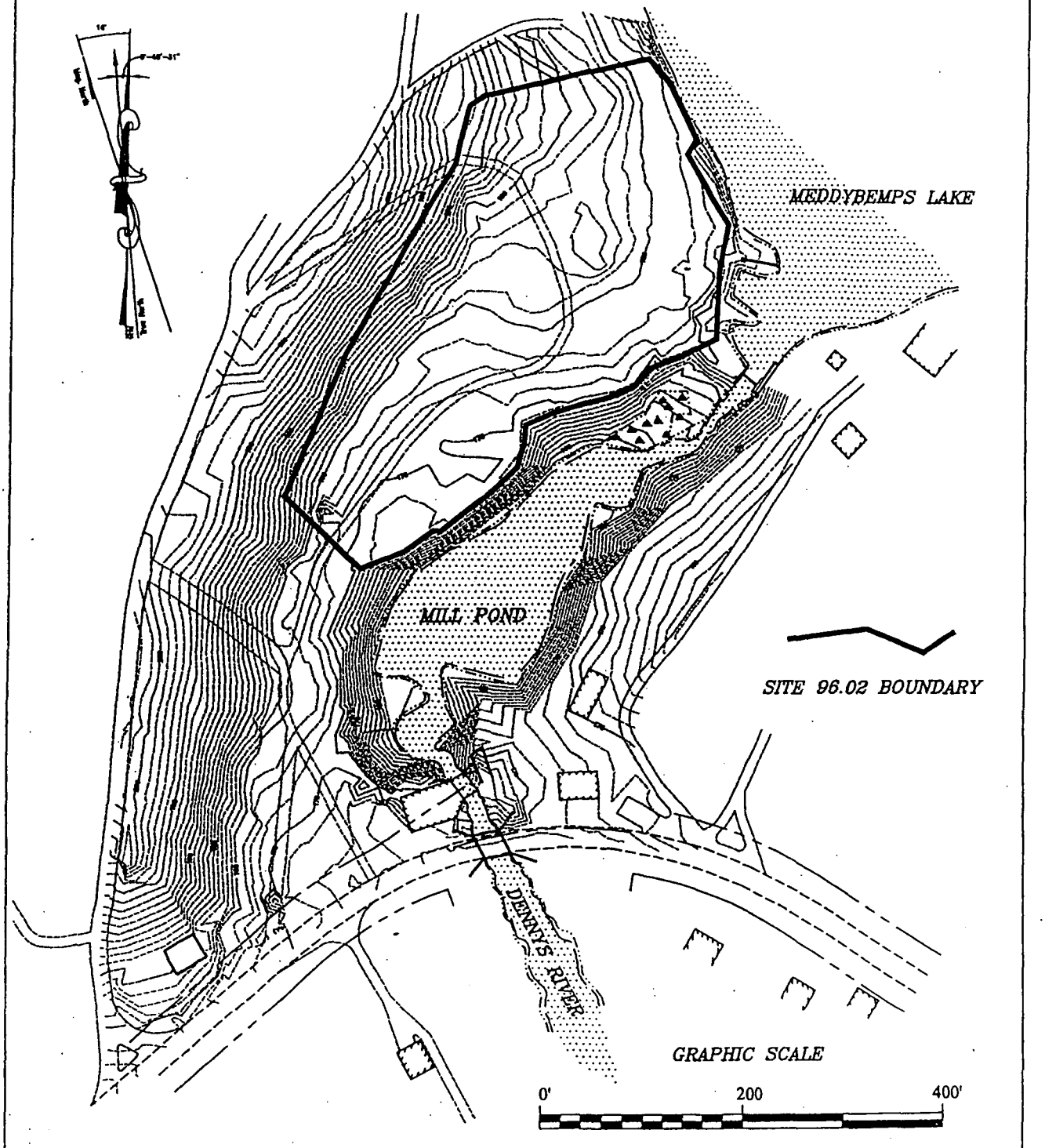
Date: 07/13/00

Richard Doyle
Tribal Governor
Pleasant Point Reservation
P.O. Box 343
Perry, Maine 04667

Date: 07/13/00

Richard Stevens
Tribal Governor
Indian Township Reservation
P.O. Box 301
Princeton, Maine 04668

ATTACHMENT 1



Archaeological Research Consultants, Inc.
71 Oak Street, Ellsworth, Maine 04605
Phone (207) 667-4055; Fax (207) 667-0485

PROJECT: Eastern Surplus Company Superfund Site

CLIENT: Tetra Tech NUS

DRAWING: Estimated limits of site 96.02.

DATE: 01/28/2000

DRAWN BY: JAC

FILE: D:\Projects\Meddybemps\site limits.dwg

AGREEMENT

1. Whereas, the Consent Decree entered as a final judgment on March 29, 1999, in the consolidated actions of United States of America v Harry J. Smith, Jr., et al, CA-99-21-B, and State of Maine v Harry J. Smith, Jr., et al, CA-99-22-B, both actions filed in the United States District Court, District of Maine (Bangor), provided for the cleanup of the Eastern Surplus Superfund Site as well as the conveyance of real property to the State of Maine as set forth in Section V. of the said Consent Decree and as depicted in Appendix B to the said Consent Decree as referenced therein;

2. Whereas, during the cleanup of the Eastern Surplus Superfund Site performed under contract with the United States Environmental Protection Agency (hereinafter, "EPA") certain archaeological materials have been recovered and removed from the Site and it is anticipated that additional archaeological materials will be recovered and removed from the Site during additional archaeological field investigation at the Site conducted pursuant to a separate Memorandum of Agreement which has been or will be entered among the Passamaquoddy Tribe, EPA, the State of Maine, and the Advisory Council on Historic Preservation;

3. *Whereas*, the Passamaquoddy Tribe, a Federally recognized Indian tribe, claims rights, title, and interests in the said archaeological materials which have been or will be recovered or removed from the location described in Section V. of the said Consent Decree as well as archaeological materials remaining at said location, including items remaining within the earth at said location;

4. Whereas, the State of Maine, including the Maine Department of Environmental Protection, and the Maine State Museum (hereinafter, collectively, the "State of Maine" or "State"), claims rights, title, and interests in the said archaeological materials which have been or will be recovered or removed from the location described in Section V. of the said Consent Decree as well as archaeological materials remaining at said location, including items remaining within the earth at said location;

5. Whereas, the Passamaquoddy Tribe and the State of Maine ~~are eo~~mmitted to having the said archaeological materials curated in accordance with responsible museum practices, consistent with the standards established by the United States Department of the Interior for

Federal repositories;

6. *Whereas,* the Passamaquoddy Tribe and the State of Maine each recognizes and accepts the Robert Abbe Museum of Stone Age Antiquities (hereinafter, "Abbe Museum") as an institution proper for the curation of the said archaeological materials;

7. *Whereas,* Terrell L. Lord, Lisa J. Lord, and Harry J. Smith, Jr., have agreed pursuant to the said Consent Decree, to transfer all rights, title, and interests which they may hold to all real property located at the said Site;

8. *Whereas, by operation of the said Consent Decree,* after August 31, 1998, Harry J. Smith, Jr., has been deemed to have abandoned and to have no claim for compensation for any personal property remaining at the said Site;

9. *Whereas,* Harry J. Smith, Jr., conveyed all rights, title, and interests in archaeological materials removed from and embedded in the soil of his real property located at the said Site to the Passamaquoddy Tribe, through the instrument of a Preservation Agreement, recorded in Book 2385. Page 49, at the Washington County Registry of Deeds;

NOW THEREFORE, in consideration of the promises mutually exchanged herein,

IT IS AGREED TO BETWEEN THE PARTIES as follows:

1. The Passamaquoddy Tribe, the State of Maine, Terrell L. Lord, and Lisa J. Lord will each release all of their respective rights, title, and interests to the said archaeological materials (hereinafter, "the collection") to the Abbe Museum, in accordance with a Quitclaim Deed of Conveyance as set forth in Exhibit A, attached hereto to be executed and delivered herewith;

2. The collection thereby conveyed shall be delivered to the Abbe Museum as a museum-suitable collection by EPA's archaeologist, after a reasonable period of examination for the purpose of inventorying and studying the said archaeological materials, but not later than two years from the date of this Agreement.

3. While the Passamaquoddy Tribe and the State of Maine recognize that they each make claim to rights, title, and interests in the collection thereby conveyed, each hereby agrees that this Agreement shall not be construed or claimed by either of them to be an admission of the claim made to said items by the other.

4. The Abbe Museum, by its acceptance of the terms of this Agreement, agrees that while

it has title to said collection (see "Exhibit A") it will hold and handle the archaeological materials thereby conveyed in accordance with the standards established by the United States Department of the Interior for Federal repositories (hereinafter, the "agreed-upon standards") and responsible museum practices.

5. The Abbe Museum, by its acceptance of the terms of this Agreement, agrees that it will provide at least forty-five days notice to the Passamaquoddy Tribe and the State of Maine by sending notification to each party at the addresses provided in this Agreement, prior to transferring all or any portion of the collection to a third party.

6. Archaeological materials which have not been recovered in earlier Site work or to be recovered pursuant to the Memorandum of Agreement regarding the Meddybemps site, shall be protected from excavation, to the extent the parties can reasonably do so, including specifically by means of restrictive deed covenants to run with the land, in any and all deeds transferring the real property or any interest therein as to which deeds any of the parties to this Agreement shall be Grantor, except that any archaeological materials that may be found at the Site after the date of this Agreement, notwithstanding the foregoing restriction, shall be owned, held, and maintained by the Abbe Museum in the same manner as those hereby presently conveyed to the Abbe Museum.

7. Notwithstanding paragraph 5 of this Agreement, any portion or all of the collection may be transferred to the Passamaquoddy Tribe at any time after the Passamaquoddy Tribe has a museum facility that complies with the agreed-upon standards set forth in paragraph 4 of the Agreement and responsible museum practices.

8. If any portion or all of the collection is transferred to a museum other than the museum facility of the Passamaquoddy Tribe, that museum must be:

(a) a museum which will hold the collection in compliance with the agreed-upon standards as set forth in paragraph 4 and responsible museum practices;

(b) at a location within the State of Maine determined by the committee of 8(c); and

(c) the specific facility to which the collection is transferred under this section will be selected by consensus, if possible, but if not possible, by a majority vote of a committee

composed of a representative determined for that purpose by the Passamaquoddy Tribe, selected by Tribal Historic Preservation Officer, or, if none, by the Joint Tribal Council, a representative determined for that purpose by the State of Maine selected by the State Historic Preservation Officer, and a representative of the Abbe Museum determined for that purpose by the Abbe Museum Board of Trustees.

9. The State of Maine, the Passamaquoddy Tribe, Terrell L. Lord, and Lisa J. Lord, and the Abbe Museum hereby agree to the full extent permitted by law to sign and execute any and all other documents, instruments or other writings necessary to effectuate the provisions of this Agreement. The undersigned parties hereby agree to accept and abide by the terms of this Agreement.

Dated at Ind Twp Maine
July 20 2000

Richard Doyle, Tribal Governor
On behalf of
the Passamaquoddy Tribe,
Its duly authorized representative

Personally appeared before me the above-named Richard Doyle, in his capacity as Tribal Governor of the Passamaquoddy Tribe, and who stated that he acknowledged his signature before me as his free act and deed.

Dated at Ind. Twp, Ma
July 20, 2000

DENISE O. POLCHES NOTARY PUBLIC MAINE

tary Public/Attorney at Law

Denise O. Polches

Dated at Ind. Twp., Ma
July 20, 2000

Richard Stevens, Tribal Governor
On behalf of
the Passamaquoddy Tribe,
Its duly authorized representative

Personally appeared before me the above-named Richard Stevens, in his capacity as Tribal Governor of the Passamaquoddy Tribe, and who stated that he acknowledged his signature before me as his free act and deed.

Dated at _____, Maine
_____ ___, 2000

_____
Notary Public/Attorney at Law
Printed Name of Official:

Martha G. Kirkpatrick

Dated at _____, Maine
_____ ___, 2000

Martha G. Kirkpatrick, Commissioner
State of Maine
Department of Environmental Protection
for the State of Maine,
Its duly authorized representative

Personally appeared before me the above-named Martha G. Kirkpatrick, in her capacity as Commissioner, Maine Department of Environmental Protection, and who stated that she acknowledged her signature before me as her free act and deed.

Dated at _____, Maine
_____ ___, 2000

_____
Notary Public/Attorney at Law
Printed Name of Official:

Joseph R. Phillips

Dated at Augusta, Maine
July 13, 2000

Joseph R. Phillips, Museum Director
Maine State Museum
Its duly authorized representative

Personally appeared before me the above-named Joseph R. Phillips, in his capacity as Museum Director, Maine State Museum, and who stated that he acknowledged his signature before me as

his free act and deed.

Dated at Augusta, Maine
July 13, 2000

Notary Public/Attorney at Law

Printed Name of Official:

Dennis Harnish

Dated at Augusta, Maine
July 13, 2000

Dennis J. Harnish,
Assistant Attorney General
Department of the Attorney General
for the State of Maine,
Its duly authorized representative

Personally appeared before me the above-named Dennis J. Harnish, Esquire, in his capacity as Assistant Attorney General, authorized to so act on behalf of the Attorney General for the State of Maine, who stated that he acknowledged his signature before me as his free act and deed on behalf of the State of Maine.

SUSAN L. PARADIS
Notary Public • State of Maine
My Commission Expires: 3/12/0

Dated at AUGUSTA, Maine
July 13, 2000

Notary Public/Attorney at Law

Printed Name of Official:

Dated at Trenton, Maine
July 28, 2000

Oscar E. Remick, President
Board of Trustees
for the Abbe Museum,
Its duly authorized representative

Personally appeared before me the above-named Oscar E. Remick, in his capacity as President, Board of Trustees, Robert Abbe Museum of Stone-age Antiquities, and who stated that he

acknowledged his signature before me as his free act and deed.

Dated at Trenton, Maine
Aug 28, 2000

Notary Public/Attorney at Law

Printed Name of Official:

William D. Fesseden

Dated at Calais, Maine
8-25, 2000

Terrell L. Lord

Terrell L. Lord

Personally appeared before me the above-named Terrell L. Lord, who stated that he acknowledged his signature before me as his free act and deed.

Dated at Calais, Maine
Aug 25, 2000

Dorothy L Skinner

Notary Public/Attorney at Law

Printed Name of Official:

Dorothy L. Skinner

Dated at Calais, Maine
8-25, 2000

Lisa J. Lord

Lisa J. Lord

Personally appeared before me the above-named Lisa J. Lord, who stated that she acknowledged her signature before me as her free act and deed.

Dated at Calais, Maine
Aug 25, 2000

Dorothy L Skinner

Notary Public/Attorney at Law

Printed Name of Official:

Dorothy L. Skinner

Quitclaim Deed of Conveyance

KNOW ALL MEN BY THESE PRESENTS, That, the **STATE OF MAINE**, in care of its Commissioner of the Maine Department of Environmental Protection, Hospital Street AMHI Ray Building, 17 State House Station, Augusta, Maine 04333-0017, and the Museum Director of the Maine State Museum, Cultural Building, 83 State House Station, Augusta, Maine 04333-0083, in consideration of an Agreement signed by the State of Maine on July 13, 2000,

and the **PASSAMAQUODDY TRIBE,** a Federally recognized Indian Tribe, whose mailing address is P.O. Box 343, Perry, Maine 04667, and P.O. Box 301, Princeton, Maine 04668, in consideration of an Agreement signed by the Passamaquoddy Tribe on July 20, 2000,

and Terrell L. Lord and Lisa J. Lord, of Meddybemps, County of Washington, State of Maine,

do hereby RELEASE unto the said **Robert Abbe Museum of Stone Age Antiquities,** P.O. Box 286, Mount Desert Street, Bar Harbor, Maine 04609, its successors and assigns, in accordance with the terms of said agreement, the terms of which were accepted by the **Robert Abbe Museum of Stone Age Antiquities**, by date of July 28, 2000,

all of their respective rights, title, and interests in all archaeological materials removed, and to be removed, or subsequently discovered from site 96.02, the Eastern Surplus Company Superfund Site, which is located in Meddybemps, Maine. The archaeological materials include without limitation various types of stone artifacts, aboriginal ceramic fragments, burned food bone remains, samples of carbonized plants remains, and soil samples.

TO HAVE AND TO HOLD all and singular the said goods to the said **Robert Abbe Museum of Stone Age Antiquities**, its successors and and assigns, in accordance with the terms of said Agreement to which reference is hereby made.

WITNESS our hands and seals,

Dated at Indian Twp, Maine
July 20, 2000

Richard Doyle, Tribal Governor
On behalf of
the Passamaquoddy Tribe,
Its duly authorized representative

Personally appeared before me the above-named Richard Doyle, in his capacity as Tribal Governor of the Passamaquoddy Tribe, and who stated that he acknowledged his signature before me as his free act and deed.

Dated at Ind. Twp, Maine
July 20, 2000

DENISE O. POLCHES NOTARY PUBLIC MAINE

Notary Public/Attorney at Law

Print:

Denise O. Polches

Dated at Ind Twp., Maine
July 20, 2000

Richard Stevens, Tribal Governor
On behalf of
the Passamaquoddy Tribe,
Its duly authorized representative

Personally appeared before me the above-named Richard Stevens, in his capacity as Tribal Governor of the Passamaquoddy Tribe, and who stated that he acknowledged his signature before me as his free act and deed.

Dated at _____, Maine

_____ ___, 2000

_____

Notary Public/Attorney at Law

Printed Name of Official:

Martha G. Kirkpatrick

Dated at _____, Maine

_____ ___, 2000

Martha G. Kirkpatrick

Martha G. Kirkpatrick, Commissioner

State of Maine

Department of Environmental Protection

for the State of Maine,

Its duly authorized representative

Personally appeared before me the above-named Martha G. Kirkpatrick, in her capacity as Commissioner, Maine Department of Environmental Protection, and who stated that she acknowledged her signature before me as her free act and deed.

Dated at Augusta, Maine

July 13, 2000

Dennis Harnish, Esq.

~~Notary Public~~/Attorney at Law

Printed Name of Official:

Joseph R. Phillips

Dated at Augusta, Maine

July 13, 2000

Joseph R. Phillips, Museum Director

Maine State Museum

Its duly authorized representative

Personally appeared before me the above-named Joseph R. Phillips, in his capacity as Museum Director, Maine State Museum, and who stated that he acknowledged his signature before me as his free act and deed.

Dated at Augusta, Maine
July 13, 2000

Dennis J. Harnish, Esq.
~~Notary Public~~/Attorney at Law

Printed Name of Official:

Dennis J. Harnish

Dated at Augusta, Maine
July 13, 2000

Dennis Harnish

Dennis J. Harnish,
Assistant Attorney General
Department of the Attorney General
for the State of Maine,
Its duly authorized representative

Personally appeared before me the above-named Dennis J. Harnish, Esquire, in his capacity as Assistant Attorney General, authorized to so act on behalf of the Attorney General for the State of Maine, who stated that he acknowledged his signature before me as his free act and deed on behalf of the State of Maine.

Dated at AUGUSTA, Maine

July 13, 2000

Susan L. Paradis

Notary Public/Attorney at Law

SUSAN L. PARADIS
Notary Public - State of Maine
My Commission Expires: 3/12/05

Printed Name of Official:

Dated at Trenton, Maine
Aug 28, 2000

Oscar E. Remick

Oscar E. Remick, President
Board of Trustees
for the Abbe Museum,
Its duly authorized representative

Personally appeared before me the above-named Oscar E. Remick, in his capacity as President, Board of Trustees, Robert Abbe Museum of Stone-age Antiquities, and who stated that he acknowledged his signature before me as his free act and deed.

Dated at Trenton, Maine
Aug 28, 2000

Notary Public/Attorney at Law

Printed Name of Official:

William M. Ferm

Dated at Calais, Maine
Aug 25, 2000

Terrell L. Lord

Terrell L. Lord

Personally appeared before me the above-named Terrell L. Lord, who stated that he

acknowledged his signature before me as his free act and deed.

Dated at Calais, Maine
Aug 25, 2000

Dorothy L Skinner
Notary Public/Attorney at Law

Printed Name of Official:

Dorothy L. Skinner

Dated at Calais, Maine
Aug. 25, 2000

Lisa J. Lord
Lisa J. Lord

Personally appeared before me the above-named Lisa J. Lord, who stated that she acknowledged her signature before me as her free act and deed.

Dated at Calais, Maine
Aug 25, 2000

Dorothy L Skinner
Notary Public/Attorney at Law

Printed Name of Official:

Dorothy L. Skinner

EXAMPLE 6-F
EASTLAND WOOLEN

MEMORANDUM OF AGREEMENT
FOR MITIGATION OF ADVERSE EFFECTS

IN COMPLIANCE WITH THE
COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980,
AS AMENDED, 42 U.S.C. § 9601 ET SEQ. ("CERCLA")
AND SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT OF 1966,
AS AMENDED, 16 U.S.C. § 470F ("NHPA")

FOR:	**EASTLAND WOOLEN MILL SUPERFUND SITE**, CORINNA, MAINE
UNDERTAKING:	FEDERAL ENVIRONMENTAL CLEANUP OF HAZARDOUS SUBSTANCE SITE
STATE:	MAINE
AGENCY:	UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

1. Whereas, the United States Environmental Protection Agency ("EPA") has determined that its environmental cleanup activities at the Eastland Woolen Mill Superfund Site (the "Site") will have an adverse effect upon a historic property which has been determined to be eligible for listing on the National Register of Historic Places; and

2. Whereas, EPA has consulted with the Director of the Maine Historic Preservation Commission, who is the designated State Historic Preservation Officer ("SHPO") in accordance with NHPA, in order to comply with NHPA and its regulations, 36 C.F.R. Part 800 (the "Section 106 Process"); and

3. Whereas, EPA has identified as other consulting parties in the Section 106 Process the following: the Town of Corinna, the Town of Corinna Historical Society, and the Independent Order of Odd Fellows ("Odd Fellows"); and

4. Whereas, EPA and the SHPO have determined that the Odd Fellows structure is eligible for National Register listing in accordance with the National Register Criteria, 36 C.F.R. § 60.4, in particular, the structure has important cultural associations in the town, the state, and the New England region as one of the more widespread fraternal societies; and

5. Whereas, EPA through its CERCLA public outreach process has provided the public with information about the environmental cleanup activities and their effects on historic properties at the Site and has given the public the opportunity to provide comment and input; and

6. Whereas, in accordance with 36 C.F.R. § 800.6(a)(1), EPA notified the Advisory Council on Historic Preservation (the "Advisory Council") of the adverse effects to a historic property; and

7. Whereas, EPA and the SHPO agree that it is in the public interest for EPA to implement environmental cleanup activities to address the contamination of hazardous substances at the Site and that there are no practicable alternatives to the cleanup approach selected by EPA

in the July 1999 Action Memorandum that would have fewer adverse effects on the historic property located within the Site; and

8. Whereas, EPA and the SHPO agree that it is unavoidable that aspects of the historic property will be adversely affected as a result of EPA's environmental cleanup activities; and

9. Whereas, EPA and the SHPO agree that EPA has made best efforts to minimize adverse effects on the historic property; and

10. Whereas, to the best knowledge and belief of EPA and the SHPO, no human remains, associated or funerary objects or sacred objects, or cultural patrimony, as defined in the Native American Graves Protection and Repatriation Act (25 U.S.C. § 3001), are expected to be encountered in the archaeological work; and

Now, therefore, EPA shall ensure that the following terms and conditions will be implemented in a timely manner and with adequate resources in compliance with CERCLA and NHPA.

TERMS AND CONDITIONS

1. EPA shall ensure that the property is moved in accordance with the approaches recommended in Moving Historic Buildings (John Obed Curtis, 1979, American Association for State and Local History) and the Eastland Woolen Mill Superfund Site "Oddfellows Building Relocation, Building Relocation Plan," (August 11, 2000) in consultation with the SHPO, by a professional mover who has the capability to move historic structures properly.

2. Before the Odd Fellows structure is moved, EPA shall ensure that it is documented in its existing setting and context in accordance with the documentation plan entitled Schedule of Documentation for the Recording of Odd Fellows Hall, Corinna, Maine provided to EPA by the Maine Historic Preservation Commission by letter dated July 10, 2000 and attached.

3. The owners of the Odd Fellows structure shall implement a Conservation Easement and Declaration of Restrictive Covenants which prevent the alteration of the structure in a manner that would cause a loss of the historic integrity. Such instrument will include a provision that requires the approval of the Maine Historic Preservation Commission prior to any alteration of the structure.

4. Should any party to this Agreement object at any time to the manner in which the terms of the Agreement are implemented:

a. EPA shall consult with the objecting party to resolve the objection; and

b. If EPA determines that the objection cannot be resolved, EPA shall forward all documentation relevant to the dispute to the Advisory Council in accordance with 36 C.F.R. § 800.2(b)(2). Upon receipt of adequate documentation, the Advisory Council will either:

1. provide EPA with recommendations, which EPA will take into account in reaching a final decision regarding the dispute; or

2. notify EPA that it will comment pursuant 36 C.F.R. § 800.7(c), and proceed to comment. Any Advisory Council comment provided in response to such a request will be taken into account by EPA in accordance with 36 C.F.R. § 800.7(c)(4) with reference to the subject of the dispute.

Any recommendation or comment provided by the Advisory Council will be understood to pertain only to the subject of the dispute; EPA's responsibility to carry out all actions under this Agreement that are not the subjects of the dispute will remain unchanged.

5. This Agreement will be null and void if its terms are not carried out within five (5) years from the date of its execution, unless the signatories agree in writing to an extension for carrying out its terms.

The UNDERSIGNED PARTY enters into this Memorandum of Agreement for Recovery of Significant Information and Mitigation of Adverse Effects, relating to the Eastern Surplus Company Superfund Site.

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: 10/5/00

Patricia L. Meaney
Director
Office of Site Remediation & Restoration
EPA New England
U.S. Environmental Protection Agency
1 Congress Street, Suite 1100
Boston, Massachusetts 02114-2023

The UNDERSIGNED PARTY enters into this Memorandum of Agreement for Recovery of Significant Information and Mitigation of Adverse Effects, relating to the Eastern Surplus Company Superfund Site.

FOR THE MAINE HISTORIC PRESERVATION COMMISSION

Date: 10/4/00

Earle G. Shettleworth, Jr.
Director and SHPO
Maine Historic Preservation Commission
55 Capitol Street
65 State House Station
Augusta, Maine 04333

The UNDERSIGNED PARTY enters into this Memorandum of Agreement for Recovery of Significant Information and Mitigation of Adverse Effects, relating to the Eastland Woolen Mill Superfund Site.

FOR THE STONE-EZEL LODGE NO. 139, INDEPENDENT ORDER OF ODD FELLOWS

Date: 10-3-2000

Mark S. Brooks

Signature MARK. S. BROOKS

Name (printed)

Noble Grand.

Title (printed)

attn. Paul H. Reynolds
Sec.

I acknowledged MarkS. Brooks and Paul H. Reynolds signature on October 3, 2000.

Pamela D. Buck, Notary Pamela D Buck
Commission expites 05/03/2004

The UNDERSIGNED PARTY enters into this Memorandum of Agreement for Recovery of Significant Information and Mitigation of Adverse Effects, relating to the Eastland Woolen Mill Superfund Site.

GRAND LODGE, INDEPENDENT ORDER OF ODD FELLOWS OF MAINE

Date: Oct. 4, 2000

Arnold D. Hill
Signature John H. Gregory

Arnold D. Hill
Name (printed)

Grand Master
Title (printed)

Debra L. Dow

My Commission Expires 8-17-02

CONSERVATION EASEMENT
AND
DECLARATION OF RESTRICTIVE COVENANTS

1. This Conservation Easement and Declaration of Restrictive Covenants is made this 4th day of October, 200 0, by and between the Grand Lodge, Independent Order of Odd Fellows of Maine, and Stone-Ezel Lodge No. 139, Independent Order of Odd Fellows, ("Grantors"), having an address of Grand Lodge of Maine, 300 Fairview Avenue, Auburn, Maine 04210 (Attn: John Gregory, Grand Secretary), and, the State of Maine Historic Preservation Commission ("Grantee"), having an address of 55 Capitol Street 65 State House Station, Augusta, Maine, 04333-0065.

WITNESSETH:

2. WHEREAS, Grantors are the owners of a parcel of land located in Corinna, Penobscot County, State of Maine, more particularly described on **Exhibit A** attached hereto and made a part hereof (the "Property"); and

3. WHEREAS, the Property is near the Eastland Woolen Mill Superfund Site ("Site"), which the U.S. Environmental Protection Agency ("EPA"), pursuant to Section 105 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9605, placed on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on July 22, 1999; and

4. WHEREAS, in an Action Memorandum dated July 22, 1999, the Director of the Office of Site Remediation and Restoration for EPA New England selected a "removal action" to address contamination at the Site, which provides, in part, for the following actions:

A. Excavation of contaminated soils in the area of the former Eastland Woolen Mill and other areas of downtown Corinna;

B. On-Site treatment of excavated soils;

C. Building demolition in downtown Corinna in order to excavate contaminated soils located below buildings;

D. Surface water management including diversion of the East Branch of the Sebasticook River; and

E. Traffic management including diversion of Main Street and the building of a new bridge to traverse Main Street.

5. WHEREAS, the Independent Order of Odd Fellows Hall, currently located on lot 123 in Corinna, Maine ("Odd Fellows Hall"), is eligible for the National Register of Historic Places, EPA has determined that it is appropriate to move the building rather than demolish it, and called for by the Action Memorandum; and

6. WHEREAS EPA plans to move the Odd Fellows Hall from lot 123 (sold to the State of Maine by the Grantors) to lot 118-A (acquired by the Grantors subject to a reversionary interest owned by the Town of Corinna) in Corinna, Maine; and

7. WHEREAS, the Grantee has requested that EPA help insure that the Odd Fellows Hall is appropriately maintained and preserved in accordance with the Secretary of the Interior's Standards for the Treatment of Historic Properties; and

8. WHEREAS, the removal action has been partially implemented at the Site; and

9. WHEREAS, the parties hereto have agreed 1) to grant a permanent right of access over the Property to the Grantee for purposes of inspecting the Property at reasonable times in order to ascertain whether the conditions of this Conservation Easement and Declaration of Restrictive Covenants are being met.; and 2) to impose on the Property use restrictions as covenants that will run with the land for the purpose of protecting human health and the environment; and

10. WHEREAS, Grantors wish to cooperate fully with the EPA in the implementation of all response actions at the Site;

NOW, THEREFORE:

11. Grant: Grantors, on behalf of themselves, their successors and assigns, without payment of consideration, does hereby covenant and declare that the Property shall be subject to the restrictions on use set forth below, and does give, grant and convey to the Grantee, and its assigns, with general warranties of title, 1) the perpetual right to enforce said use restrictions, and 2) a conservation easement of the nature and character, and for the purposes hereinafter set forth, with respect to the Property.

12. Purpose: It is the purpose of this instrument to convey to the Grantee real property rights, which will run with the land, to maintain and preserve the historic character of the Odd Fellows Hall.

13. Restrictions: The following covenants, conditions, and restrictions apply to the Property, run with the land and are binding on the Grantors:

No construction, alteration, or any other activity shall be undertaken which will alter or adversely affect the appearance or structural integrity of the interior or exterior of the Odd Fellows Hall without prior written permission and design approval from the Grantee.

14. Modification of restrictions: The above restrictions may be modified, or terminated in whole or in part, in writing, by the Grantee. If requested by the Grantors, such writing will be executed by Grantee in recordable form.

15. Conservation Easement: Grantors hereby grant to the Grantee an irrevocable, permanent and continuing right of access at all reasonable times to the Property for purposes of inspecting the Property at reasonable times in order to ascertain whether the conditions of this Conservation Easement and Declaration of Restrictive Covenants are being met.

16. Reserved rights of Grantors: Grantors hereby reserve unto themselves, their successors, and assigns, all rights and privileges in and to the use of the Property which are not incompatible with the restrictions, rights and easements granted herein.

17. Notice requirement: Grantors agree to include in any instrument conveying any interest in any portion of the Property, including but not limited to deeds, leases and mortgages, a notice which is in substantially the following form:

NOTICE: THE INTEREST CONVEYED HEREBY IS SUBJECT TO A CONSERVATION EASEMENT AND DECLARATION OF RESTRICTIVE COVENANTS, DATED _____, 200__, RECORDED IN THE PUBLIC LAND RECORDS ON _____, 200__, IN BOOK _____, PAGE _____, IN FAVOR OF, AND ENFORCEABLE BY, THE STATE OF MAINE.

Within thirty (30) days of the date any such instrument of conveyance is executed, Grantors must provide Grantee with a certified true copy of said instrument and, if it has been recorded in the public land records, its recording reference.

18. Enforcement: The Grantee shall be entitled to enforce the terms of this instrument by resort to specific performance or legal process. All remedies available hereunder shall be in addition to any and all other remedies at law or in equity. Enforcement of the terms of this instrument shall be at the discretion of the Grantee, and any forbearance, delay or omission to exercise its rights under this instrument in the event of a breach of any term of this instrument shall not be deemed to be a waiver by the Grantee of such term or of any subsequent breach of the same or any other term, or of any of the rights of the Grantee under this instrument.

19. Damages: Grantee shall be entitled to recover damages for violations of the terms of this instrument, or for any injury to the remedial action, to the public or to the environment protected by this instrument.

20. Waiver of certain defenses: Grantors hereby waive any defense of laches, estoppel, or prescription.

21. Covenants: Grantors hereby covenant to and with the State of Maine and its assigns, that the Grantors are lawfully seized in fee simple of the Property, that the Grantors have a good and lawful right and power to sell and convey it or any interest therein, that the Property is free and clear of encumbrances, and that the Grantors will forever warrant and defend the title thereto and the quiet possession thereof.

22. Notices: Any notice, demand, request, consent, approval, or communication that either party desires or is required to give to the other shall be in writing and shall either be served personally or sent by first class mail, postage prepaid, addressed as follows:

To Grantors:

Stone-Ezel Lodge No. 139
Independent Order of Odd Fellows
c/o Mr. Paul C. Fournier, Esq.
Law Offices of Paul C. Fournier, P.A.
65 East Avenue
P.O. Box 1703
Lewiston, Maine 04241-1703

The Grand Lodge,
Independent Order of Odd Fellows of Maine
300 Fairview Avenue
Auburn, Maine 04210
(Attn: John Gregory, Grand Secretary)

To Grantee:

Maine Historic Preservation Commission
55 Capitol Street
65 State House Station
Augusta, Maine, 04333-0065

3. General provisions:

A. Controlling law: The interpretation and performance of this instrument shall be governed by the laws of the United States or, if there are no applicable federal laws, by the law of the state where the Property is located.

B. Liberal construction: Any general rule of construction to the contrary notwithstanding, this instrument shall be liberally construed in favor of the grant to effect the purpose of this instrument and the policy and purpose of the National Historic Preservation Act. If any provision of this instrument is found to be ambiguous, an interpretation consistent with the purpose of this instrument that would render the provision valid shall be favored over any interpretation that would render it invalid.

C. Severability: If any provision of this instrument, or the application of it to any person or circumstance, is found to be invalid, the remainder of the provisions of this instrument, or the application of such provisions to persons or circumstances other than those to which it is found to be invalid, as the case may be, shall not be affected thereby.

D. Entire Agreement: This instrument sets forth the entire agreement of the parties with respect to rights and restrictions created hereby, and supersedes all prior discussions, negotiations, understandings, or agreements relating thereto, all of which are merged herein.

E. No Forfeiture: Nothing contained herein will result in a forfeiture or reversion of Grantors' title in any respect.

F. Joint Obligation: If there are two or more parties identified as Grantors herein, the obligations imposed by this instrument upon them shall be joint and several.

G. Successors: The covenants, terms, conditions, and restrictions of this instrument shall be binding upon, and inure to the benefit of, the parties hereto and their respective personal representatives, heirs, successors, and assigns and shall continue as a servitude running in perpetuity with the Property. The term "Grantors", wherever used herein, and any pronouns used in place thereof, shall include the persons and/or entities named at the beginning of this document, identified as "Grantors" and their personal representatives, heirs, successors, and assigns. The term "Grantee", wherever used herein, and any pronouns used in place thereof, shall include the persons and/or entities named at the beginning of this document, identified as "Grantee" and their personal representatives, heirs, successors, and assigns. The rights of the Grantee and Grantors under this instrument are freely assignable, subject to the notice provisions hereof.

H. Termination of Rights and Obligations: A party's rights and obligations under this instrument terminate upon transfer of the party's interest in the Easement or Property, except that liability for acts or omissions occurring prior to transfer shall survive transfer.

I. Captions: The captions in this instrument have been inserted solely for convenience of reference and are not a part of this instrument and shall have no effect upon construction or interpretation.

J. Counterparts: The parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by both parties; each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.

TO HAVE AND TO HOLD unto the State of Maine and its assigns forever.

IN WITNESS WHEREOF, Grantors have caused this Agreement to be signed in its name.

Executed this 4th day of Oct, 2000.

Grand Lodge,
Independent Order of Odd Fellows of Maine

By: Arnold Dill

Its: Grand Master
John A. Gregory

STATE OF Maine)
) ss
COUNTY OF Waldo)

On this 4 day of Oct, 2000, before me, the undersigned, a Notary Public in and for the State of Maine, duly commissioned and sworn, personally appeared Arnold Hill, known to be the Grand Master of Odd Fellows of Me the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they are authorized to execute said instrument.

Witness my hand and official seal hereto affixed the day and year written above.

Debra L. Dodd

Notary Public in and for the
State of Maine

My Commission Expires: 8-17-02

Executed this 3 day of Oct, 2000.

Stone-Ezel Lodge No. 139,
Independent Order of Odd Fellows

By: Mark S Brooks

Its: Noble Grand

att. Paul W. Reynolds
Sec.

STATE OF Maine)
) ss
COUNTY OF Penobscot)

On this 3rd day of Oct, 2000, before me, the undersigned, a Notary Public in and for the State of Maine, duly commissioned and sworn, personally appeared Mark S. Brooks Paul W. Reynolds, known to be the Noble Grand Secretary of Stone-Ezel Lodge #139, the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they are authorized to execute said instrument.

Witness my hand and official seal hereto affixed the day and year written above.

Pamela D Buck
Notary Public in and for the
State of Maine

My Commission Expires: 05/03/2004

This easement is accepted this 4 day of October, 2000.

STATE OF MAINE

the persons and/or entities named at the beginning of this document, identified as "Grantors" and their personal representatives, heirs, successors, and assigns.

MAINE HISTORIC PRESERVATION COMMISSION

By: _____

Attachments: Exhibit A - legal description of the Property (Lot 118-A)

MUNICIPAL QUITCLAIM DEED WITHOUT COVENANT

The Inhabitants of the Town of Corinna, a municipal corporation located in Penobscot County, Maine, for consideration paid, grant to Stone-Ezel Lodge #139, Independent Order of Odd Fellows, a Maine corporation with a location in Corinna, Maine, for so long as the property is primarily used and operated as a fraternal lodge of the Stone-Ezel Lodge #139, Independent Order of Odd Fellows or the Grand Lodge, Independent Order of Odd Fellows of Maine, or a period of twenty (20) years from the date of recording of this deed, whichever is the first to occur, a certain lot or parcel of land, with any improvements thereon, in Corinna, Penobscot County, Maine, bounded and described as follows:

Beginning at a stake in the westerly sideline of Spring Street, so-called, in said Town of Corinna, said stake being located two hundred and ninety-seven and eighty-seven hundredths (297.87) feet southerly from a bolt located at the intersection of the southerly sideline of Main Street and the westerly sideline of Spring Street; thence westerly on and by the northerly line of land used by the Town of Corinna as a parking lot one hundred and twenty-eight (128.00) feet to a stake; thence southerly on and by the westerly line of said parking lot one hundred (100.00) feet to a stake, thence easterly by and along the northerly boundary line of property now or formerly owned or occupied by Joseph R. Gould and Susan L. Gould to the westerly sideline of Spring Street; thence northerly by and along said westerly sideline of Spring Street to the point of beginning.

By acceptance of this deed, the Grantee, on behalf of itself, its successors and assigns, covenants and agrees that within (1) one year after the date the building presently owned by the Grantee herein is relocated to the above parcel and a certificate of occupancy for that building is issued, the Grantee shall, at its own expense, expend a minimum of four thousand five hundred dollars ($4,500) to improve the exterior of the building with new siding. Said improvements shall comply, to the extent required, with all federal, state, and local land use laws, regulations, and ordinances.

The Grantee's address is Corinna, Maine.

c: E. Hathaway, EPA
R. Leighton, EPA
S. Acone, ACOE

In witness whereof, the Inhabitants of the Town of Corinna have caused this deed to be signed by the undersigned selectmen, duly authorized this 12 day of Sept 2000.

Witness.

Judith G. Doore
to all

Inhabitants of the Town of Corinna

By _____
Steven R. Buck, Chairman, Selectman

_____

By _____
Galen P. McKenney, Selectman

_____

By _____
James P. Emerson, Selectman

_____

By _____
Roland G Dorman, III, Selectman

_____

By _____
Marvin F Lister, Selectman

STATE OF MAINE

Penobscot County

Sept 12 2000

Personally appeared the above-named Steven R. Buck, Chairman of the Selectmen of the Town of Corinna, and acknowledged before me the foregoing instrument to be his free act and deed in his said capacity, and the free act and deed of said municipal corporation.

_____
Notary Public / ~~Attorney at Law~~ COMMISSION EXPIRES 05/04/02

Pamela D Buck
Print or type name as signed

"Maine Real Estate
Transfer Tax Paid"

PENOBSCOT COUNTY, MAINE
_____
Register of Deeds

CERTIFICATE OF PERSONALTY

This Agreement is made by and between The Inhabitants of the Town or Corinna, a municipal corporation located in Penobscot County, Maine, (hereinafter *the Town*), and Stone-Ezel Lodge #139, Independent Order of Odd Fellows, a Maine corporation with a location in Corinna, Maine, (hereinafter *the Lodge*).

A certain piece of real estate situated in Corinna, Penobscot County, Maine, is being transferred by the Town to the Lodge by deed of substantially even date herewith, to be recorded herewith. Said deed contains conditions and restrictions which, if breached by the Lodge, will cause reversion of title to the Inhabitants of the Town of Corinna.

There are to be located on said real estate certain structures and appurtenant improvements. and

It is the intent and agreement of the Town and the Lodge that, in the event of reversion of title to the Town, said structures and improvements are and remain the personal property of the Lodge.

NOW THEREFORE, for valuable consideration, and pursuant to the provisions of Title 33 M.R.S.A. §455, the parties hereto agree that the aforesaid structures, together with all appurtenant improvements and fixtures, located on, in or over said real estate, shall be and remain personal property of the Lodge, its successors and assigns.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be signed and sealed this 25 day of September, 2000.

Witness:

Tressa Gudroe
Notary Public
Commission Expires April 2, 2004

SEAL

Stone-Ezel Lodge #139, Independent Order of Odd Fellows

By Paul H. Reynolds
Its Duly Authorized

Paul H. Reynolds
Print or type name as signed

Witness:

Judith A. Dore to all

The Inhabitants of the Town of Corinna

By _____
Steven R. Buck, Chairman, Selectman

By _____
Galen P. McKenney, Selectman

By _____
James P. Emerson, Selectman

By _____
Roland G. Dorman, III, Selectman

By _____
Marvin F. Lister, Selectman
Sept. 13, 2000

STATE OF MAINE

Penobscot County

Sept 13, 2000

Personally appeared the above-named Steven R Buck Chairman of the Selectmen of the Town of Corinna, and acknowledged before me the foregoing instrument to be his free act and deed in his said capacity and the free act and deed of said municipal corporation

_____
Notary Public / Attorney at Law

_____
Print or type name as signed

PENOBSCOT COUNTY, MAINE
Susan F. Bailey
Register of Deeds

ATTACHMENT 7
EXAMPLE PROGRAMMATIC AGREEMENTS

EXAMPLE 7-A
REVOLVING FUND

(EPA) PW-95934563-0
9004

PROGRAMMATIC AGREEMENT AMONG THE ENVIRONMENTAL PROTECTION AGENCY, THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND THE NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS CONCERNING COMPLIANCE WITH THE NATIONAL HISTORIC PRESERVATION ACT UNDER EPA's STATE WATER POLLUTION CONTROL REVOLVING FUND PROGRAM

WHEREAS, the U.S. Environmental Protection Agency (EPA) awards capitalization grants to States to establish State Revolving Fund (SRF) programs within State Agencies (each hereinafter referred to as "SRF Agency") authorized under the Clean Water Act (CWA) (33 U.S.C. 1251 et. seq., as amended); and

WHEREAS, the EPA has issued Initial Guidance for the SRF program (January 1988), Appendix D of which (Attachment 1) contains criteria for approval of State Environmental Review Processes (SERPs); and

WHEREAS, Sections 106 and 110(b), (d) and (f) of the National Historic Preservation Act (NHPA) (16 U.S.C. 470f and 470h-2(b), (d), and (f)) apply to all SRF assistance directly made available to States by federal capitalization grants (EPA federal assistance); and

WHEREAS, projects carried out with EPA federal assistance may have effects on properties included in, or eligible for inclusion in, the National Register of Historic Places (historic properties); and

WHEREAS, the EPA has consulted with the Advisory Council on Historic Preservation (Council) and the National Conference of State Historic Preservation Officers (NCSHPO) pursuant to Section 800.13 of the regulations (36 CFR Part 800, et seq.) implementing Sections 106 and 110(f) of the NHPA;

NOW, THEREFORE, the EPA, the Council, and the NCSHPO agree that the SRF program shall be administered in accordance with the following stipulations, which will be deemed to satisfy EPA's Section 106 and 110(f) responsibilities for all EPA SRF program actions and SRF Agency program actions undertaken with EPA federal assistance.

Stipulations

EPA will ensure that the following measures are carried out:

1. Purpose and Applicability.

(a) This Programmatic Agreement [PA] sets forth the process by which EPA will meet its responsibilities under Sections 106 and 110(d) and 110(f) of the NHPA with the assistance of SRF agencies. As such, it sets forth the basis for SRF Agency review of individual projects that may affect historic properties, and establishes how EPA will be involved in such review.

(b) This PA is applicable to the review of CWA Section 212 (wastewater treatment facilities), 319 (non-point source pollution control) and 320 (estuary protection) projects that receive EPA federal assistance under an SRF Agency's program.

2. Responsibilities of EPA and SRF Agencies.

In compliance with its responsibilities under the NHPA and as a condition of its award of any capitalization grant to a State, EPA shall require that the SRF Agency or another designated State agency carry out the requirements of 36 CFR 800.4 through 800.6, with reference to 36 CFR 800.1, 800.2, 800.3, 800.8, 800.9, 800.10, 800.11, 800.12 and 800.14 (see 36 CFR Part 800, Attachment 2) and applicable Council standards and guidelines for all SRF Agency actions that receive EPA federal assistance. EPA will participate in the process to the extent mutually agreed upon by the EPA Regional Administrator and the SRF Agency, but at a minimum, EPA must be notified by the SRF Agency if after routine consultation or coordination with the State Historic Preservation Officer (SHPO) disputes remain pursuant to stipulation #5.

3. Use of SRF Certification Reviews and Annual Reviews.

(a) Certification reviews. EPA will review, or re-review as may be necessary, the certification each State is required to provide as a part of its initial application for SRF capitalization grant funding to ensure that:

(1) The State has the authority and capability to carry out the responsibilities assigned to the SRF Agency as described in this PA; and

(2) The SRF Agency will carry out such responsibilities.

(b) Programmatic coordination and consultation. Whenever an EPA Regional Administrator prepares for an annual review of an SRF Agency's program, the EPA Regional Administrator will afford the appropriate SHPO and the Council the opportunity to comment on their experiences with EPA's and the SRF Agency's execution of their respective responsibilities assigned under this PA and the SRF capitalization grant agreement, and shall consider such comments in the conduct of its annual review. If problems are reported with the execution of responsibilities under this PA, the EPA will consult with the SHPO or the Council and other interested persons if appropriate, and if mutually agreed that participation is necessary, the EPA will invite the SHPO or the Council to participate directly in the EPA's annual review on SRF program matters involving their jurisdiction or expertise.

(c) Annual reviews. (1) During each annual review of an SRF Agency's program, the EPA Regional Administrator will ensure that the SRF Agency is using:

(i) adequate expertise to carry out its responsibilities consistent with the professional qualifications standards found in the "Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation" (48 FR 44738-9) (Attachment 3);

(ii) effective mechanisms for carrying out the responsibilities assigned to it under the capitalization grant agreement, in accordance with this PA, including those assigned pursuant to stipulation 2 above;

(iii) effective mechanisms for identifying historic properties subject to potential effect by SRF Agency actions using EPA federal assistance, taking into account the Council's publication: "Identification of Historic Properties: a Decisionmaking Guide for Managers" (1988) (Attachment 4);

(iv) effective procedures for involving interested parties and the public in the review process taking into account the

Council publication: "Public Participation in Section 106 Review: A Guide for Agency Officials" (1989) (Attachment 5); and

(v) effective mechanisms for avoiding, minimizing, or mitigating adverse effects on historic properties.

(2) The EPA will further ensure that deficiencies noted in carrying out of responsibilities under this PA and capitalization grant agreement (including any alternative review process contained in an approved SERP), as a result of oversight provided by the Council, SHPO and EPA's annual reviews, are remedied or effectively rebutted with appropriate documentation. Notification of deficiencies, suggested remedies affecting the work of the SRF Agency, and proposed EPA action (if any), shall be included in the report sent to the SRF Agency at the conclusion of an annual review. If the report identifies deficiencies, remedies or actions concerning NHPA compliance, a copy of those portions of the report will be sent to the appropriate SHPO and the Council.

4. State/SHPO Consultation/Coordination.

The Regional Administrator will ensure that a State's capitalization grant agreement provides consultation and coordination between the SRF Agency and the SHPO that is consistent with 36 CFR 800.4, 800.5, and 800.14, and with the guidance outlined in Attachment 6.

5. Dispute Resolution.

(a) Either the SRF Agency or the SHPO may, at its own discretion, request that the EPA Regional Office and/or the Council participate in the review of individual SRF projects or assist in resolving disputes that may arise between the two State agencies. The EPA and the Council will participate in reviewing and assisting the State agencies if so requested, and may participate at their own discretion, when significant issues are raised from other sources, without such a request.

(b) In situations where disagreements among the SRF Agency and SHPO cannot be resolved in consultation with either the EPA Regional Office or the Council, the EPA will be responsible for resolving the dispute in consultation with the Council in accordance with 36 CFR 800.4 through 800.6 as applicable.

6. Applicable Guidance.

(a) Implementation of this PA will be guided by Attachments 1 through 6 and such program guidance or regulations as EPA may

issue subsequently, and the applicable regulations, standards, guidelines and explanatory bulletins of the Council and the Department of the Interior.

(b) In consultation with SRF Agencies and the NCSHPO, the EPA and Council may from time to time jointly develop and provide SRF Agencies and SHPOs with additional guidance or training.

7. Distribution.

Following the Council's publication of the required notice of an approved PA in the Federal Register, EPA will distribute copies of this PA and its attachments to all EPA Regional SRF and National Environmental Policy Act (NEPA) Coordinators, SRF Agencies, SHPOs, and requesting parties.

8. Amendment.

Any party to this PA may request that it be amended, whereupon the parties will consult pursuant to 36 CFR 800.13 to consider such amendment.

9. Termination.

Any party to this PA may terminate it by providing ninety (90) days notice to the other parties, provided that the parties will consult during the period prior to termination to seek agreement on amendments or other actions that would avoid termination. In the event of termination, the EPA will ensure compliance with 36 CFR 800.4 through 800.6 with regard to individual undertakings covered by this PA.

Execution of this PA, and carrying out its terms, evidences that the EPA has satisfied its Section 106 and 110(f) responsibilities under the NHPA for Title VI of the CWA.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

By: _____ Date: March 19, 1990
Chairman

U.S. ENVIRONMENTAL PROTECTION AGENCY

By: _____ Date: 3/23/90
Director, Office of Federal Activities

By: _____ Date: 3/23/90
Director, Office of Municipal Pollution Control

NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS

By: _____ Date: 3/28/90
President

ATTACHMENT 6:

SRF AGENCY/SHPO COORDINATION

[These do not substitute for 36 CFR 800.4 through 800.6]

(A) Initial project consultation.

(1) Early in a project's planning phase, when project alternatives are identified which have the potential to affect historic properties, if any are present, the SRF Agency should, in conformance with 36 CFR Part 800.4(a)(1)(ii), consult with the SHPO and request their views, comments and advice on: (a) what further actions may be necessary by the SRF Agency to further identify and evaluate historic properties; (b) the significance of all identified historic properties; (c) possible effects on historic properties; and (d) project alternatives and suggested mitigation measures where effects are likely.

(2) If within a thirty day period (as provided under 36 CFR Section 800.1(c)) the SHPO does not respond to the SRF Agency's request(s), the SRF Agency Shall proceed in accordance with 36 CFR 800.4, et. seq..

(B) Routine consultation.

Following initial contact, SRF Agencies should respond to the SHPO's views, comments and advice; shall take further actions as necessary to identify and evaluate historic properties and assess effects on them; and continue to consult and coordinate with the SHPO throughout the historic preservation review process. Where applicable, this review should be integrated with the SERP process (as defined in Attachment 1).

(C) Transmittal of decision documents.

(1) Prior to making a decision on a project, the SRF Agency shall notify the SHPO of measures it intends to incorporate in the project to avoid, minimize, or mitigate effects on historic properties, which must be consistent with any determinations made or agreements entered into by the SRF Agency pursuant to 36 CFR 800.4(d), 800.5(d), 800.5(e) (4), 800.5(e)(5), and/or 800.11(a) as applicable.

(2) The SRF Agency shall provide the SHPO with a copy of its final ER determination for all SRF projects that have involved consultation and coordination pursuant to 36 CR Part 800 et. seq. and the Programmatic Agreement among EPA, the Advisory Council on Historic Preservation, and the National Conference of SHPOs.

(3) In addition, the SRF Agency will routinely notify the SHPO that appropriate documentation regarding SRF 212 projects funded with EPA federal assistance that may affect historic properties is available whenever:

(i) A Draft ER document is finalized; or

(ii) Significant new information relevant to the project's environmental determination is identified, or significant changes to the project plan is made, following the issuance of a Final Determination (ER decision document), but prior to completion of construction,; or

(iii) A mandatory five-year reassessment of a previously issued environmental determination has been conducted on projects and, as requested or otherwise agreed between the SRF Agency and SHPO, provide the SHPO with copies of such documentation.

(4) Appropriate documentation should also be provided the SHPO at similar intervals for 319 and 320 projects funded with EPA federal assistance that may affect historic properties.

EXAMPLE 7-B
UPPER CLARK FORK

SECOND PROGRAMMATIC AGREEMENT
AMONG
THE ENVIRONMENTAL PROTECTION AGENCY
REGION VIII MONTANA OFFICE,
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION,
THE MONTANA STATE HISTORIC PRESERVATION OFFICE,
MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES,
LOCAL GOVERNMENTS OF
BUTTE/SILVER BOW AND ANACONDA/DEER LODGE, AND WALKERVILLE,
AND ARCO
REGARDING IMPLEMENTATION OF THE CERCLA RELATED ELEMENTS OF
THE UPPER CLARK FORK RIVER BASIN
REGIONAL HISTORIC PRESERVATION PLAN

Whereas, the U.S. Environmental Protection Agency (EPA), in cooperation with the State of Montana administers the Superfund program, in the Clark Fork River basin under provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9601 et seq., as amended by the Superfund Amendments and Reauthorization Act (SARA) of 1986 (P.L. 99-499); and

Whereas, EPA has promulgated a National Oil and Hazardous Substances Pollution Contingency Plan (NCP) (40 CFR Part 300, et. seq.) implementing CERCLA which, among a number of things, addresses EPA's responsibility to comply with Applicable or Relevant and Appropriate Requirements (ARARs); and

Whereas, actions conducted under CERCLA qualify as undertakings pursuant to Section 301(7) of the National Historic Preservation Act (NHPA), and are subject to 36 CFR Part 800, implementing Section 106 of the NHPA (16 U.S. C. 470f), and Section 110 (f) of the same Act 16 U.S.C. 470h-2(f); and

Whereas, the EPA, in cooperation with the Montana Department of Health and Environmental Sciences, proposes to conduct removal and remedial actions at Superfund sites in the Upper Clark Fork River Basin, the Area of Potential Effects (APE), under provisions of CERCLA, and

Whereas, the Butte/Silver Bow and Anaconda/Deer Lodge areas of the Upper Clark Fork

River Basin are the site of more than 100 years of living history of the early development of natural resources and industrialization of America and, include a designated National Historic Landmark, "arguably the nation's quintessential mining town, Butte" (Advisory Council on Historic Preservation 1990); and

Whereas, the EPA has determined that actions carried out under CERCLA may have an effect on the National Historic Landmark and other historic properties included in or eligible for inclusion on the National Register of Historic Places, and has consulted with the Advisory Council on Historic Preservation ("Council") and the Montana State Historic Preservation Office ("SHPO"), the Community Historic Preservation Officers (CHPOs) in Butte/Silver Bow and Anaconda/Deer Lodge, pursuant to 36 CFR § 800.13 of the regulations (36 CFR Part 800) implementing Section 106 of the NHPA; and

Whereas, the Butte/Silver Bow Historic preservation office (BSB/SHPO), representing the City/County government of Butte/Silver Bow (BSB) and Walkerville, the Anaconda/Deer Lodge Historic Preservation Office (A/DLHPO), representing the City/County government of Anaconda/Deer Lodge (ADL), the local government of Walkerville, the Montana Department of Health and Environmental Sciences, and ARCO, a Potentially Responsible Party, participated in consultation and have been invited to concur in this Programmatic Agreement; and

Whereas, based on a common concern among the parties to this agreement, a Regional Historic Preservation Plan (RHPP) was developed, pursuant to the terms of the 1992 Programmatic Agreement; and

Whereas, the RHPP identified and defined important historic properties throughout the Upper Clark Fork Basin, and recommended the development of the Butte-Anaconda Mining Heritage Park as a major destination visitor attraction; and

Whereas, a comprehensive matrix (Attachment A) was derived from the RHPP for potential Superfund remediation impacts to historic properties in the Upper Clark Fork Basin; and

Whereas, ARCO as a Potentially Responsible Party (PRP) has entered into an agreement with EPA to develop responses to Section 106 for those construction sites where it is performing or will perform response activities under CERCLA, and has been invited to concur in this agreement; and

Whereas, the definitions provided at 36 CFR § 800.2 are applicable throughout this Programmatic Agreement unless otherwise defined;

Whereas, ARCO provided $250,000 to develop the RHPP and to initiate efforts to meet Sections 106 and 110(f) requirements of the NHPA; and

Now, therefore, the EPA shall be administer the program in accordance with the following stipulations to satisfy the requirements of Sections 106 and 110(f) of the NHPA.

STIPULATIONS

The EPA shall ensure that the following measures are carried out.

1. QUALIFICATIONS

EPA will ensure that the on-site EPA and MDHES construction oversite representative will be instructed by a cultural resource specialist meeting the Secretary of Interior's Professional Qualification Standards (48 FR 44738-0) in order to effectively implement the provisions of this agreement. EPA will also ensure that qualified consultants are available on an on-call basis to respond to discoveries as described in Stipulation 5 and also assist EPA in the implementation of this agreement.

2. MITIGATION

The evaluation of the historic properties for purposes of compliance with Sections 106 and 110(f) of the NHPA is contained in the RHPP. This evaluation (Attachment A) is the basis for the mitigation actions included in this agreement. .

A. Based on the evaluation of the historic properties the following actions have been agreed to:

1. At most construction sites, the historic property will be avoided by the response action remedy. These historic properties are listed in Attachment B to this PA.

2. At some construction sites, on-site mitigation will be incorporated into the

design of the remedial action. The on-site historic properties are listed in Attachment C to this PA. The on-site mitigation will be based on the guidelines in the RHPP, the performance role identified in Attachment A for the specific site and the ***Process*** **outlined in Stipulation 3, below.** Only those historic properties specified for such treatment or undiscovered historic properties will be subject to the *Process*.

3. For those historic properties that cannot be avoided and where there has been agreement by the signatories of this Second Programmatic Agreement that impact may occur; off-site mitigation as described in the following section will be conducted. These historic properties are listed in Attachment D to this PA.

B. All proposed remedial actions (including investigations, design, and construction) taken in areas containing historic properties will be subject to the normal Superfund public involvement process. (See Attachment E)

3. *PROCESS*

Throughout the following process, the EPA will make every effort to reach consensus at all decision points. However, if any party to this agreement objects to any proposed action, the EPA will resolve the dispute in accordance with Stipulation 6, Dispute Resolution. Attachment C contains a list of the construction sites for which on-site mitigation is considered appropriate. The following process outlines when and how the objectives for on-site mitigation for these sites will be incorporated into the Superfund remediation process. Additionally, if any historic property listed on Attachment B can not be avoided as planned, this process shall also apply.

A. **Consideration of Historic Properties during Superfund Studies**

As studies progress through the Superfund process, consideration of historic properties will be an integral part of the consideration and evaluation of remedial alternatives. Consultation with the CHPOs will be initiated by EPA during the response action process.

B. **Remedial Design Work Plans**

As a remedial design ("RD") work plan for a specific remedial action is developed, consideration of historic properties will be included as an integral part of the design. The EPA will invite the CHPOs to participate actively in the development of work plans as they relate to potential effects, and on-site mitigation of effects to historic properties. The development of remedial design work plans shall accommodate CHPO concerns to the extent feasible. The EPA will provide the CHPOs 15 working days to review and comment on each work plan and the adequacy of mitigation efforts for those sites listed on Attachment C.

C. **Final Remedial Design**

The EPA will invite the CHPO's to participate in the development of final remedial design plans as they relate to potential impacts and on-site mitigation of impacts to historic properties. It is expected that a consensus will be reached on the final design. However, as noted under dispute resolution, if the CHPOs object to the final design within thirty (30) days of receipt of the final design EPA must consult with the CHPO and others to attempt to resolve the dispute in accordance with Stipulation 6. The final decision is EPA's under the NHPA.

The remedial design will adhere to the RD work plan provisions. If deviations from the work plan affecting the on-site mitigation are necessary due to technical or engineering constraints, the EPA will attempt to reach a consensus decision without undue delay in the design process. Although design for remediation of a particular Superfund project may relate to only a portion of a historic property in the area, the design will attempt to be consistent with the specific purpose or larger context in which the historic property is situated pursuant to the RHPP.

The Administrative Order on Consent, Unilateral Order, or Consent Decree gives EPA or MDHES authority to ensure that the construction of a remedy follows the remedial design plan. If reclamation work occurs in such a way that work plans are not followed and historic property is harmed, EPA will consult with the relevant CHPO and the PRP to determine what corrective actions may be necessary. EPA shall ensure corrective actions are consistent with the RHPP and are completed. EPA will also determine why the failure to follow specifications occurred and change personnel or procedures. This will be documented by the EPA in a letter to all other affected parties to provide a written record of decisions.

D. Implementation

Weekly, or as appropriate based on level of activity, EPA will hold meetings to review the upcoming week's construction activities. These meetings will also be used to identify any pertinent activities related to the historic properties elements as they relate to the agreed to final design plan for the construction site. Representatives of the PRP, EPA, MDHES, CHPO, contractor, and other representatives of appropriate agencies (public works, state or federal agencies) will have a standing invitation to attend these meetings. The PRP will distribute minutes from each meeting to all interested parties so construction progress can be tracked at a given construction site at any given point in time.

In addition to weekly construction meetings, daily oversight may be provided by any representative of any of the parties. Safety certification must be obtained by any on-site observer, and safety plans must be followed.

4. OFF-SITE MITIGATION

Based on the RHPP and the jointly developed matrix of Attachment A, the unavoidable effects of potential Superfund remedial actions shall be mitigated as described below: ARCO and the affected communities and the signatories to this PA agree that the following actions along with on-site mitigation fully mitigate for all unavoidable impacts or losses of known historic properties in BSB and ADL counties.

A. Butte-Silver Bow

(1.) At the Lower Area One ("LAO") construction site, ARCO, in consultation with BSB, shall develop and incorporate into the final design for the area and shall construct recreation and historic interpretive facilities. The attached map, LAO Conceptual Reclamation Plan, July 1993, identifies the actions to be taken and the facilities to be built.

(2.) ARCO will transfer the title of the land adjacent to the LAO site (west of the KOA campground along George Street, see map), subject to specific land use restrictions, to Butte-Silver Bow for a proposed visitor and information center.

(3.) ARCO will provide Butte-Silver Bow with $100,000 cash payment toward the development of the proposed visitor center. This cash payment shall be used for the express purposes of constructing the proposed visitor center and developing the historic interpretation elements and heritage park information (as per the constellation/gateway concept outlined in the RHPP) at the proposed visitor center.

(4.) ARCO will connect the visitor center/gateway from its location on George Street to the LAO area by constructing a bike/pedestrian path.

(5.) As EPA, BSB, MDHES, and ARCO develop Institutional Controls necessary to supplement engineering remedies, additional elements of the Butte-Anaconda Mining Heritage Park as outlined in the RHPP will be given consideration for inclusion in the remedial design work plans at all operable units in the BSB area to be remediated in the future.

B. Anaconda-Deer Lodge

1. ARCO will provide to Anaconda Deer Lodge the sum of $33,000 as matching funds for completion of a Community Architectural and Historical Survey of historic properties in Anaconda.

2. ARCO will provide matching funds in the amount of $5,000 to ADL for the Historical Data Presentation grant.

3. ARCO, in consultation with ADL, shall design and construct an interpretive trail at the Old Works. The trail shall include interpretive signage detailing the history of smelting in Anaconda; including discussions of natural resources, smelting sites, facilities, technologies and the remaining features/landscapes. There will be an Upper Works Trail and Lower Trail system which includes the following:

- Upper Works Trail
  - Trail construction (approximately 4,600 feet)
  - Fencing of the trail site and historic properties as necessary
  - Interpretative stations (3 basic sign stations, 1 sign rest area station, 1 sign shelter station, 1 kiosk)
  - Interpretive signing of historic properties
  - Amenities (20 car parking lot, access gate, landscaping, (2) toilets, (2) picnic tables, (2) trash cans)
- Lower Trail System
  - Trail construction (crushed limerock and slag) from Cedar Street to Galen Road
  - Interpretative stations (1 basic sign station, 1 sign shelter station)

(3.) As EPA, ADL, MDHES, and ARCO develop Institutional Controls necessary to supplement engineering remedies, additional elements of the Butte-Anaconda Mining Heritage Park as outlined in the RHPP will be given consideration for inclusion in the remedial design work plans at all

operable units in the ADL area to be remediated in the future.

5. UNDISCOVERED and UNDOCUMENTED HISTORIC PROPERTIES

During construction activities, undiscovered and undocumented historic properties may be encountered. In such event, the EPA will ensure the following procedures are carried out:

A. For all unknown and undocumented historic properties discovered during response actions, the on-site EPA or MDHES representative will stop construction activities in the immediate area of the find to the extent such stoppage will not create an undue risk of harm to human health or the environment and notify the designated "on-call" qualified historian or archaeologist who has previously been contracted with to provide this service. The archaeologist/historian will examine the find, verify its significance, and conduct preliminary recordation, as necessary.

Within a maximum of four hours of the identification of a historic property judged to be significant, all available participating parties to this agreement will be notified. The CHPO or a representative shall visit the discovery within at least one business day to recommend how the historic property should be treated: avoided, mitigated on-site, mitigation off-site, or receive additional recordation.

B. Within a business day, EPA will consider the findings of the archeologist/historian and the recommendations of the CHPO and make a final determination on actions to be taken. EPA will consult with the PRP and the CHPO's before finalizing their decision. All decisions will be documented to the parties to this agreement by EPA and become part of the record. As with dispute resolution, all EPA decisions are final, pursuant to Superfund authority.

C. As construction proceeds, it may be necessary to make "field judgements". For example, safety of workers will sometimes require action before the archaeologist/historian can respond. Every effort will be made by all parties to respond as quickly as possible utilizing back-up personnel if necessary. EPA will make every effort to avoid action before the affected parties or their representatives can respond. These decisions will be included in the annual reports.

6. DISPUTE RESOLUTION

Unless otherwise specified under the terms of this agreement, should any party to this agreement object within thirty (30) days after receipt to any plans, specifications, contracts, or other documents provided for review pursuant to this agreement, or to the manner in which this agreement is being implemented, EPA shall consult with the objecting party to resolve the objection. If EPA determines that the objection cannot be resolved, EPA shall forward all documentation relevant to the dispute to the Council. Within thirty (30) days after receipt of all pertinent documentation, the Council will either:

A. Provide EPA with recommendations, which EPA will take into account in reaching a final decision regarding the dispute; or

B. Notify EPA that it will comment pursuant to 36 CFR § 800.6(b) and proceed to comment. Any Council comment provided in response to such a request will be taken into account by EPA in accordance with 36 CFR § 800.6(c)(2) with reference to the subject of the dispute.

C. At any time during implementation of the measures stipulated in this Agreement, should an objection to any such measure or its manner of implementation be raised by a member of the public, the CHPO, or local governments, the EPA will take the objection into account and consult as needed with the objecting party, the SHPO, the CHPO, or the Council to resolve the objection. EPA may request the further comments of the Council pursuant to 36 CFR § 800.6(b). Any Council comment provided in response to such a request will be taken into account by the EPA in accordance with 36 CFR § 800.6(c)(2) with reference to the subject of the dispute.

7. AVAILABILITY OF CHPO

In the event that a CHPO is unable to carry out its review responsibilities under the terms of this agreement, or such position is eliminated by the local governing body, the SHPO will assume the CHPO's responsibilities pending reinstatement of the CHPO and resumption of the CHPO's review role. The CHPO will be responsible to notify EPA and SHPO that the position is unavailable or has been eliminated.

8. MONITORING

The Council, SHPO, CHPOs, may monitor activities carried out pursuant to this Programmatic Agreement, and the Council will review such activities if so requested. EPA, ARCO and other PRP's will cooperate with the Council, the SHPO, and the CHPOs in carrying out their monitoring and review responsibilities.

9. ANNUAL REPORT

A. On an annual basis, the EPA will submit to the parties to this agreement a report of all actions carried out under the terms, and EPA's assessment of the effectiveness of the agreement. Such reports will summarize all such actions conducted during the previous fiscal year,based in part on monthly progress reports submitted to EPA by ARCO, and shall be submitted to the parties to this agreement no later than January 1 of each year that the agreement remains in effect.

B. Within 30 days of receipt of the annual report, the parties to this agreement shall consult to determine whether a meeting of the parties is needed to review EPA's actions and the effectiveness of the terms of the agreement.

10. ADMINISTRATIVE STIPULATIONS

A. Amendment

Any party to this agreement may request that it be amended, whereupon the parties will consult in accordance with 36 CFR § 800.13 to consider such amendment.

B. Failure to Perform

In the event any party to this agreement believes that the EPA is not carrying out the terms of the agreement, the party may request that the agreement be terminated by providing 90 days notice to the other parties. All parties will consult during the 90 day period to seek agreement on amendments or other actions that would avoid termination.

C. Termination

In the event that during the 90 day consultation period described above, no agreement can be reached on amendments or other actions, EPA and the Council will determine if this agreement will be terminated. The EPA, in consultation with the Council, will then consider all actions completed under this agreement, and make final decisions on how EPA will further comply with 36 CFR §§ 800.4 through 800.6, if further compliance is required. Completed and approved funding or implementation of actions described in this agreement will be fully considered by EPA in making such determinations.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

By: _____ Date: 9/2/94

ENVIRONMENTAL PROTECTION AGENCY REGION VIII MONTANA OFFICE

By: _____ Date: 9/19/94

MONTANA STATE HISTORIC PRESERVATION OFFICER

By: _____ Date: 9-20-94

MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES

By: _____ Date: 9/19/94

LOCAL GOVERNMENT OF BUTTE/SILVER BOW

By: _____ Date: 10-4-94

ATTEST: _____
CLERK & RECORDER

LOCAL GOVERNMENT OF ANACONDA/DEER LODGE

By: _____ Date: 10-19-94

LOCAL GOVERNMENT OF WALKERVILLE

By: _____ Date: 10-6-94

ARCO

By: _____ Date: 9/27/94

~~Concur:~~

~~By: _____ Date: _____~~

OTHER PRP's

By: _____ Date: _____

By: _____ Date: _____

By: _____ Date: _____

ATTACHMENT A

Selected Historic Properties Located
Within the Upper Clark Fork Basin Superfund Construction Sites

ATTACHMENT B

Historic Properties That Which No Impact Is Expected[1]

Historic Properties	Matrix Number[2]
Silver Bow Creek	3,4
Rocker	6
Milwaukee Railroad	7
BA&P Railroad	8
Dublin Gulch	9
Missoula Gulch	10
Orphan Boy	11
Blue Bird Trail	12
Buffalo Gulch	13
Bluebird Mill	16
Yellow Ditch	17
Alice Mine/Mill	18
Washoe Reduction Works/Stack	25
Slag Piles	26
Anaconda Ponds	27
Mill Creek Community	28
Opportunity Ponds	30
Missoula Mine	33
Mt. Con	34
Syndicate Pit / Lexington Tunnel	35
Alice Pit / Knob	37
Railroad through Butte	39
Ophir Mine Yard	40

[1] It should be noted that the normal Superfund public involvement process applies to all historic properties.

[2] From Attachment A

ATTACHMENT C

Historic Properties That Will Receive
On-Site Mitigation and be subject to the *Process* as per Stipulation 3

Historic Properties	Matrix Number[3]
Original Mine Yard	2
Teddy Bear Placer	14
First Gold Strike	19
Lower Area One (Colorado Tailings/Butte Reduction Works)	21
Belmont	22
Old Works	23
Red Sands Area	29
Anselmo Central Timber Yard	32
Steward Mine Yard	36

[3] From Attachment A

ATTACHMENT D[4]

Historic Properties That May Be Impacted
And If So, Will Be Included In The Off-Site Mitigation Package

Historic Properties	Matrix Number[5]
Silver Bow Creek	3,4
Rocker	6
Milwaukee Railroad	7
BA&P Railroad	8
Dublin Gulch	9
Missoula Gulch	10
Orphan Boy	11
Blue Bird Trail	12
Buffalo Gulch	13
Other Placers	15*
Bluebird Mill	16
Yellow Ditch	17
Alice Mine/Mill	18
Lower Area One (Colorado Tailings/Butte Reduction Works)	21
Old Works	23
Warm Springs Ponds	24
Washoe Reduction Works/Stack	25
Slag Piles	26
Anaconda Ponds	27
Mill Creek Community	28
Red Sands Area	29
Opportunity Ponds	30
Butte Smelters	31*
Missoula Mine	33
Mt. Con	34
Syndicate Pit / Lexington Tunnel	35

[4] It should be noted that all historic properties will be subject to the normal Superfund public involvement process.

[5] From Attachment A

ATTACHMENT D[6] (continued)

Historic Properties	Matrix Number[7]
Steward Mine Yard	36
Alice Pit / Knob	37
Mining Landscape	38*
Railroad through Butte	39
Ophir Mine Yard	40
Smelter Hill	n/a

* Historic Properties that will be impacted and are included in the off-site mitigation package.

[6] It should be noted that all historic properties will be subject to the normal Superfund public involvement process.

[7] From Attachment A

SITES WHERE THERE WILL BE SUPERFUND IMPACT

#	SITE	CONSTELLATION	OPERABLE UNIT	PERFORMANCE ROLE	Refer to attach-ments B, C or D	NOTES
1	Travona	Pre-History, Richest Hill, Gold & Silver	PS TCRA, PS ERA and RI/FS (stormwater)	Participatory	Complete	Resources were avoided during TCRA, no: much left except the headframe, a building was moved to this site from another mine yard. Need to protect access to shaft for maintenance of pump. If future actions are required the resources will be avoided.
2	Original	Pre-History, Reclamation, Richest Hill	PS OU--PS RI/FS (stormwater)	Participatory	C	ARCO did early reclamation work which needs to be re-evaluated. May need to do further soil reclamation and stormwater. Some resources may be lost due to stormwater considerations. Note--Our Lady of Rockies Foundation uses this mine yard to build and maintain their equipment and as storage. May be asbestos in the remaining mine buildings.
3	Silver Bow Creek-Pre History Site	Pre-History	Streamside	Dormant	B & D	Depending on exactly where this area may be and what is left the actions of Streamside Tailings may drastically change creek or area. It may not be possible to avoid resources; although there may not be much left. On-site mitigation agreed to but not yet completed.
4	Silver Bow Creek Drainage	Pre-History	Streamside	Survey	Complete	Depending on exactly where this area may be and what is left the actions of Streamside Tailings may drastically change creek or area. It may not be possible to avoid resources; although there may not be much left.
5	Lexington Mine and Mill	Gold and Silver, Reclamation, Richest Hill	Walkerville TCRA; PS RI/FS mine yard-stormwater	Participatory	Complete	Walkerville TCRA had on (photodocumentation, inventories) and off (Granite Mountain Plaques) site mitigation--this has been completed. Mine Yard was actively used by New Butte until recently. Future work will mostly avoid resources.
6	Rocker	Gold and Silver, Reclamation	Rocker TCRA, Rocker RI/FS	Participatory	B & D	Inventory has been completed. As a result of the TCRA, off-site mitigation may be necessary. Depending upon RI/FS decisions may need some off-site mitigation.
7	Milwaukee Road	Gold and Silver, Smelting	Butte sections PS RI/FS, rest Streamside	Controlled Participatory	B & D	Butte sections--railroad bed most likely will remain the same. There may be, however, the necessity to destroy, move or change some trestles such as the trestle in Lower Area One. This may necessitate some off-site mitigation. Streamside sections--railroad bed will remain, therefore should be able to avoid resource.

Attachment E

Public Involvement in Superfund

	Study						Remedy Selection			Implementation	
	RI/FS Scoping	Risk Assessment: Scoping	Risk Assessment: Conduct	Draft RI	Alternative Screening	RI/FS	Proposed Plan	ROD	Consent Decree Negotiation	RD	RA
*						B F			-	Fact Sheet - Public Briefing	-
**	E	D E C Varies		D E	D E	B D E F			-	Fact Sheet - D G	G
***								E ****	-	Public Briefing	E Initiate RA

A General public review & comment without response to comments
B General public review & comment with response to comments
C Special public work group review and comment without response to comments
D Special public work group meetings (MTAC, CTEC, CWG, etc.)
E General public information meeting
F Formal public hearing with responsiveness summary
G Meeting upon request (Applies throughout the process)

* Statutory public involvement requirement
** Current (MO public involvement practice)
*** Potential additional public involvement

**** May include RD briefing

#	SITE	CONSTELLATION	OPERABLE UNIT	PERFORMANCE ROLE	Attach-ments B, C, or D	NOTES
8	BA &P Corridor	Gold and Silver, Richest Hill, Smelting	Butte sections–PS RI/FS; Streamside, and Anaconda	Controlled Participatory	B & D	Butte sections–railroad bed most likely will remain the same. There may be, however, the necessiy to destroy, move or change some trestles such as the trestle in lower Area One. This may necessitate some off-site mitigation. Streamside sections and Anaconda–railroad bed will remair, therefore should be able to avoid resource.
9	Dublin Gulch (Town)	Gold and Silver, Richest Hill	PS ERA, and PS RI/FS	Controlled Participatory	B & D	May be some residential yards under PS ERA. May be some off-site mitigation required as part of the mitigation package for loss of mining landscape.
10	Missoula Gulch	Gold and Silver	PS RI/FS and LAO (bottom)	Controlled Participatory	B & D	Walkerville TCRA did photodocumentation, inventories, and Granite Mountain signs. May be some off-site mitigation required as part of the mitigation package for loss of mining landscape.
11	Orphan Boy	Gold and Silver, Richest Hill	Non-Priority Soils	Controlled Participatory	B & D	DSL closed shaft, may require stormwater and soils reclamation. Should be able to avoid resources. Some off-site may be required.
12	Prospect-Glory Holes/ Bluebird Trail	Gold and Silver, Richest Hill	Non-Priority Soils	Controlled Participatory	B & D	Numerous shafts of various depths and size. May require shaft closures. The few resources left most likely could be avoided, although it may be necessary to do some off-site mitigation.
13	Buffalo Gulch	Gold and Silver	PS RI/FS	Controlled Participatory	B & D	May be some off-site mitigation required as part of the mitigation package for loss of mining landscape. Depending on action for RI/FS these gulches may be drastically changed.
14	Teddy Bear Placer	Gold and Silver	Streamside	Controlled Participatory	C	Depending upon action under Streamside, this may be drastically changed. Resources should be avoided, however may require some on-site mitigation.
15	Other Placers	Gold and Silver	Streamside	Controlled Participatory	D	Depending upon action under Streamside this may drastically changed. Resources should be avoided, however may require some off-site mitigation.
16	Bluebird Mill	Gold and Silver	Non-PS OU	Observed	B & D	As this is a former mill site there may be elevated levels of mercury as well as lead and arsenic. Very little left so should be able to avoid resources, although may require some off-site mitigation.
17	Yellow Ditch	Gold and Silver	Streamside	Observed	B & D	Very little left so should be able to avoid resources, although may require some off-site mitigation.
18	Alice Mine and Mill	Gold and Silver	Walkerville TCRA, PS RI/FS stormwater	Observed	Complete	Walkerville TCRA did photodocumentation, inventories, and Granite Mountain signs.

#	SITE	CONSTELLATION	OPERABLE UNIT	PERFORMANCE ROLE	Attach-ment B, C, or D	NOTES
19	First Gold Strike	Gold and Silver	Streamside	Dormant	C	There is very little left here. Should be able to avoid, however may require some on-site mitigation.
20	Emma Mine Yard	Reclamation, Richest Hill	PS RI/FS	Participatory	Complete	BSB did reclamation under an RIT grant. Stormwater will be under PS RI/FS, however should not change anything that is left. DSL closed shaft. (Historic Properties Management Plan mitigation for this.)
21	Butte Reduction Works/ Colorado Tailings	Reclamation, Smelting	Lower Area One ERA	Participatory	C & D	Most of slag walls will remain, although some sections will be removed necessitating on-site mitigation. Most of water flumes will remain although again, some on-site mitigation will be required. Foundations, loading platforms other significant resources will remain and be avoided.
22	Belmont	Reclamation, Richest Hill	PS RI/FS	Participatory	C	ARCO did early reclamation not under Superfund. Inland Properties has done stormwater reclamation not under Superfund. Mine yard may necessitate some on-site mitigation. Early work will be reviewed under PS RI/FS.
23	Old Works Golf Course (Upper and Lower Works)	Reclamation, Smelting	Anaconda OW/EADA RI/FS	Controlled Participatory	C & D	Proposed interpretive trail will serve as on-site mitigation. Other resources may be avoided depending upon RI/FS decisions.
24	Warm Springs Ponds	Reclamation	Warm Springs Ponds	Controlled Participatory	C & D	Historic inventory completed as part of previous work. Future work will avoid resources, although reclamation may require some on-site mitigation. On-site mitigation agreed to but not yet completed.
25	Washoe Reduction Works/ stack	Reclamation, Smelting	Anaconda	Controlled Participatory	B & D	Avoidance of few remaining structures where possible. Final remedy may require off-site mitigation. Stack will remain.
26	Slag Piles	Reclamation, Smelting	Anaconda Regional water and waste	Observed	B & D	Depending upon the final remedy decision most resources should be avoided, however may need some off-site mitigation.

#	SITE	CONSTELLATION	OPERABLE UNIT	PERFORMANCE ROLE	Attach-ments B, C, or D	NOTES
27	Anaconda Ponds	Reclamation, Smelting	Anaconda Regional Water and Waste RI/FS	Observed	B & D	Depending on final remedy may need some off-site mitigation. Should be able to avoid most resources.
28	Mill Creek Community	Reclamation, Smelting	Anaconda Soils RI/FS	Dormant	B & D	Most structures already removed under Mill Creek removal. May need some off-site mitigation.
29	Red Sands Area	Smelting	Anaconda OW/EADA RI/FS	Controlled Participatory	C & D	
30	Opportunity Ponds	Reclamation, Smelting	Anaconda Regional Water and Waste RI/FS	Observed	B & D	Most resources can be avoided, however depending upon the remedy the landscape may be changed requiring off-site mitigation.
31	Butte Smelters	Smelting	Colorado Smelter TCRA, PS RI/FS and Active Mine	Dormant	D	Colorado Smelter TCRA did inventories and avoided foundations. Little remaining of other smelters in Butte. Should be able to mitigate off-site as part of total package for loss of mining landscape. Some smelters located in active area will be under DSL reclamation.
32	Anselmo/ Central Timber Yard	Richest Hill	Anselmo TCRA, PS RI/FS stormwater	Participatory	C	BSB RIT funds removed asbestos, put new roofs and windows on some of the buildings. DSL closed shaft and did some reclamation; dumps to south of mine yard where done by ARCO. Most resources were avoided during TCRA, some on-site mitigation occurred. Stormwater drainage still a problem. May need to still do some on-site mitigation.
33	Missoula Mine	Richest Hill	PS RI/FS, Walkerville TCRA	Participatory	B & D	Most resources can be avoided; may still need some off-site mitigation.
34	Mountain Con	Richest Hill	PS RI/FS, Dumps in PS ERA	Participatory	B & D	Some reclamation work completed by ARCO, reclamation study being completed as part of PS ERA, stormwater PS RI/FS. Mine buildings in mine yard may contain asbestos. Resources will be avoided.
35	Syndicate Pit	Richest Hill	PS ERA, PS RI/FS	Participatory	B & D	Dumps upgradient of pit are part of PS ERA, stormwater under PS RI/FS. Mine permit includes pit and underground areas, therefore reclamation will be under DSL.

#	SITE	CONSTELLATION	OPERABLE UNIT	PERFORMANCE ROLE	Attach-ment B, C, or D	NOTES
36	Steward Mine Yard	Richest Hill	PS TCRA, PS RI/FS	Controlled Participatory	C & D	PS TCRA did partial reclamation, mitigation was photodocumentation. Resources in mine yard will be avoided, however may need some off-site mitigation due to stormwater actions. May be asbestos present in mine buildings.
37	Alice Pit and Knob	Richest Hill	PS ERA, PS RI/FS	Observed	B & D	PS ERA will address Alice Knob. May change shape of knob drastically therefore will need to do some off-site mitigation. Stormwater remedy may also change landscape requiring some off-site mitigation. Should be part of total package for loss of mining landscape.
38	Mining Landscape Waste Dumps/ Mine Yards Neighborhoods (throughout Butte)	Reclamation, Richest Hill	PS ERA, PS RI/FS, Non-PS RI/FS, Active Mine OU	Observed (Neighborhoods, and Mining Landscape) Controlled Participatory (Waste Dumps/Mine Yards)	D	There will be a change to the mining landscape in the sections of the community that are in the PS CU. The active mine area falls under DSL reclamation and most likely will not be changed. The proposed off-site mitigation package should take into account the loss of this landscape, although large areas of the community (the active mine area) will remain the same. Some reclamation has taken place under Butte TCRAs. PS era will address residential yards and remaining dumps.
39	Railroads throughout Butte (Milwaukee, Great Northern, Northern Pacific)	Richest Hill	PS RI/FS,	Observed	B & D	Railroad beds most likely will remain the same. There may be, however, the necessity to destroy, move or change some trestles or associated railroad banks, therefore some off-site mitigation may be necessary.
40	Ophir Mine Yard	Richest Hill	PS ERA, PS RI/FS	Dormant	B & D	Few remaining resources. Mine yard will be addressed under PS ERA, stormwater under PS RI/FS. Most resources can be avoided, may need some off-site mitigation.

EXAMPLE 7-C
NANSEMOND ORDNANCE DEPOT

June 2000

PROGRAMMATIC AGREEMENT
AMONG
THE NORFOLK DISTRICT, U.S. ARMY CORPS OF ENGINEERS,
REGION III, THE ENVIRONMENTAL PROTECTION AGENCY,
AND
THE VIRGINIA DEPARTMENT OF HISTORIC RESOURCES
SUBMITTED TO THE ADVISORY COUNCIL ON HISTORIC PRESERVATION
PURSUANT TO 36 CFR §800.14 (b)

WHEREAS, the Norfolk District (District), U.S. Army Corps of Engineers and the Envrionmental Protection Agency, Region III (EPA) are conducting cleanup of ordnance, other unexploded safety hazards and other hazardous substances at the Former Nansemond Ordnance Depot (FNOD) under the authority of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (CERCLA),42 U.S.C. §§ 9601 et seq., and other authorities; and

WHERAS, the FNOD consists of 975+ acres on the south shore of the James River, east of the interesection of the Nansemond River with the James, in the City of Suffolk, Virginia (as shown on the attached map), and was used by the Department of Defense between 1917 and 1960; and

WHEREAS, the District and EPA have determined that this project is an undertaking under Section 106 of the National Historic Preservation Act that may have an effect on historic properties, specifically archaeological sites and have consulted with the the Virginia State Historic Preservation Officer (SHPO) pursuant to Section 800.14 of the regulations (36 CFR Part 800) implementing Section 106 of the National Historic Preservation Act (NHPA); (16 U.S.C. 470f), and have invited the Advisory Council on Historic Preservation (Council) to participate in the consultation; and

WHEREAS the District has prepared a report on the general historic background and contexts of the FNOD project area, entitled *Phase Ia Historical and Archaeological Assessment of the 1,000-Acre Former Nansemond Ordnance Depot, City of Suffolk, Virginia* (McDonald and Givens 1996) and the District and the EPA have prepared an Archaeological Work Plan which provides procedures for inventory and evaluation of archaeological resources as part of all project planning and execution activities for the FNOD, and is included with this document as Attachment A; and

WHEREAS, as part of the National Environmental Policy Act (NEPA) process, the District and the EPA have informed the public about the project through various public notices, public hearings, the formation of a Restoration Advisory Board, and the Draft Final Site Management Plan (January 2000). As a result of these efforts the District in consultation with the EPA and the SHPO, has identified various parties that were invited to participate in the development of this Programmatic Agreement (PA); and

WHEREAS, the following Native American tribes, organizations, agencies, and institutions (consulting parties) were requested participate in consultation, and to concur in this PA:

The Nansemond Tribal Association
The Virginia Council on Indians
The United Indians of Virginia
The Virginia Department of Environmental Quality
The Tidewater Community College
The City of Suffolk
Dominion Land, Incorporated

NOW, THEREFORE, the District, the EPA, and the SHPO agree that the proposed environmental testing and cleanup shall be carried out in accordance with the following stipulations in order to take into account

the effects of these undertakings on historic properties:

STIPULATIONS

The District and the EPA shall insure that the following stipulations are carried out:

I. Identification and Evaluation

Stipulation 1: The District and the EPA have prepared and will execute an Archaeological Work Plan (AWP) which provides the technical details for the Identification and Evaluation of historic properties within the context of the ongoing project. The AWP is included as Attachment A of this PA.

Stipulation 2: The District shall insure that an archaeologist meeting the Secretary of Interior's Professional Qualifications Standards (Project Archaeologist) shall prepare a detailed map of the project area delineating its potential to contain archeological properties and submit the map to the SHPO for review and approval, as indicated in Item 2 of the Archaeological Work Plan.

Stipulation 3: Project Plans, Work Plans, Contracts

The Project Archaeologist shall review all existing and future general plans, work plans, scopes-of-work and contract documents for possible effects to previously identified and predicted archaeological resources as provided for in the AWP (Attachment A). This work will be done in cooperation with the EPA Project Manager and the District Project Manager, and shall include documents prepared by non-federal entities under the oversight or approval of the EPA or the District. All scopes-of-work and contract documents prepared by or subject to the approval of the EPA or the District shall contain a reference to this PA as defining requirements that must be observed in the conduct of contracted work.

Stipulation 4: The Project Archaeologist shall submit plans for all actions with the potential to affect historic properties to the SHPO for review and comment. If the SHPO does not provide comments within thirty days, the EPA and the Corps will assume concurrence and proceed. If the EPA and the District in consultation with the SHPO determines that no historic properties are affected, work may proceed. If the EPA and the District in consultation with the SHPO find that further identification efforts are needed, the identification and evaluation of archaeological properties will proceed following the procedures outlined in the AWP.

Stipulation 5: If archaeological properties are identified as a result of the execution of the procedures in the AWP (which includes unexpected discoveries), the EPA and the District will consult with the SHPO and other consulting parties on ways to reduce, avoid, or mitigate project effects.

If the proposed actions will affect archaeological properties, the Project Archaeologist shall prepare a treatment plan in consultation the EPA, the District, the SHPO, and other consulting parties. The treatment plan may include, but need not be limited to, any one or more of the following:

- Avoidance
- Protection in place
- Stabilization
- Data recovery
- Incorporation into protected areas
- Curation
- Publication
- Public Interpretation
- Repatriation
- Long term management and co-management

The Project Archaeologist shall provide all Treatment Plans to the EPA, the District, the SHPO, and all consulting parties for a thirty day review period. Comments on the Treatment Plans shall be submitted to the Project Archaeologist.

Stipulation 6: Any human remains encountered during the implementation of this agreement shall be treated in accordance with the "Regulations Governing Permits for the Archaeological Removal of Human Remains" (VR 390-01-02) found in the Code of Virginia (10.1-2305, et seq., Virginia Antiquities Act).

The District must obtain a permit from the SHPO for the removal of human remains in accordance with the regulations stated above. In reviewing a permit involving removal of Native American human remains, the SHPO will notify, the District and the SHPO will notify and consult with the Nansemond Tribal Association.

All reasonable efforts will be made to avoid disturbing Native American gravesites and associated artifacts.

Skeletal remains and funerary items shall be handled with respect beginning with the start of excavation, osteological examination and the final reinterment. Excavation of skeletal remains shall use a pedestal with the same positioning and orientation as originally found.

The general public shall be excluded from viewing any Native American grave sites and associated artifacts.

Human skeletal remains shall be reinterred as determined by and in a location as agreed upon by the Nansemond Tribal Association with two years after removal, with no extension.

Stipulation 7: Unanticipated Discoveries: the EPA and the District will ensure that construction documents contain the following provisions for the treatment of unexpected discoveries:

"In the event that a previously unidentified historic property is discovered in the area of potential effect after implementation of this PA or initiation of ground disturbing activities, all construction work involving subsurface disturbance will be halted in the area of the resource and in the surrounding area where further subsurface remains can reasonably be expected to occur. The Contractor shall immediately notify the District Project Manager and/or the EPA Project Manager who will consult with the Project Archaeologist, the SHPO and other appropriate parties, including the Nansemond Tribal Association, to determine if further investigations are warranted. The Project Archaeologist will immediately inspect the work site and determine the area and the nature of the affected archeological property. Work may then continue in the project area outside the site area."

The District and the EPA, in consultation with the SHPO, will determine the National Register eligibility of the previously unidentified resource. Potentially eligible historic properties will be evaluated using the National Register criteria in accordance with 36 CFR 800.4(c). If the resourceis determined to meet the National Register Criteria (36 CFR Part 60.6), the District and the EPA will ensure compliance with Section 800.11 of the Council's Regulations. Work in the affected area shall not proceed until either the development and implementation of an appropriate treatment plan; or the determination is made that the located resource is not eligible for inclusion on the National Register.

II. Previous Disturbance to Archaeological Sites

Stipulation 8: Because some environmental testing and cleanup was conducted without inventory completing the identification of historic properties and assessment of effects prior to the execution of this Programmatic Agreement sites of this previous work will be visited and assessment of any effects to archaeological resources will be documented, following the procedures called for in the Archaeological Work Plan (Attachment A).

III. Public Involvement

Stipulation 9: The District and the EPA will arrange for public participation appropriate to the subject matter and the scope of work and involve the individual, organizations and entities likely to be interested, in accordance with Section 800.2(d) and Section 800.8 of the regulations (36 CFR Part 800) implementing Section 106 of the NHPA (16 U.S.C. 470f). Consultation with the Nansemond Tribal Association and other appropriate interested parties will take place on all aspects of the archaeological resource work arising from this PA, for example identification, evaluation, treatment, curation, treatment of human remains, and review of reports. Information contained in technical reports will be provided in accessible, non-technical form.

IV. Dispute Resolution

Stipulation 10: Should any party to this PA object to any action carried out or proposed with respect to implementation of this PA, the EPA, the District, and the SHPO will consult with the objecting party to resolve the objection.

If after inititiang such consultation, the EPA and the District determine that the objection cannot be resolved through consultation, the EPA and the District shall forward all documentation relevant to the objection to the ACHP, including the proposed response to the objection.

Within thirty days after the receipt of all pertinent documentation, the ACHP shall exercise one of the following options:

(a) Advise the EPA and the District that the ACHP concurs in the proposed response to the objection, whereupon the EPA and the District will respond to the objection accordingly; or

(b) Provide the EPA and the District with recommendations, which the EPA and the District shall take into account in reaching a final decision regarding its response to the objection; or

(c) Notify the EPA and the District that the objection will be referred for ACHP comment pursuant to Section 110(l) of the NHPA and 36 CFR 800.6, and proceed to refer the objection for comment. Any ACHP comment rendered pursuant to this stipulation shall be understood to apply only to the subject of the objection; all other responsibilitie of the parties stipulated in this PA shall remain unchanged.

V. Reports, Annual Reports, and Amendments

Stipulation 11: All archaeological work conducted under the terms of this agreement will be the subject of a comprehensive report or reports, to be submitted within two years of the termination of the undertakings associated with the cleanup at FNOD. All technical reports prepared pursuant to this agreement will be consistent with the federal standards entitled Archeology and Historic Preservation: Secretary of the Interior's Standards and Guidelines (48 FR 44716-44742, September 29, 1983) and the Guidelines for Preparing Identification and Evaluation Reports for Submission Pursuant to Sections 106 and 110, National Historic Preservation Act, Virginia Department of Historic Resources, June 1992.

Stipulation 12: On or before January 31st of each year until the EPA and the District determine that the terms of this PA have been fulfilled and so notify other consulting parties, the Corps will prepare and provide an annual report to all parties to this PA, addressing:

- Status of Project Implementation
- Progress in Work
- Coordination of work with planning and construction schedules
- Any problems or unexpected issues encountered during the year, and

- Any changes that the EPA and the Corps believe should be made in implementation of this PA.

The Annual Report will be prepared in non-technical, accessible language. The EPA and the District shall insure that the annual report is made available for public inspection, that potentially interested members of the public are made aware of its availability, and that interested members of the public are invited to provide comments to the EPA, the District, and other consulting parties.

Stipulation 13: Based upon this annual review, any party to this PA may propose to the EPA and the District that the PA be amended, whereupon the EPA and the District will consult with the other parties to this PA to consider such an amendement. All signatories (EPA, the District, and SHPO) to the PA must agree to the proposed amendment in accordance with 36 CFR 800.6(c)(1)(i).

Stipulation 14: The distribution of the fourth annual report shall include a request to signatories and consulting parties to consult to evaluate the execution of the PA, and consider whether to amend, continue or otherwise extend the PA, which will otherwise terminate at the end of the fifth year (see Siptulation 18).

VI. Professional Qualifications

Stipulation 15: All archaeological work conducted under the terms of this agreement will be done under the direct supervision of qualified individuals meeting, at a minimum, the appropriate federal qualifications provided in 36 CFR Part 61, Appendix A, as provided for in the Archaeological Work Plan (Attachment A).

VII. Curation

Stipulation 16: Artifacts collected in the course of implementing this agreement are the property of the present land owners. The District and the EPA shall encourage the curation of these materials in accordance with 36 CFR Part 79. All archaeologial field records and documents will be the property of the District, and will be curated in accordance with 36 CFR Part 79.

VIII. Termination

Stipulation 17: If the EPA or the District determines that the terms of this PA cannot be carried out, or if the EPA, the District or the SHPO determines that the PA is not being properly implemented, the EPA, the Distric and the SHPO shall consult to seek amendment of the agreement. If the agreement is not amended, any signatory may terminate it with thirty days notice to the other signatories. The EPA and the District shall then either execute a Memomorandum of Agreement with signatories under 36 CFR 800.6(c)(1) or request the comments of the Council under 36 CFR 800.7 (a).

IX. CERCLA Lead Agency Disclaimer

Stipulation 18: Nothing in this Programmatic Agreement shall be construed as a resolution, agreement or admission regarding which federal agency is the lead agency at the FNOD for purposes of CERCLA or to which federal agency the President of the United States has delegated his authority under CERCLA at the FNOD.

IX. Expiration

Stipulation 19: This agreement will continue in full force and effect for 5 years. At some time in the six month period prior to the expiration of the Agreement, all parties can agree to extend this agreement with or without amendments, indicating their agreement to the District and the EPA in writing.

Evidence of Compliance

Execution and implementation of this Programmatic Agreement evidences that the District and the EPA have satisfied their Section 106 responsibilities for all individual undertakings of this program.

REFERENCES:

Benedict, Tod L.

1996 *Archeological Assessment of Sampling Grids, Ordnance and Explosives Engineering Evaluation/Cost Analysis, Former Nansemond Ordnance Depot, City of Suffolk, Virginia.* Letter Report, provided by John L. Milner Associates to Foster-Wheeler Environmental Corporation, December 12, 1996.

McDonald, Bradley M. and David M. Givens

1996 *Phase Ia Historical and Archaeological Assessment of the 1,000-Acre Former Nansemond Ordnance Depot, City of Suffolk, Virginia.* Report prepared by the James River Institute for Foster Wheeler Environmental Corporation.

[Separate] SIGNATURE PAGE

NORFOLK DISTRICT, U.S. ARMY CORPS OF ENGINEERS:

By: _____ Date: _____
ALLAN B. CARROLL, JR.
Colonel, U.S. Army, District Engineer, Norfolk District

REGION III, U.S. ENVIRONMENTAL PROTECTION AGENCY

By: _____ Date: _____

VIRGINIA STATE HISTORIC PRESERVATION OFFICER:

By: _____ Date: _____
H. ALEXANDER WISE, JR.
Director, Virginia Department of Historic Resources

ACCEPTED FOR ADVISORY COUNCIL ON HISTORIC PRESERVATION:

By: _____ Date: _____
JOHN M. FOWLER
Executive Director, Advisory Council on Historic Preservation

ATTACHMENT A:

Archaeological Work Plan
Former Nansemond Ordnance Depot
March 2000

Tim Thompson
Archaeologist
Project Management Division, Environmental Branch
Norfolk District
U.S. Army Corps of Engineers

Plan reviewed and approved:

Kirk Stevens Project Manager Norfolk District, U.S. Army Corps of Engineers	Robert Thomson Project Manager Region III, U.S. Environmental Protection Agency

[cover page]

Introduction

In July 1999, the former Nansemond Ordnance Depot (FNOD) was put on the National Priority List (NPL) by U.S. EPA Region III. The Department of Defense has been identified as one of the "Primary Responsible Party" (PRP). Under the Formerly Used Defense Site (FUDS) Program the Norfolk District, U.S. Army Corps of Engineers is addressing environmental concerns that resulted from Department of Defense (DOD) use of the former depot. This work plan address the work at this site being conducted at this site by the Corps of Engineers, the Environmental Protection Agency, and their contractors.____A number of specific actions related to the requirements of Section 106 of the National Historic Preservation Act have been carried out. However, no overall plan for the identification, evaluation, protection and management of the historic properties within the FNOD has been completed. This Archaeological Work Plan (AWP) is intended to fill that void, and provide the basis for a Programmatic Agreement (PA) to establish compliance with Section 106.

The identification and remediation of hazardous materials at FNOD is a complex process, and this plan will group certain similar sets of activities together to provide generic procedures for insuring that the requirements of the law and the regulations are met. Reference will be made to the "Draft Final Site Management Plan, Former Nansemond Ordnance Depot" (January 03, 2000), prepared by the Norfolk District, to identify activities requiring action to satisfy Section 106.

Before examining the project in more detail it is appropriate to review the Historic Preservation Contexts to insure that the work plan will address resources within those contexts. Previous reports and management recommendations are summarized in the section called "Historic Preservation Context." Following this, a set of general procedures governing the archaeological work at FNOD in the section called "General Procedures: Archaeological Work." These procedures will be applied to the investigations and cleanup process, which are described in the next section, "Undertaking: Process". Following this a procedure for evaluating work completed to this point is given in the section "Undertakings: Completed." This covers previous testing and remediation excavation that was not covered by previous Section 106 consultation.

The plan section "Undertaking: Locations" reviews the various areas at FNOD where hazardous materials or unexploded ordnance are known or suspected. The final section "Reports" provides for Reports to be prepared an all archaeological investigation at the FNOD. A "References" section is provided.

Historic Preservation Context

Milner Report

On 26 September 1996 Robert Ogle, Chief of Planning Division, Norfolk District, sent a letter to David Dutton, Virginia Department of Historic Resources which gave a brief summary of the history of the property and included as an attachment "Ordnance and Explosives Engineering Evaluation/Cost Analysis [EE/CA] at the Former Nansemond Ordnance Depot, Suffolk County, Virginia". The attachment described the use of 100' by 100' sampling grids placed across the property to identify ordnance deposits. Thirty to forty sampling grids were used. The details of the procedures to identify archaeological sites are given in the section of this work plan called "General Monitoring" and will be used to the degree applicable as part of this plan.

The sampling work was completed, and a letter report was submitted to Foster Wheeler Corporation. This letter report with the subject title "Archeological Assessment of Sampling Grids, Ordnance and Explosive Engineering Evaluation/Cost Analysis, Former Nanosecond Ordnance Depot, City of Suffolk, Virginia" documents the completion of the procedures described in Item 3, above. Visual inspection, and the placement of one shovel test pit within each grid square investigated 34 sample grid squares, designated for geophysical survey were completed. The final recommendations by the archaeologist include the following statement:

> Accordingly, no further archeological monitoring is recommended within the 34 grids examined during this investigation. However, if similar UXO testing is to be done elsewhere within the project area, in possibly less-disturbed loci, additional archeological monitoring is advised (12

December 96 - Letter Report, Todd Benedict, archaeologist, John Milner Associates, to Mark Shells, Project Manager, Foster-Wheeler Environmental Corporation).

Phase IA Report

In 1996, the James River Institute for Archaeology completed a "Phase IA Historical and Archaeological Assessment of the 1,000-Acre Former Nansemond Ordnance Depot, City of Suffolk, Virginia (McDonald and Givens 1996)" under contract to the Foster Wheeler Environmental Corporation. This study included a review of documentary and cartographic resources pertaining to the study area and included the results of previous archaeological studies within the area (Outlaw 1990; McSherry and Luccketti 1992). Both prehistoric and historic period contexts were reviewed, and the following summary was included:

> Approximately 130 prehistoric and historic archaeological sites are located in the immediate vicinity of the project area. It is therefore likely that unidentified archaeological resources exist within the project area, particularly along the terraces overlooking the tributaries of West and Streeter Creeks. Archaeological resources likely to be located within the project area include: (1) small prehistoric campsites dating to the Archaic or Woodland periods; (2) seventeenth-century domestic sites; (3) eighteenth century domestic sites; (4) nineteenth-century domestic and agricultural sites; and (5) twentieth-century domestic and military sites. (MacDonald and Givens 1996: iii).

The following recommendations were given:

> *The Cultural Resources assessment of the former Nansemond Ordnance Depot suggests* that the majority of the project area has not been surveyed archaeologically. Given the concentration of both prehistoric and historic sites in the immediate vicinity of the study area, it is likely that -- barring significant construction disturbances--the unsurveyed areas have moderate to high potential to contain a variety of archaeological sites, particularly along the terraces overlooking the tributaries of West and Streeter Creeks. Archaeological Resources located on the property may include prehistoric sites, seventeenth-century domestic sites, eighteenth-century domestic sites, nineteenth-century domestic and farmstead sites, and twentieth-century domestic and military sites.
>
> One site previously identified within the general bounds of the former Nansemond Ordnance Depot, 44SK399, was deemed potentially eligible for nomination to the National Register of Historic Places. Espey, Huston, and Associates recommended this site should be investigated at the Phase II level if future work will impact this area. Also within the bounds of the project area, 44SK6 was identified in 1977; at that time, the site was visibly eroded, but the site form does not indicate the need for further work. JRIA suggests that Site 44 SK6 should be re-examined if the proposed plan of work at the depot will disturb this area (McDonald and Givens 1996:47).

This work plan is designed to address these recommendations.

Unexpected Discovery: Burial

On Tuesday, 14 April 1998, human bones were discovered in a road cut placed to provide access for test drilling on the beach on the James River. Some of these were removed by the Suffolk Police Department as possible "crime scene" evidence, and when they were found to be ancient were returned to the site. During consultation with the Virginia State Historic Preservation Officer (SHPO) staff and the Nansemond Tribe, it was agreed that this location would be treated as a prehistoric burial site. The Norfolk District placed filter cloth and a thick layer of gravel over the remains to protect them from further erosion. It was agreed that if this location were subject to any further disturbance, that consultation would resume and a more thorough investigation would be completed to determine the limits of any site that might be present and to design measures to protect the site or complete data recovery. It was further agreed that a PA would be prepared to cover the entire project.

General Procedures: Archaeological Work

1. Project Archaeologist

The archaeologist presently employed by the Norfolk District, U.S. Army Corps of Engineers, is assigned the role of "Project Archaeologist". That individual meets the professional standards established by the Secretary of the Interior (Federal Register 62(119):33707-33723). If this role is reassigned, these qualifications will be required.

2. Probability Map

The Phase IA report (McDonald and Givens 1996) indicated that the entire project area possessed a medium to high probability for containing significant archaeological resources. The Project Archaeologist will review previous studies to refine this probability statement and provide a more detailed map indicating specific areas of high and medium probability. This map will be used to condition management activities for specific portions of this complex project area. The following elements will be used to create predictive models and the map:

1. Distribution of topographic and drainage features
2. Prehistoric settlement patterns
3. Historic period settlement patterns
4. Disturbance analysis of recent land use actions in the area.

The Probability Map will be submitted to the Virginia SHPO for review and comment.

3. Unexpected Discoveries: archaeological resources

All contractor personnel and government personnel will be alerted to the possibility that significant archaeological resources may be encountered at any point in the study area. Of particular concern is the possibility that additional human remains from either the prehistoric or the historic period may be encountered.

Anyone conducting any excavation or ground disturbance that observes possible archaeological resources, particularly human burials, will immediately cease work and contact the Norfolk District Project Manager, or his designated representative, to arrange for a field evaluation of the discovery by the project archaeologist. This policy will be established immediately for all ongoing work, and will be made a contract requirement for all future contracts.

Treatment of the unexpected discovery of human remains shall be in accordance with § 10.1-2300 et seq of the Code of Virginia, and Virginia Regulations 390-1-02, and the SHPO shall be notified immediately. In the case of remains that are, or are suspected to be of Native American Origin, the Virginia Council on Indians, the United Indians of Virginia, and the Nansemond Tribal Association shall be notified immediately to participate in consultation on the treatment of such remains.

4. Site Management and Work Plan Review

Thorough reviews of the Draft Final Site Management Plan ("SMP"; U.S. Army Corps of Engineers 2000) and other specific work plans and studies for individual candidate remediation sites is ongoing. All segments of these plans that might result in the disturbance of archaeological resources, particularly contractors' work plans and project scopes, will be identified and subject to review by the project archaeologist. This will allow for the identification of archaeological resource management problems and the formulation of specific procedures prior to the initiation of field activities for testing or remediation. Specific procedures are given below, in the section "Integrating Archaeological Protection and the Cleanup Process." Any changes needed these plans to insure compliance activities can by incorporated will be made.

Changes and modifications to the SMP and other work plans will likewise be reviewed by the project archaeologist, and the AWP adjusted to address these changes.

5. Scopes of Work, and Contracts

Existing scopes of work and contracts will be reviewed by the project archaeologist as soon as possible to identify compliance needs. Soils and surface condition data generated by previous studies will be

used to aid in the disturbance analysis, which is a factor in the creation of the probability map.

Future work plans, scopes of work, and contracts will be reviewed in consultation with the project archaeologist to identify compliance needs. Any changes to these scopes and contracts required to insure compliance will be made.

6. Other Activities

Any activities connected with the FNOD cleanup that involve ground disturbance or excavation of any kind that are not covered in the Site Management Plan or other work plans will be submitted to the Norfolk District Project Manager for review by the project archaeologist with sufficient lead time to allow for the design of any project modifications that may be necessary to insure the protection of any archaeological resources, and to complete any needed archaeological field investigations, as described below in the section "Integrating Archaeological Protection and the Cleanup Process."

7. Unexpected Discovery: Unexploded Ordnance, Hazardous Materials

If an unexpected discovery of explosive ordnance, or any item or object that as an immediate threat to life or property occurs, and immediate remediation is required, the Norfolk District Project Manager will be notified, and the project archaeologist will be given an opportunity to examine any excavation after the threat is removed and before the excavation is backfilled. This provision applies to circumstances that occur outside the normal screening and identification procedures provided for in the Site Management Plan.

8. General Monitoring

This plan follows the model originally specified in the "Ordnance and Explosives Engineering Evaluation/Cost Analysis at the Former Nansemond Ordnance Depot, Suffolk County, Virginia." The details of this procedure are quoted below. The Virginia State Historic Preservation Office approved this procedure in 1997 for the limited sampling area covered by this EE/CA.

> Procedures will be implemented to identify archaeological sites and to avoid damage to such sites. Prior to the start of excavation work, the contractor must first locate and stake the corners of the sampling grids. Grids in areas of heavy vegetation must be cleared enough so that workers carrying geophysical instruments can gain access to the grid. Once the grids have been staked and cleared of vegetation, the contractor's archaeologist (with the accompaniment and guidance of ordnance specialists) will visually survey the areas for anything of archaeological significance and indicate the locations where archaeological samples shall be taken. If anything of archaeological significance is found at the grid, no ordnance sampling will be done and the Virginia SHPO will be notified. (Grids eliminated from ordnance sampling due to archaeological significance will generally be shifted to avoid areas of archaeological significance or replaced by newly established grids outside the areas of archaeological significance). If there is no indication of archaeological significance for the grid, the archaeologist will move on to the next grid, and the contractor's ordnance specialists will begin the ordnance sampling. (Safety regulations require that only persons trained in ordnance operation are allowed within 1250 feet of ordnance sampling operations. Therefore, the archaeologist may not be present during the ordnance sampling operations.) After completion of ordnance sampling, but prior to backfilling of holes, the archaeologist will conduct quality assurance inspections on ordnance excavations.

These procedures are here modified to set the withdrawal of the archaeologist to the "Public Withdrawal Distance" (PWD) specified for particular locations in the contractor's work plans, and to allow for their use in intrusive geophysical and other testing actions, in addition to ordnance removal.

9. Exceptions

Some activities that are part of routine sampling operations do not create sufficient disturbance to require immediate archaeological attention. Two activities are specified:

a. Placement of groundwater monitoring wells

These wells are created by drilling an encased shaft two to three inches in diameter into the water table to provide for periodic monitoring of the chemical constituents of the groundwater.

b. Hand Auger soil sampling

This sampling procedure uses hand operated augers to sample soil below the surface for various constituents needed to evaluate the need for more extensive intrusive testing. This sampling procedure creates an auger hole three to four inches in diameter, normally to a depth no greater than four feet.

While these activities in themselves do not create sufficient effects to require immediate archaeological attention, more extensive earthmoving, such as excavation or grading for access roads associated with them may be more damaging. For this reason, the project archaeologist should be notified of these procedures prior to their conduct, and any additional ground disturbance associated with them should be indicated and evaluated by the project archaeologist to determine whether archaeological testing or monitoring is required.

10. Archaeological Investigations

a. Previously identified archaeological sites

There are eight previously identified archaeological sites within the project boundaries. Seven of these are listed in the Phase IA archaeological report submitted by James River Institute (McDonald and Givens 1996:43):

44SK6
44SK379
44SK396
44SK398
44SK399
44SK401
44SK403

Of these, five had been determined not eligible to the National Register of Historic Places (NRHP), 44SK378, 44SK396, 44SK398, 44SK401, and 44SK403, and no further action is required under this plan. 44SK6 was recommended "status unclear", and will require further evaluation. This site is just to the west of the portion of the project referred to as the "James River Beachfront". 44SK399 is classified "potentially eligible" and Phase II is recommended. This site is on the west edge of the "Impregnite Kit Area Geophysics Coverage area".

An eighth site is represented by the "Unexpected Discovery" of a human burial, mentioned above. This location, based on very limited evidence, is interpreted as a prehistoric burial. It is some distance to the east of 44SK6, a historic period site, and may be associated with it, though it is more likely to represent a separate prehistoric site.

Before an intrusive investigation, removal or other ground disturbance is conducted in the vicinity of 44SK6, 44SK399, or the burial site, the SHPO will be consulted to determine whether or not further archaeological evaluation is required.

b. Archaeological sites discovered during the project

Any archaeological sites identified during the further conduct of the project will be evaluated in the field by the project archaeologist. Any intrusive work at or near an archaeological site location will be suspended until this evaluation is complete. The project archaeologist will prepare a recommendation based on the nature of the site and the nature of any intrusive work that is needed to complete the project, and it will immediately be submitted to the Virginia SHPO for consultation. Site testing will be recommended if

absolutely necessary. Every effort will be made to avoid disrupting or delaying any investigations or removal work.

Undertaking: Process

Cleanup Process

This section of the plan provides a general analysis of the site cleanup process and some general procedures that will be followed as the site cleanup work continues. The process used to cleanup FNOD is not unlike that followed in archaeological studies. It begins with the identification of possible unexploded ordnance (UXO) or other hazardous and toxic items. This is followed by an investigation of the items to determine if they are really a threat, a decision about the best course of action, a cleanup action, and a closeout of the process. The formal stages involve documentation and verification and proceed as follows:

Preliminary Assessment/Site Inspection (PA/SI)
Remedial Investigation/Feasibility Study (RI/FS)
Record of Decision (ROD)
Remedial Design or Remove Action (RD/RA)
Close-out

After each of these stages (except closeout) a decision may be made that no further Department of Defense action is required (NDAI). This could happen if no material requiring remediation or removal is discovered, or if something is found that is not the responsibility of the Department of Defense to remediate.

Also, at any stage of the process a removal action can be taken if warranted by an immediate threat to life or property.

The processes of assessment and inspection (PA/SI), remedial investigation (RI/FS), and remediation or removal may all involve excavation to gather samples for testing, to evaluate anomalies identified by remote sensing such as magnetometer, or to remove hazardous material including UXO. Since there are several different locations at FNOD that have already been identified as candidates for possible remediation there may be several evaluation and remediation actions running on parallel tracks, each of which may cause an adverse effect to archaeological resources. This is particularly true since no comprehensive archaeological inventory of the property has been conducted.

A removal action may follow one of two tracks. In the case of a removal action which is "non-time critical" -- that is where there is no imminent threat, and there is more than six months available for planning -- a document called an "Engineering Evaluation/Cost Analysis (EE/CA) may be prepared. This is an internal document that may be used to analyze and justify the procedures to be used and the costs to be incurred. This is not required, however, and in cases which are time critical, and actions must be initiated with less than six months lead time it may be dispensed with.

In many cases evaluation reports and work plans are prepared, sometimes after actions have taken place that might otherwise have required Section 106, National Historic Preservation Act (NHPA).

The general site cleanup procedures described here are ideals based on the Department of Defense FUDS manual which is not regulatory, and individual sites may be subject to different sequences of investigation, evaluation and removal. In addition, the FNOD has been designated as a National Priority List site and may be subject to what is referred to as a "Superfund Accelerated Cleanup Model" with fewer opportunities for plan and testing review.

The process described here, in practical execution, generates numerous activities that could have an adverse effect on archaeological resources, and the General Procedures for archaeological work, given at the beginning of this plan have been designed to provide maximum flexibility in completing appropriate archaeological evaluation in a timely way, in order to not retard the process of identifying and removing materials that are hazardous to life and property.

Integrating Archaeological Protection and the Cleanup Process

The project archaeologist will work closely with the FNOD project management team, both for the

Norfolk District, USACE, and the EPA Region III, to identify archaeological and assessment needs for all activities involving ground disturbance, using the general archaeological procedures described in the beginning of this AWP.

1. In any case where a site investigation or other testing or evaluation or removal will be carried out that may involve ground disturbance, that is outside the scope of any existing work plan, this action will be referred to the project archaeologist for evaluation.

a. If the location is within an area of high probability for the presence of archaeological resources, sufficient lead time will be given for the project archaeologist to make a field inspection of the area after vegetation has been cleared. If an UXO or other hazard exists, the project archaeologist will be accompanied by an appropriate expert(s) to insure the safety of all parties. If an archaeological resource is identified or suspected, a limited archaeological test excavation will be conducted, subject to the supervision and control of an appropriate site safety expert. If this cannot be done within the standard safety protocols in place for the overall conduct of the site cleanup, it will be deferred. If a significant archaeological resource is identified, the project will immediately advise the Virginia SHPO of the location and nature of the resource and evaluation of the potential effects of the ground disturbing procedure. If any alternatives to the procedure exist, they will be provided. In the case of excavation for general site characterization, excavations will be shifted to avoid affecting significant archaeological resources, if possible. The project archaeologist will confer with the project manager to determine whether or not the procedure (including removal) is essential to the completion of the cleanup mission, and if it is the project archaeologist will recommend procedures to minimize the effects to the archaeological resource. If such procedures are not feasible, the project manager will advise the SHPO that the action must be carried out, and provide minimal documentation of the decision.

In all areas of high probability, whether or not significant resources are identified in advance, the project archaeologist will inspect all excavations before they are backfilled and document any resources that have been revealed, if any.

b. In areas of low or medium probability will inspect excavations after they are complete and before they are backfilled, on a sampling basis. Any resources revealed will be documented, and the probability map adjusted, if necessary.

2. In the case of actions for which scopes of work, or work plans have been prepared, the project archaeologist will review such documents and identify any actions needed to insure the protection of archaeological resources, using the general procedures for archaeology and the specific procedures described in item 1., immediately above.

3. In all cases the general procedures for archaeological work, given above will be followed, particularly Item 3 (unexpected discoveries: archaeological resources), Item 7 (unexpected discovery: unexploded ordnance), and item 8 (General Monitoring).

Undertakings: Completed

Work has been underway at FNOD that has not undergone Section 106 NHPA review. It is desirable to do field evaluations of locations where extensive excavation has taken place to determine if any archaeological resources were present. The project archaeologist will review project documentation to tabulate a list of such locations. These will be visited on a time-available basis, without interrupting the procedures given above which are necessary to complete the timely closeout of all sites at FNOD. Any new data generated by the field review may be used to modify the archaeological probability map.

Undertaking: Locations

The Draft Final Site Management Plan (SMP) identifies several different categories of locations and of actions to be taken at the FNOD. These include "Removal Actions", "NPL Source Areas" and "Areas of

Concern". These are shown aerial photographs in the SMP.

Removal Action Areas (RAAs)

The SMP identifies five RAAs, as follows:

1. Removal Action Area 1: TCC Geophysical Anomaly Investigation
2. Removal Action Area 2: FNOD Main Burning Ground Area
3. Removal Action Area 3: James River Beachfront Area
4. Removal Action Area 4: Nansemond River Beachfront Area
5. Other Removal Actions

Removal Action Area 1: TCC Geophysical Anomaly Investigation

There are five areas of concern (AOCs) that have been identified related to the possibility of unexploded ordnance. Additional investigations are planned for these areas. Some areas have already been subject to limited investigations and remediation. These will be subject to a field impact evaluation by the project archaeologist on a time available basis, without interrupting the schedule for dealing with the AOCs.

1. TNT Removal Area. Some investigation and removal has been completed in this area, but it has been expanded to insure that all hazardous material has been or will be identified.

2. Athletic Field (South and North). Based on the terrain of this area, it was included in the geophysical survey.

3.Renovation Plant area. This area was previously used to renovate shells.

4. Buildings L-11 and L-12. These magazine buildings were destroyed by fire in the 1920s by fire.

5. Building 410. This magazine building was destroyed by fire in 1937.

Removal Action Area 2: FNOD Main Burning Ground Area

The Ordnance and Explosives Final Engineering Evaluation/Cost Analysis (OE EE/CA) identified trenches that may contain OE and OE-related items. These areas are in the main burning ground source area. That area is also defined as an NPL source area.

Removal Action Area 3: James River Beachfront Area

The James River Beachfront is also designated Source Area 2 in the EPA's "Hazardous Ranking System" documentation. A Removal is scheduled for June 2000.

Removal Action Area 4: Nansemond River Beachfront Area

This area was identified by consensus between the Corps of Engineers, the EPA, and Virginia Department of Environmental Quality as the highest priority Area of Concern (AOC) at FNOD.

"areas of concern" (AOCs) that will be subject to testing and remediation in the near future. This AWP will address work planned at these AOCs in the order that investigations are planned. The AOCs include the following:

1. Source Area: TNT removal area, residual soil evaluation
2. Source Area: James River beach front, metallic debris field
3. Source Area: Impregnite test kit area
4. Source Area: Horseshoe Pond
5. Source Area: Main Burning Ground and Steamout Pond
6. Source Area: Track K dump

Each of these will be analyzed and informal Source Area Archaeological Work Plans prepared for each in the order in which investigations will proceed. The general procedures for "Integrating Archaeological Protection and the Cleanup Process," given above will be used to designate specific actions that will be carried out to identify and protect any archaeological resources that may be present.

Additional Areas

It is possible that other areas may be identified in the course of investigations and remediation that will require cleanup activity. Such areas will be treated according to this plan.

Reports

Prior to project closeout, the project archeologist will prepare archaeological reports on each of the project sites, and an overall summary report on the archaeological work will be prepared. In the case of any remediation site where no resources were identified, a brief description of what was done will be provided. Any needed funding for these reports will be secured in advance.

References

Benedict, Todd
1996 "Archeological Assessment of Sampling Grids, Ordnance and Explosives Engineering Evaluation/Cost Analysis, Former Nansemond Ordnance Depot, City of Suffolk, Virginia." Letter Report, Todd Benedict, archaeologist, John Milner Associates, to Mark Shells, Project Manager, Foster-Wheeler Environmental Corporation.

Foster Wheeler Environmental Corporation
n.d. Ordnance and Explosives Engineering Evaluation/Cost Analysis at the Former Nansemond Ordnance Depot, Suffolk County, Virginia.

McDonald, Bradley M., and David M. Givens
1996 **Phase IA Historical and Archaeological Assessment of the 1,000-Acre Former Nansemond Ordnance Depot, City of Suffolk, Virginia**. James River Institute for Archaeology, submitted to Foster Wheeler Environmental Corporation, 8 October 1996.

McSherry, Perry, and Nicholas Luccketti
1992 **Phase I Archaeological Survey of Nansemond Waste Water Treatment Plant, Suffolk, Virginia**. James River Institute for Archaeology, Williamsburg, Virginia.

Ogle, Robert
1996 Letter, Robert Ogle, Chief of Planning Division, Norfolk District, to David Dutton, Virginia Department of Historic Resources. 26 September 1996.

Outlaw, Alain C.
1990 **Phase I Archaeological Survey at Pig Point, Suffolk, Virginia**. Espey, Huston & Associates, reported submitted to Dominion Resources, Richmond, Virginia.

U.S. Army Corps of Engineers, Norfolk District

2000 **Draft Final Site Management Plan, Former Nansemond Ordnance Depot.** January 3, 2000, U.S. Army Corps of Engineers, Norfolk District, Norfolk, Virginia.

EXAMPLE 7-D
EMERGENCY RESPONSE

1997

NRT

ional Response
eam (5101)
U.S. EPA
Washington, DC
60

Chair:
Environmental
tection Agency

Co-Chair:
U.S. Coast Guard

partment of
mmerce

epartment of
Interior

partment of
griculture

epartment of
nse

epartment of
ate

rtment of
ce

epartment of
ansportation

rtment of
alth and Human
rvices

ral Emergency
gement
ency

partment of
y

partment of
bor

ar Regulatory
mission

neral Services
ministration

tment of
reasury

port Oil and
emical Spills
Free
0-424-8802

Ms. Elaine Davies
Acting Deputy Director
Office of Emergency & Remedial Response
United States Environmental Protection Agency (5202G)
Washington, D.C. 20460

Re: Transmittal for Signature of Programmatic Agreement on Protection of Historic Properties during Emergency Response

Dear Ms. Davies:

At its March meeting, the National Response Team (NRT), the organization of 16 Federal agencies responsible for oil discharge and hazardous material release response planning and coordination at the national level (40 CFR Part 300), recommended that member agencies sign the attached Programmatic Agreement (PA) addressing the protection of historic properties during an emergency response. The Agreement reflects two years of work by a National Response Team Committee chaired by the Justice Department. The committee included representatives from affected Federal agencies and representatives from the appropriate State organization.

It is the judgment of the NRT that implementation of the PA will enable the Federal On-Scene Coordinator (FOSC) to consider the effects of Federal emergency response activities on historic properties without hindering the FOSC's primary mission of protecting the public and the environment. Under the Advisory Council on Historic Preservation's regulations, compliance with this PA constitutes compliance with Section 106 of the National Historic Preservation Act, thereby providing the FOSC with a simplified and expedited process that should be defensible in a legal challenge. The National Response Team therefore transmits the Programmatic Agreement to you with its strong recommendation that you or the appropriate official sign it on behalf of your Department or Agency.

Please note that we have provided a separate signature page for each Department, Agency, or organization to complete with the appropriate official's name and title. Please send the signed page back to John Gustafson (EPA Headquarters, Waterside Mall, 401 M Street, SW, MC 5104, Washington, DC 20460), so that we can assemble a complete copy.

In addition to the Programmatic Agreement, we also have included background information to assist in consideration of the Agreement. If you have questions, please contact Steve Baer, NRT Justice Department Respresentative and Cultural Resources Committee Chair, at 202-267-0528; Jan Thorman, NRT Department of the Interior Alternate Representative and Cultural Resources Committee ViceChair, at 202-208-6304; or John Gustafson, NRT Executive Director, at 202-260-3315. Thank you.

Yours truly,

Jim Makris
Chair, National Response Team

Capt. Dick Bennis
ViceChair, National Response Team

Enclosures:
Background Document
Programmatic Agreement
Qs & As
Fact Sheet

[illegible]onal Response
[illegible]eam (5101)
[illegible].S. EPA
[illegible]shington, DC
[illegible]0

[illegible]hair:
[illegible]nvironmental
[illegible]otection Agency

[illegible]Chair:
[illegible].S. Coast Guard

[illegible]rtment of
[illegible]merce

[illegible]partment of
[illegible]terior

[illegible]rtment of
[illegible]riculture

[illegible]rtment of
[illegible]se

[illegible]partment of
[illegible]te

[illegible]rtment of
[illegible]e

[illegible]partment of
[illegible]nsportation

[illegible]rtment of
[illegible]alth and Human
[illegible]rvices

[illegible]al Emergency
[illegible]agement
[illegible]ency

[illegible]rtment of
[illegible]/

[illegible]rtment of
[illegible]or

[illegible]r Regulatory
[illegible]ission

[illegible]eral Services
[illegible]inistration

[illegible]ment of
[illegible]reasury

[illegible]port Oil and
[illegible]emical Spills
[illegible]Free
[illegible]0-424-8802

Background on the Formation of the NRT Ad Hoc Committee on Cultural Resources and the Development of the Programmatic Agreement

Section 106f of the National Historic Preservation Act (NHPA), 16 USC § 470f, requires federal agencies having direct or indirect jurisdiction over a proposed federal or federally assisted "undertaking" to take into account the effect of the undertaking on historic properties included in or eligible for inclusion in the National Register of Historic Properties. In response to an Action Proposal seeking NRT guidance on the effect of Section 106 on federally led emergency response to discharges of oil and hazardous substances under the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), the NRT formed the Ad Hoc Committee on Cultural Resources in 1995. The Committee worked for two years to develop a Programmatic Agreement (PA) which would clarify the role of the Federal On-Scene Coordinator (FOSC) during emergency response and provide some measure of protection to the FOSC in the event his or her actions are challenged. Along with the attached information, this document provides background to the PA.

Drafting and Review Process of the PA

All NRT-member Departments and Agencies were invited to participate on the Ad Hoc Committee. The Committee that drafted the PA was chaired by the Department of Justice and included representatives of the Environmental Protection Agency, Department of Transportation (including the Coast Guard), Department of the Interior (including the National Park Service), Department of Commerce (particularly NOAA), Department of Agriculture and Department of Defense. In addition, two non-NRT-member organizations were actively involved in the drafting and revision of the PA: the Advisory Council on Historic Preservation (the Advisory Council), which is primarily responsible for the administration of the NHPA, and the National Conference of State Historic Preservation Officers (NCSHPO), which is the national organization of State Historic Preservation Officers, who are appointed by the governor of each state and territory. Each participating federal Agency or Department was asked to solicit comments from its employees. EPA, for instance, distributed drafts of the PA to OSCs in the Regions and solicited their comments twice in 1996. The PA was distributed in an earlier form at the NRT/RRT Co-Chairs meeting in Alexandria, Virginia in 1996. On October 30, 1996, a revised PA was formally transmitted to the NRT for comments by its members. In December 1996, the Advisory Council published notice of the proposed PA in the Federal Register and solicited comments from interested parties and the public. Finally, the PA was presented again at the most recent NRT/RRT Co-Chairs meeting in Denver this past winter. Changes were made in the PA at each stage in this process, most of them to reflect and further clarify the limited role of the FOSC in considering potential effects on historic properties during emergency response, rather than affirmatively requiring the FOSC to protect historic properties.

Important Features of the Programmatic Agreement

Perhaps the most important feature of the PA is inherent in its form. An interagency agreement or memorandum of understanding sets out an agreement between federal Departments or Agencies. Compliance with a Programmatic Agreement, as that term is employed by the Advisory Council on Historic Preservation in its regulations, 36 CFR § 800.13, is deemed to satisfy an agency's legal requirements under Section 106. Under the terms of the instant PA then, compliance by a federal Department or Agency will constitute compliance with Section 106 of the NHPA.[1]

The PA does not commit its signatories to a position on the applicability of any legal requirements under Section 106. Rather, the PA, at IV.A., provides only that "[f]or the purpose of this PA, the federal OSC . . . is responsible for ensuring that historic properties are appropriately considered." [Emphasis supplied.] Both the NRT and the Committee members have long-since agreed that, while it is not necessary to determine whether an emergency response activity is, in fact, legally an undertaking within the meaning of the NHPA, the FOSC, as the federal official designated to coordinate and direct response actions, is the only federal official who can meaningfully ensure that historic properties are appropriately considered during emergency response. Any other determination might result in dividing the FOSC's authority at the site of a spill or release. While the FOSC must ultimately consider the potential effects of emergency response actions on historic properties, federal agencies, State officials, State Historic Preservation Officers (SHPOs) and others are available to assist in the work necessary to make such consideration possible.

In sum, the instant PA has been drafted both to facilitate consideration of historic properties during emergency response and to help protect the FOSC's actions from legal challenges under NHPA. The Sections of the PA are described briefly below.

Brief Overview of the Programmatic Agreement

The PA is divided into eight sections. The first three sections are introductory and explanatory. Section I explains the purposes of the PA, but makes clear that the priorities set out in the NCP, particularly protecting public health and safety, are the overriding concerns of the FOSC. Nothing in the PA changes the national response

[1] It should be noted, however, that the language in this PA is much more favorable to federal Departments and Agencies than other individual agency PAs which appear to give the Advisory Council and the NCSHPO unilateral power to terminate.

priorities set out in 40 CFR § 300.17; nor does the PA change existing law. Sections II and III describe the NHPA and define "historic property."

An important change in the draft PA since it was first distributed to the NRT in March 1996, is contained in I.A., which now indicates that both the Advisory Council and the NCSHPO will be available to assist federal OSCs in the event an individual SHPO does not respond. Also, I.F. notes that "during such time as the Advisory Council and the NCSHPO are signatories, compliance with this PA . . . will be deemed . . . compliance with Section 106." [Emphasis supplied.]

Section IV explains the role of the FOSC in considering the effect of emergency response activities on historic properties during planning and emergency response under the NCP. Significantly, as explained above, IV.A. does not interpret the legal requirements of Section 106; it merely specifies the responsibilities of the FOSC "[f]or the purpose of this PA." Also, Section IV now contains new language describing the assistance to the FOSC to be provided by the National Program Center (NPC) of the National Park Service. The inclusion of the NPC language satisfies long-standing concerns expressed by EPA members of the Committee as to the level of assistance available to FOSCs.

Section V further elaborates how historic properties are to be considered during pre-incident planning. Section VI spells out the specific actions to be taken to consider the effect of emergency response actions on historic properties, including activating the mechanisms and procedures developed during pre-incident planning. Section VI also lists potential adverse effects of a spill or release and of emergency response actions on historic properties. Section VII provides for development of regional PAs tailored to address local concerns and conditions.

The last textual portion of the PA, Section VIII, describes the signature and withdrawal process. It is important to note that while any signatory is free to withdraw from the agreement with thirty days' written notice, no signatory can unilaterally terminate the PA. In the event of a legal challenge, this will enable remaining signatories to contend in good faith that they are in substantive compliance with any applicable requirements of Section 106 of the NHPA. Of equal importance, it will enable remaining signatories to continue to utilize the procedures set out in the PA in order to consider the potential effect of emergency response on historic structures.

PROGRAMMATIC AGREEMENT ON PROTECTION OF HISTORIC PROPERTIES DURING EMERGENCY RESPONSE UNDER THE NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN

I. PURPOSE

A. The signatory federal Departments and Agencies enter into this Programmatic Agreement (PA) to ensure that historic properties are taken into account in their planning for and conduct of the emergency response under the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). 40 CFR Part 300. The National Conference of State Historic Preservation Officers (NCSHPO) is also a signatory, on behalf of State Historic Preservation Officers (SHPOs), to facilitate federal agency ability to develop and execute a uniform nationwide approach for considering and treating historic properties before and during emergency response. In the event an individual SHPO is unable to respond, the Agency or Department may contact the NCSHPO or the Advisory Council on Historic Preservation (ACHP) to consider alternatives and receive assistance. The signatories agree that their Departments/Agencies will follow this PA or, to meet regional needs, develop regional PAs that are not inconsistent with this PA and the National Historic Preservation Act of 1966, as amended (NHPA), P.L. 89-665, 16 U.S.C. § 470 et seq., and the regulations promulgated thereto.

B. The NCP does not provide specific guidance for taking historic properties into account during emergency response to an actual or threatened release of a hazardous substance, pollutant or contaminant or the discharge of oil or other pollutants (hereinafter, a release or spill). Also, emergency provisions contained in the regulations implementing Section 106 of the NHPA do not directly address requirements for such emergency responses. Accordingly, for the purpose of this PA, an "emergency" shall be deemed to exist whenever circumstances dictate that a response action to a release or spill must be taken so expeditiously that normal consideration of the Section 106 process is not reasonably practicable.

C. The purpose of this PA is to provide an alternative process to ensure appropriate consideration of historic properties within the meaning of the NHPA during emergency response to a release or spill. This PA does not address the consultation procedures under Section 106 of the NHPA once that phase of the response action has ended.

D. In carrying out duties under the NCP, including the priorities of protecting public health and safety, the federal On-Scene Coordinator (OSC) may have to make emergency response decisions that adversely affect historic properties. By following this PA, however, the federal OSC will be making an informed

decision that takes historic property information into account prior to authorizing actions that might affect such property.

E. The responsibility of the federal OSC in protecting public health and safety is paramount. That mission is a difficult one involving problems that cannot be anticipated and calling for judgment on the part of the federal OSC. Nothing in this PA changes the national response priorities, nor does it change the effect of existing law.

F. 36 CFR § 800.13 provides, inter alia, that:

> An Agency Official may elect to fulfill an agency's Section 106 responsibilities for a particular program , a large or complex project, or a class of undertakings . . . through a Programmatic Agreement.

36 CFR § 800.13(e) provides that:

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

During such time as the ACHP and the NCSHPO are signatories, compliance with this PA by a federal OSC will be deemed to constitute compliance with Section 106 of the NHPA during pre-incident planning and emergency response activities.

II. LEGAL AUTHORITIES PROTECTING HISTORIC PROPERTIES

A. National Historic Preservation Act

1. In 1966, Congress instituted a policy to preserve the Nation's cultural and historic heritage by enacting the NHPA. The NHPA implementing regulations most pertinent to actual or threatened releases of hazardous substances, pollutants or contaminants or oil spills are those of: 1) the ACHP, an independent federal agency that administers Section 106 of the NHPA through procedures specified in 36 CFR Part 800, "Protection of Historic Properties," and 2) the Department of the Interior (DOI) regulations at 36 CFR Part 60, National Register of Historic Places.

2. Section 106 of the NHPA provides that federal agencies are to take into account the effects of "Federal or federally assisted undertakings" on historic properties that are listed in or eligible for inclusion in the National Register of Historic Places. It further affords the ACHP an opportunity to comment on the undertaking.[1]

B. This PA does not address other federal laws defining and protecting historic properties, such as:

1. The Archaeological Resources Protection Act (ARPA), 16 U.S.C. § 470aa et seq., which provides for the protection of archeological sites and other resources. ARPA establishes criminal and civil penalties for actual or attempted illegal excavation or removal of or damage to archeological resources; illegal trafficking in archeological resources; and knowingly causing another to commit an ARPA violation;

2. The Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. § 3001 et seq., which provides for the protection of Native American human remains and other defined classes of cultural items. NAGPRA also establishes criminal penalties for illegal trafficking in these cultural items. 18 U.S.C. § 1170;

3. The Antiquities Act of 1906, 16 U.S.C. § 433 et seq., which establishes criminal penalties for non-permitted appropriation, excavation, injury, or destruction of any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the federal government; and

---

[1] Section 106 of the NHPA provides, inter alia, as follows:

Effect of Federal undertakings upon property listed in National Register; comments by Advisory Council on Historic Preservation

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

16 U.S.C. § 470f.

4. The National Marine Sanctuaries Act (also known as Title III of the Marine Protection, Research and Sanctuaries Act, 16 U.S.C. § 1431, et seq., which establishes civil penalties for destruction of, loss of, or injury to a sanctuary resource, including historic properties. In addition to fines, parties can also be held responsible for response costs; damages including replacement cost, restoration cost, or acquisition of an equivalent sanctuary resource, and lost-use value of that resource and interest.

C. Many States also have laws defining and protecting historic properties. Regional PAs may consider State laws relevant to the historic properties in the region, to the extent they are not inconsistent with federal law.

III. DEFINITION OF "HISTORIC PROPERTY"

A. The term "historic property" is defined in the NHPA as: "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register;" such term includes artifacts, records, and remains which are related to such district, site, building, structure, or object. 16 U.S.C. § 470(w)(5).

B. Criteria for listing a property in the National Register of Historic Places are found at 36 CFR Part 60. The statutory definition of historic properties and the established criteria determine whether a historic property needs to be considered during emergency response. A historic property need not be formally listed on the National Register to receive NHPA protection, it need only meet the National Register criteria (i.e., be eligible for listing in the National Register). Section VI.C.2, below, discusses determining the National Register eligibility of historic properties during emergency response.

IV. RESPONSIBILITY FOR HISTORIC PROPERTIES CONSIDERATION

A. For the purpose of this PA, the federal OSC, as the federal official designated to coordinate and direct response actions, is responsible for ensuring that historic properties are appropriately considered in planning and during emergency response.

B. Planning Support/Coordination

1. The NCP, at 40 CFR § 300.210(c), provides that Area Contingency Plans (ACPs) are to be developed under the direction of a federal OSC. The federal OSC shall ensure that ACPs include the information on

consideration of historic properties and are developed in consultation with the parties specified in Section V of this agreement.

2. Federal agencies with expertise in protection of historic properties available to assist the federal OSC during preparedness planning include the Department of the Interior,[2] the ACHP, and other federal land-managing agencies for properties on their lands. The primary source of information on historic properties in an area, particularly properties not on federal lands, is the SHPO, who is the official appointed by the Governor as part of the State's participation in NHPA programs. Other parties that may assist are listed in V.A. of this PA.

3. The National Program Center (NPC) of the National Park Service, consistent with its authority and responsibilities, will provide coordination of appropriate expertise to Area Committees and Regional Response Teams (RRTs) for pre-incident planning activities through the United States Coast Guard (Coast Guard) and the United States Environmental Protection Agency (EPA). The NPC will coordinate through the Commandant of the Coast Guard and the Office of Emergency and Remedial Response of EPA.

4. Prior to finalizing or subsequently revising ACPs, the federal OSC will provide a draft of sections addressing historic properties identification and protection to the parties identified in Section V.A. of this PA. Each party shall have 30 calendar days from receipt to review the draft and provide comments to the federal OSC. Should any reviewing party file a timely objection to the draft or any portion thereof, the federal OSC will consult with the objecting party to resolve the objection. If the objection cannot be resolved, the federal OSC will provide documentation of the dispute to the ACHP and request their comments. The ACHP comments will be taken into account by the federal OSC in finalizing or revising ACPs.

---

[2] 40 CFR § 300.175(b)(9) reads, in pertinent part, as follows:

> "DOI may be contacted through Regional Environmental Officers (REOs), who are the designated members of RRTs. . . . [B]ureaus and offices have relevant expertise as follows:
>
> > . . . (viii) National Park Service: General biological, natural, and cultural resource managers to evaluate, measure, monitor and contain threats to park system lands and resources; archaeological and historical expertise in protection, preservation, evaluation, impact mitigation, and restoration of cultural resources . . .

C. Emergency Response Support/Coordination

1. To ensure historic properties are considered during emergency response, the federal OSC must have access to reliable and timely expertise and support in order to make timely and informed decisions about historic properties.

2. A federal OSC may obtain historic properties expertise and support in any one of several ways. These include implementing an agreement with State or federal agencies that have historic properties specialists on staff (see IV.B.2), executing a contract with experts identified in ACPs or hiring historic properties specialists on staff. Historic properties specialists made available under contract or hired must:

   a. Meet the qualifications listed in the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation, 48 Federal Register 44738-39 (September 29, 1983); see Appendix II; and

   b. Be available to assist the federal OSC whenever needed.

V. PRE-INCIDENT PLANNING

A. As part of pre-incident planning activities, federal OSCs (or the OSC's management) shall consult with the SHPO, federal land-managing agencies, appropriate Indian tribes and appropriate Native Hawaiian organizations, as defined in Section 301 of the NHPA, and the other interested parties identified during pre-incident planning, as described in Section IV.B of this PA, to:

1. Identify historic properties.

   a. Identify: 1) historic properties that have been listed in or determined eligible for inclusion in the National Register of Historic Places that might be affected by response to a release or spill; and 2) unsurveyed areas where there is a high potential for the presence of historic properties.

   b. Identify exclusions. These may be specific geographic areas or types of areas where, should a release or spill occur, historic properties are unlikely to be affected. This includes the specifics listed in Appendix I and any additional exclusions agreed on by the signatories to this or a regional PA. Incidents in areas covered by exclusions would not require consideration for

protection of historic properties, except as provided in Section VI.A.1.[3]

2. Develop a list of parties that are to be notified in the event of an incident in a non-excluded area. This list should include the SHPO for the State in which the incident occurred, federal and Indian tribal land owners or land managers and Hawaiian Native organizations in the area where the incident occurred, if any.

3. Develop emergency response strategies that can be reasonably anticipated to protect historic properties. The federal OSC shall ensure that response strategies, including personnel and equipment needed, are developed to protect or help protect historic properties at risk. This includes consideration of the sensitivity of historic properties to emergency response measures proposed in ACPs or other response plans, including chemical countermeasures and in situ burning.

B. The federal OSC shall ensure that historic properties protection strategies can be carried out by:

1. Identifying who will be responsible for providing expertise on historic properties matters to the federal OSC during emergency response. Depending on the size and complexity of the incident, a federal OSC historic properties specialist or a historic properties technical advisory group convened by the specialist may be the most effective mechanism;

2. Providing information on availability of appropriate training for historic property specialists to participate in emergency response, e.g., Hazardous Waste Operations and Emergency Response (HAZWOPER) training, familiarity with all relevant contingency plans and response management systems, etc.; and

3. Working with the parties listed in section V.A. to obtain information for response personnel on laws protecting and activities that may potentially affect historic properties.

---

[3] Response to spills or releases that involve non-excluded areas should be considered to have the potential to adversely affect historic properties that are listed in or eligible for inclusion in the National Register.

VI. FEDERAL LEAD EMERGENCY RESPONSE

A. The federal OSC shall determine whether the exclusions described in section V.A.1.b. apply.

1. If the incident affects only excluded areas, no further actions are necessary under this PA, unless:

   a. Previously unidentified historic properties are discovered during emergency response; or

   b. The SHPO (or appropriate federal, Indian, or Hawaiian Native organizations) notifies the federal OSC that a categorically excluded release or spill may have the potential to affect a significant historic property.

2. If the area where a release or spill occurs has not been excluded, in the cases specified in Section VI.A.1.a or b, if the federal OSC is unsure whether an exclusion applies, or if the specifics of the incident change so that it no longer fits into one of the exclusions, the remaining steps in this Section shall be followed.

B. Activate the agreed-upon mechanism for addressing historic properties, including notification of the parties identified pursuant to Section V.A.2., and consultation with these parties concerning the identification of historic properties that may be affected, assessing the potential effects of the emergency response, and developing and implementing emergency response activities. These requirements for notification and consultation shall be satisfied if the federal OSC makes reasonable and timely efforts to notify and consult the parties listed in this Section. Thereafter there shall be additional consultation to the extent practicable.

C. Verify identification of historic properties.

1. Consult with the SHPO, landowners and/or land managers, appropriate Indian tribes and Native Hawaiian organizations, and other interested parties identified in pre-incident planning to verify the location of historic properties identified during the planning process and determine if other historic properties exist in areas identified in V.A.1.a.2. that might be affected by the incident or the emergency response.

2. If newly discovered or unanticipated potential historic properties are encountered during emergency response actions, the federal OSC shall

either: 1) consult with the SHPO (or appropriate federal, Indian, or Hawaiian Native organizations) to determine if the properties are eligible for inclusion in the National Register, or 2) treat the properties as eligible.

D. Assess potential effects of emergency response strategies on historic properties. Such assessment shall be done in consultation with the parties listed in Section V.A.

1. The potential adverse effects of releases or spills and of emergency response on historic properties may include, but are not limited to:

   a. Physical destruction, damage, or alteration of all or part of the historic property;

   b. Isolation of the property from or alteration of the character of the property's setting when that character contributes to the property's qualification for the National Register; and

   c. Introduction of visual, audible, or atmospheric conditions that are out of character with the property or alter its setting.

2. Emergency response actions that may have adverse effects on historic properties include, but are not limited to:

   a. The placement of physical barriers to deter the spread of released or spilled substances and the excavation of trenches to stop the spread of the released or spilled substances; and

   b. Establishing camps for personnel, constructing materials storage and staging yards, excavating borrow pits for fill materials, and constructing alignments for road access.

3. Direct physical contact of historic properties with released or spilled substances may result in one or more of the following: 1) inability to radiocarbon date the contaminated resources; 2) acceleration of deterioration of an object or structure; or 3) prevention of identification of historic properties in the field. As a result, important scientific, historic, and cultural information may be lost.

E. Make and implement decisions about appropriate actions. The federal OSC shall take into account professional comments received from the parties listed in Section V.A. in making decisions that might affect historic properties.

1. Emergency response strategies delineated in plans may need to be reviewed based on information available at the time of an actual incident. The purpose of this review is to evaluate whether implementation of the strategies in the plan might, for the emergency response action that is underway, adversely affect historic properties and, if so, how such effects might be avoided or reduced.

2. Make arrangements for suspected artifact theft to be reported to the SHPO, law enforcement officials, and the landowner/manager.

3. Arrange for disposition of records and collected materials.

4. Ensure the confidentiality of historic property site location information, consistent with applicable laws, so as to minimize opportunities for vandalism or theft.

F. Whenever the federal OSC determines the requirements of this Section cannot be satisfied concurrently with the paramount requirement of protecting public health and safety, the determination shall be documented in a writing including the name and title of the person who made the determination; the date of determination; and a brief description of the competing values between public health and safety and carrying on the provisions of this Section. Notwithstanding such a determination, if conditions subsequently permit, the federal OSC shall endeavor to comply with the requirements of this Section to the extent reasonably practicable.

VII. REGIONAL PAs

A. Regional PAs may be developed as provided in I.A. as an alternative to this national PA. Regional PAs are to include the provisions of this PA and may include appropriate additional provisions responsive to regional concerns.

B. A regional PA should be signed by appropriate regional-level federal officials, State agencies, tribal officials and the ACHP.

C. Either this PA or a PA developed at a regional level may be adopted by the RRT and incorporated or referenced in Regional Contingency Plans (RCPs), 36 CFR § 300.210(b), and ACPs in the region.

VIII. AUTHORITY, EFFECTIVE DATE, WITHDRAWAL, AMENDMENT

A. The signatories below are authorized to sign the PA on behalf of their respective Department, Agency or organization. This PA may be signed in counterparts.

B. In order to allow sufficient time for pre-incident planning and other preparedness activities, this PA shall not be become effective with respect to a signatory Department or Agency until ninety (90) days after it has been signed on the Department's or Agency's behalf.

C. Any signatory may withdraw from this PA by sending, through an official authorized to act in this matter, written notice to all current signatories at least thirty (30) days in advance of the effective date of withdrawal. The requirements contained in this PA will remain in full force and effect with respect to remaining signatories.

D. Nothing herein prevents the signatories from agreeing to amend this PA.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BY: Elaine Davies Date: 5/23/97

Title: ACTING DEPUTY DIRECTOR
OFFICE OF EMERGENCY AND REMEDIAL RESPONSE

APPENDIX I

Categorical Exclusion List

RELEASES OR SPILLS CATEGORICALLY EXCLUDED FROM ADDITIONAL NATIONAL HISTORIC PRESERVATION ACT SECTION 106 COMPLIANCE

Releases/Spills onto (which stay on):

- Gravel pads
- Roads (gravel or paved, not including the undeveloped right-of-way)
- Parking areas (graded or paved)
- Dock staging areas less than 50 years old
- Gravel causeways
- Artificial gravel islands
- Drilling mats, pads, and/or berms
- Airport runways (improved gravel strips and/or paved runways)

Releases/Spills into (that stay in):

- Lined pits; e.g., drilling mud pits and reserve pits
- Water bodies where the release/spill will not: 1) reach land/submerged land; and 2) include emergency response activities with land/submerged land-disturbing components
- Borrow pits
- Concrete containment areas

Releases/Spills of:

- Gases (e.g., chlorine gas)

IMPORTANT NOTE TO FEDERAL OSC: 1) IF YOU ARE NOT SURE WHETHER A RELEASE OR SPILL FITS INTO ONE OF THE CATEGORIES LISTED ABOVE; 2) IF AT ANY TIME, THE SPECIFICS OF A RELEASE OR SPILL CHANGE SO IT NO LONGER FITS INTO ONE OF THE CATEGORIES LISTED ABOVE; 3) IF THE SPILL IS GREATER THAN 100,000 GALLONS; AND/OR 4) IF THE STATE HISTORIC PRESERVATION OFFICER NOTIFIES YOU THAT A CATEGORICALLY EXCLUDED RELEASE OR SPILL MAY HAVE THE POTENTIAL TO AFFECT A HISTORIC PROPERTY, YOU OR YOUR REPRESENTATIVE MUST FOLLOW THE SECTION VI. OF THIS PA.

APPENDIX II
SECRETARY OF THE INTERIOR'S STANDARDS FOR ARCHEOLOGY AND HISTORIC PRESERVATION
48 Federal Register 44738-39 (September 29, 1983)

Professional Qualifications Standards

The following requirements are those used by the National Park Service and have been previously published in the Code of Federal Regulations 36 CFR Part 61. The qualifications define minimum education and experience required to preform identification, evaluation, registration, and treatment activities. In some cases, additional areas or levels of expertise may be needed depending on the complexity of the task and the nature of the historic properties involved. In the following definitions, a year of full-time professional experience need not consist of a continuous year of full-time work but may be made up of discontinuous periods of full-time or part-time work adding up to the equivalent of a year of full-time experience.

History

The minimum professional qualifications in history are a graduate degree in history or closely related field: or a bachelor's degree in history or closely related field plus one of the following:

1. At least two years of full time experience in research, writing, teaching, interpretation, or the demonstrable professional activity with an academic institution, historic organization or agency, museum, or other professional institution; or

2. Substantial contribution through research and publication to the body of scholarly knowledge in the field of history.

Archeology

The minimum professional qualifications in archeology are a graduate degree in archeology, anthropology, or closely related field plus:

1. At least one year of full-time professional experience or equivalent specialized training in archeological research, administration or management;

2. At least four months of supervised field and analytic experience in general North American archeology; and

3. Demonstrated ability to carry research to completion.

In addition to these minimum qualifications, a professional in prehistoric archeology shall have at least one year of full-time professional experience at a supervisory level in the study of archeological resources of the prehistoric period. A professional in historic archeology shall have at least one year of full-time professional experience at a supervisory level in the study of archeological resources of the historic period.

Architectural History

The minimum professional qualifications in architectural history are a graduate degree in architectural history, art history, historic preservation, or closely related field, with coursework in American architectural history; or a bachelor's degree in architectural history, art history, historic preservation or closely related field plus one of the following:

1. At least two year of full-time experience in research, writing, or teaching in American architectural history or restoration architecture with an academic institution, historical organization or agency, museum, or other professional institution; or

2. Substantial contribution through research and publication t.. he body of scholarly knowledge in the field of American architectural history.

Architecture

The minimum professional qualifications in architecture are a professional degree in architecture plus at least two years of full-time experience in architecture: or State license to practice architecture.

Historic Architecture

The minimum professional qualifications historic in architecture are a professional degree in architecture or a State license to practice architecture, plus one of the following:

1. At least one year of graduate study in architectural preservation, American architectural history, preservation planning, or closely related field; or

2. At least one year of full-time professional experience on historic preservation projects.

Such graduate study or experience shall include detailed investigations of historic structures, preparation of historic structure research reports, and preparation of plans and specifications for preservation projects.

SECTION 106/EMERGENCY RESPONSE PROGRAMMATIC AGREEMENT QUESTIONS & ANSWERS

1. Does Section 106 of the National Historic Preservation Act apply to emergency responses to spills of hazardous substances and oil?

Section 106 of the National Historic Preservation Act requires federal agencies to consider the effect on historic properties before a federal or federally assisted undertaking. The NRT Committee was charged with deciding if and how Section 106 should be followed, not whether Section 106 is a legal requirement. Both the Committee members and the NRT agreed that it is important to protect historic properties during emergency response and that the OSC, as the federal official most intimately involved in emergency response, should therefore consider the impact of emergency response on historic properties.

2. Why a programmatic agreement? Since protecting the nation's cultural resources is only common sense, why do we need a programmatic agreement?

Although almost everyone agrees that protecting historic properties is important, understanding how to do so is not that simple, especially during emergency response to a release or spill. The Advisory Council on Historic Preservation has promulgated extensive regulations on Section 106. Professionals, both within and outside the federal government, possess expertise on historic properties. The Programmatic Agreement provides a road map for making an informed judgment on protecting historic properties during emergency response to a release or spill.

3. If we follow the guidelines of the PA, can we still be sued?

Anyone can be sued for anything. The regulations promulgated by the Advisory Council on Historic Preservation provide, however, that compliance with the PA will be deemed to be compliance with Section 106. That means that the government and its employees are much less likely to be sued and much more likely to prevail if they are sued.

4. Do Section 106 and the PA mean that emergency response can be delayed or stopped entirely?

No, they do not. The OSC's first priority is protection of public health and the environment. Nothing in the PA changes that. Neither the PA nor Section 106, moreover, are designed to stop an emergency response. Rather they require that the potential effects of undertakings on historic structures be considered.

5. Can I get help in complying with the PA?

Yes. The PA details a host of federal, state and private parties who will help the OSC. These include professionals in the National Program Center of the National Park Service, State Historic Preservation Officers (SHPOs) and historic property experts. (SHPOs are appointed

by the Governor of each State as part of the States' participation in National Historic Preservation Act programs. They are the primary source of information on historic properties on non-federal lands.) The key to considering potential effects on historic structures is pre-incident planning, so that expertise is available when the OSC actually requires assistance. After an environmental emergency arises funding will be available from the Superfund or the Oil Spill Liability Trust Fund to pay for assistance to the OSC. All of this is detailed in the PA.

6. What are the Advisory Council on Historic Preservation and the National Conference of Historic Preservation Officers and what do I do to obtain their assistance?

Both the Advisory Council on Historic Preservation and the National Conference of State Historic Preservation Officers are signatories to the Programmatic Agreement. The Advisory Council is the federal council responsible for administering the National Historic Preservation Act. The National Conference of State Historic Preservation Officers is the national organization of SHPOs which signed the Programmatic Agreement on behalf of individual SHPOs. Both the Advisory Council and the National Conference will provide general assistance to the OSC and well as help in the event the OSC is unable to enlist the participation of the SHPO.

NRT Ad Hoc Cultural Resource Committee April 1997

Programmatic Agreement on Historic Properties and Emergency Response

Summary of the Programmatic Agreement

The Programmatic Agreement (PA) provides a process for ensuring appropriate consideration of historic properties during pre-incident planning and emergency response. It also provides for development of regional PAs tailored to address regional concerns and conditions. The PA does not change the national response priorities of safety and stabilization discussed in section 300.317 of the National Hazardous Substances Pollution Contingency Plan (NCP).

Background

In response to a request from members of the Alaska Regional Response Team (ARRT), the National Response Team (NRT) formed an ad hoc committee on cultural resources to address how Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f, impinges on emergency response actions under the NCP. Section 106f requires federal agencies having direct or indirect jurisdiction over a proposed federal or federally assisted undertaking to take into account the effect of the undertaking on historic properties included in or eligible for inclusion in the National Register of Historic Places. The NRT ad hoc committee was chaired by the Department of Justice and included representatives from the Department of Agriculture, the US Coast Guard, the Department of Commerce/NOAA, the Department of Defense, the Environmental Protection Agency, the Department of the Interior, the Advisory Council on Historic Preservation, and the National Conference of State Historic Preservation Officers. The PA on Protection of Historic Properties during Emergency Response under the NCP is the result of the committee's work.

Overview of the PA

The PA is divided into eight sections. The first three sections are introductory and explanatory. Section I explains the purpose of the PA. Sections II and III describe the National Historic Preservation Act and define "historic property." Section IV explains the role of the On-Scene Coordinator (OSC) in considering the effect of emergency response activities on historic properties during planning and emergency response under the NCP.

Section V further elaborates how historic properties are to be considered during pre-incident planning. Section VI spells out the specific actions to be taken during emergency response to consider the effect of response actions on historic properties, including activating the mechanisms and procedures developed during pre-incident planning. Section VI also lists potential adverse effects of a spill or release and of emergency response actions on historic properties. Section VII provides for development of regional PAs tailored to address regional concerns and conditions. Finally, Section VIII describes the signature and withdrawal process.

Purpose

The PA provides an alternative to the process specified in section 106 of the NHPA to ensure appropriate consideration of historic properties during emergency response to a release or spill.

Important Features of the PA

◊ Compliance with the terms of this PA will constitute compliance with section 106 of the NHPA. The PA does not commit signatories to a position on the applicability of any legal requirements under section 106.

◊ The PA requires the potential effects of response actions on historic properties to be considered and emphasizes that effective consideration occurs as part of planning. It does not require the Federal On-Scene Coordinator (FOSC) to take or refrain from any specific response actions.

◊ Although the FOSC must ultimately consider the potential effects of emergency response actions on historic properties, federal agencies, State Historic Preservation Officers, and others are available to assist in the work necessary to make such consideration possible. These include:

1. State Historic Preservation Officers (SHPO); Officials appointed by the Governor as part of the State's participation in NHPA programs. A list of SHPO's will be posted and updated in NOAA's FirstClass E-Mail System under the NRT Conference - Cultural Resource Committee Sub conference. The list of SHPO's may also be obtained through the Internet at:

http://www.cr.nps.gov/pad/shpolist.html.

2. Indian tribes and appropriate Native Hawaiian organizations;

3. The National Program Center (NPC) of the National Park Service will provide coordination of appropriate DOI expertise to Area Committees and RRTs for pre-incident planning activities. The NPC will coordinate through Coast Guard and EPA headquarters at the national level;

4. Federal land-managing agencies for properties on their lands or who have available technical expertise (i.e. Department of Agriculture, Department of Energy, and Department of Defense);

5. The Advisory Council on Historic Preservation (ACHP); an independent federal agency that administers Section 106 of the NHPA;

6. The Department of the Interior (DOI); DOI may be contacted through Regional Environmental Officers (REOs), who are the designated members of the RRTs.

◊ The PA outlines actions to be taken during pre-incident planning and response to ensure appropriate consideration of historic properties. These are summarized in checklist form in the attachment to this fact sheet. The corresponding section in the PA is given in bold at the end of each action item for easy reference.

POC: Steven R. Baer, Senior Counsel Environmental Enforcement Section, Environment and Natural Resource Division, United States Department of Justice. Phone: (202) 514-2794.

Jan C. Thorman, Environmental Protection Specialist, Office of Environmental Policy & Compliance, United States Department of Interior. Phone: (202) 208-6304.

Carol Gleichman, Historic Preservation Specialist Advisory Council on Historic Preservation, Western Office of Review, Phone: (303) 969-5110.

Eric Hertfelder, Executive Director, National Conference of State Historic Preservation Officers (NCSHPO), Phone: (202) 624-5465.

PREPARERS

LIST OF PREPARERS

This manual was prepared for the U.S. Environmental Protection Agency by Maguire Group Inc. The following people were instrumental in it's development:

David R. Westcott, AICP: Maguire Group Inc.
Principal Planner

Mr Westcott has over 20 years of experience as an Environmental Planner and over 7 years experience teaching at the graduate level. He is Principal Planner with the Maguire Group and an Adjunct Professor at the University of Rhode Island. He has been a Project Manager for consulting contracts with EPA Region I and Region II and has worked in Section 106 Compliance for over 10 years.

John Vetter: U.S. EPA
EPA National Expert, Archeology

Mr Vetter is EPA's national expert in archeology. He is based in Region 2 and has 20 years experience in applying the National Historic Preservation Act to CERCLA, RCRA, and Construction Grants programs. He is also chairman of the Anthropology Department at Adelphi University in Garden City, NY.

Patricia Haman: U.S. EPA,
EPA Federal Preservation Officer

Ms. Haman has been EPA's FPO since January, 1997. She participated extensively in the development of the recently revised 106 regulations. She also has expertise in NEPA and has been with the EPA for 14 years.

Robert W Hargrove: U.S. EPA
Contract Manager
290 Broadway, Room 1539
New York, NY 1007-1866
(212) 637-3756

Robert Wardwell, AICP: Maguire Group Inc
Contract Manager
One Court Street
New Britain, CT 06051
(860) 224-9141