

Executive Committee  
Resolution #10-68

**RESOLUTION OF THE COUNTY BOARD  
WILL COUNTY, ILLINOIS**

**ADOPTING THE PROGRAMMATIC AGREEMENT BETWEEN THE COUNTY OF WILL,  
AND THE ILLINOIS STATE HISTORIC PRESERVATION OFFICER FOR THE  
COMMUNITY DEVELOPMENT BLOCK GRANT, HOME INVESTMENT PARTNERSHIP,  
AND NEIGHBORHOOD STABILIZATION PROGRAMS OF THE U.S. DEPARTMENT OF  
HOUSING AND URBAN DEVELOPMENT AND LEAD HAZARD CONTROL GRANT,  
LEAD HAZARD REDUCTION DEMONSTRATION GRANT, AND HEALTHY HOMES  
GRANT PROGRAMS OF THE OFFICE OF HEALTHY HOMES & LEAD HAZARD  
CONTROL ADMINISTERED BY THE COUNTY OF WILL**

**For the 2009 Program Year through 2014 Program Year  
March 1, 2010 through September 30, 2015**

**WHEREAS**, the County of Will, Illinois (County) has determined that the implementation of its Community Development Block Grant (CDBG), Healthy Homes Grant (HH), Home Investment Partnership Program (HOME), Lead Hazard Control Grant (LHCG), Lead Hazard Reduction Demonstration Grant (LHRDG), and Neighborhood Stabilization (NSP) PROGRAMS for Federal Fiscal Years 2009-2014 may have an effect on properties included or eligible for inclusion in the National Register of Historic Places; and

**WHEREAS**, these programs are administered by the County's Land Use Department, Community Development Division and encompass a variety of activities including: rehabilitation, new construction, demolition, and infrastructure improvements and other eligible activities; and

**WHEREAS**, the County has consulted with the Illinois State Historic Preservation Officer (SHPO) pursuant to Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470f) and its implementing regulations, "Protection of Historic and Cultural Properties" (36 CFR Part 800); and

**WHEREAS**, the County and the SHPO have determined that the County can more effectively fulfill its Section 106 review responsibilities for CDBG, HH, HOME, LHCG, LHRDG, and NSP program activities if a programmatic approach is used to delegate Section 106 compliance responsibilities to the County; and

**WHEREAS**, the County is a Certified Local Government with a historic preservation commission and qualified professional staff who will carry out duties enumerated below.

**NOW, THEREFORE, BE IT RESOLVED BY THE COUNTY BOARD OF WILL COUNTY ILLINOIS, THAT:**

**SECTION 1:** The Will County Executive is authorized and directed to execute the attached Programmatic Agreement Between the County of Will and the Illinois State Historic Preservation Officer pending approval of the Illinois State Historic Preservation Officer and upon the review and approval of the Will County State's Attorney.

**SECTION 2:** This Resolution and every provision thereof shall be separable and the invalidity of any portion shall not affect the validity of the remainder.

**SECTION 3:** All Resolutions or parts thereof, in conflict herewith, are hereby repealed.

**SECTION 4:** This Resolution shall take effect following its passage, approval, adoption, recording, inspection and publication, as may be required by law.

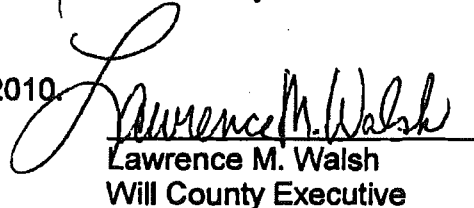
**BE IT FURTHER RESOLVED,** that the Preamble of this Resolution is hereby adopted as if fully set herein.

Adopted by the Will County Board this 18th day of February, 2010.

Vote: Yes 21 No 0 Pass \_\_\_\_\_ (SEAL)  
Abstain 1

  
Nancy Schultz Voots  
Will County Clerk

Approved this 26 day of February, 2010.

  
Lawrence M. Walsh  
Will County Executive

**PROGRAMMATIC AGREEMENT  
AMONG THE COUNTY OF WILL, AND  
THE ILLINOIS STATE HISTORIC PRESERVATION OFFICER  
FOR THE  
COMMUNITY DEVELOPMENT BLOCK GRANT,  
HOME INVESTMENT PARTNERSHIP, AND NEIGHBORHOOD STABILIZATION  
PROGRAMS OF THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
AND  
LEAD HAZARD CONTROL GRANT, LEAD HAZARD REDUCTION DEMONSTRATION  
GRANT, AND HEALTHY HOMES GRANT PROGRAMS OF THE OFFICE OF HEALTHY  
HOMES & LEAD HAZARD CONTROL  
ADMINISTERED BY THE COUNTY OF WILL**

For 2009 Program Year through 2014 Program Year  
March 1, 2010 through September 30, 2015

- WHEREAS,** the County of Will, Illinois (County) has determined that the implementation of its Community Development Block Grant (CDBG), Healthy Homes Grant (HH), Home Investment Partnership Program (HOME), Lead Hazard Control Grant (LHCG), Lead Hazard Reduction Demonstration Grant (LHRDG), and Neighborhood Stabilization (NSP) Programs for Federal Fiscal Years 2009-2010 may have an effect on properties included or eligible for inclusion in the National Register of Historic Places; and
- WHEREAS,** these programs are administered by the County's Land Use Department, Community Development Division and encompass a variety of activities including: rehabilitation, new construction, demolition, and infrastructure improvements and other eligible activities; and
- WHEREAS,** the County has consulted with the Illinois State Historic Preservation Officer (SHPO) pursuant to Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470f) and its implementing regulations, "Protection of Historic and Cultural Properties" (36 CFR Part 800); and
- WHEREAS,** the County and the SHPO have determined that the County can more effectively fulfill its Section 106 review responsibilities for CDBG, HH, HOME, LHCG, LHRDG, and NSP Program activities if a programmatic approach is used to delegate Section 106 compliance responsibilities to the County; and
- WHEREAS,** the County is a Certified Local Government with a historic preservation commission and qualified professional staff who will carry out duties enumerated below;

**NOW, THEREFORE,** the County and the SHPO agree that said programs shall be implemented in accordance with the following stipulations in order to take into account the effect of the undertaking on historic properties.

**STIPULATIONS**

**I. Qualified Personnel**

- A. The County shall ensure that it maintains a staff that meets the qualifications outlined in 36 CFR Part 61, the Secretary of the Interior's Professional Qualification Standard, hereafter referred to as Certified Staff.
- B. The County shall ensure that all historic preservation work carried out pursuant to this Agreement is carried out by or under the direct supervision of Certified Staff.
- C. The County shall notify the SHPO whether it has employed or contracted with qualified professionals to carry out reviews under the terms of the Programmatic Agreement or whether it will require assistance from SHPO. The vitae of qualified professionals and/or contractors shall be provided to the SHPO for review as a component of the Certified Local Government Annual Report.
- D. The County will notify the SHPO of staff changes or vacancies. If the County does not have Certified Staff in place or if the SHPO does not certify a county staff person, or consultant, then this Agreement will become null and void and the County will comply with 36 CFR part 800.4 through 800.6 with regard to individual undertakings covered by this Agreement.

**II. Exempt Activities**

When the following activities are proposed for properties listed in the National Register or eligible for listing in the National Register, further review is not required because there is limited potential to affect historic resources.

- A. Involvement of properties less than 50 years old not listed in or eligible for the National Register.
- B. Repair or replacement of electrical, plumbing, heating and ventilation systems or their components, when no structural alteration is involved. This includes repair or replacement of electrical panels, breakers, circuits, switches, receptacles, and fixtures, plumbing and water lines, drains, sewers, fixtures, water heaters, heating vents, floor furnaces, wall heaters, central heat systems and gas lines.
- C. Painting of any exterior component which has previously been painted.
- D. Repair or replacement of existing infrastructure in kind.

**III. Identification and Evaluation of Historic Properties**

- A. Identification of Historic Properties
  - 1. The County will continue to survey its historic properties and forward information on locally significant properties to the SHPO. This information will be conveyed via the Certified Local Government Annual Report.
  - 2. In conducting a local identification of historic properties the County shall review and consult:

- a. The current listing of the National Register of Historic Places.
  - b. The current listing of the Will County Register of Historic Places.
  - c. The current Will County Rural Historic Structures Survey.
  - d. The current landmarks list and surveys for the municipalities participating in the Will County CDBG, HH, HOME, LHCG, LHRDG, and NSP Programs.
  - e. The Illinois Historic Sites survey (1972).
3. When the County determines that additional information is required to adequately assess the presence of historic properties, additional surveys shall be conducted that are responsive to the nature of the undertaking. As appropriate, the focus of the identification surveys shall be on target areas rather than property-by-property.

**B. Evaluation of National Register Eligibility**

1. Documentation for properties 50 years or older involved in a U.S. Department of Housing and Urban Development funded undertaking that are not individually listed in the National Register of Historic Places will be evaluated by Certified Staff. Certified Staff shall apply the National Register criteria and determine if the structures qualify for National Register eligibility.
2. If Certified Staff has questions concerning the eligibility of a certain property, he or she will forward documentation to the Will County Historic Preservation Commission (Commission) for evaluation and recommendation.
3. If the Commission has questions concerning the eligibility of a certain property, they will forward documentation to the SHPO for evaluation and recommendation. If the Commission chooses not to accept the recommendation of the SHPO, in this instance, they will forward adequate documentation, including the views of the SHPO, to the Keeper of the National Register of Historic Places for a formal determination of eligibility in accordance with 36 CFR Part 800.4 (c). The SHPO shall be notified accordingly.
4. Certified Staff may submit eligibility determinations for properties to the Commission and SHPO concurrently in order to expedite the Section 106 review.
5. Properties determined to be not listed in the National Register or not eligible for the National Register will be documented as such by Certified Staff and a copy of the determination will be included in the individual project files.

**IV. Treatment of Historic Properties**

- A. Properties listed in the National Register, eligible for listing in the National Register, and which have been determined to meet the National Register criteria in accordance with Stipulation III shall be treated in accordance with this section.

**B. Rehabilitation**

1. The County shall ensure that work write-ups of plans and specifications for all rehabilitation activities not listed as exempt under Stipulation II are developed in accordance with the recommended approaches in *The Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings* (Standards).
2. Prior to the initiation of rehabilitation activities, program recipients shall submit work write-ups or plans, photographs and specifications which evidence adherence to the Standards to Certified Staff for review and approval. These plans must be complete enough in order to facilitate understanding of the proposed project.
3. Should Certified Staff recommend modifications to the work write-ups or plans and specifications to ensure that the project meets the Standards, program recipients shall make the appropriate modifications and submit revised work write-ups or plans to Certified Staff. If Certified Staff, in consultation with the Commission, determine that the project meets the criteria of adverse effect, the County will consult with the SHPO to develop a Standard Mitigation Agreement in accordance with Stipulation V. If the SHPO determines that the Standard Mitigation Measures do not apply, the County shall notify the Council and initiate the consultation process set forth in 36 CFR Part 800.5(c).
4. If a project will have no effect or no adverse effect on historic resources, it may proceed after review and documentation in individual project files by Certified Staff.

**C. Demolition and Relocation of Historic Properties**

1. The County shall not proceed with the demolition or relocation of contributing buildings within an historic district or properties listed in or eligible for listing in the National Register until the procedures set forth in this section are completed.
2. Demolition or relocation of properties that are included in or eligible for inclusion in the National Register, listed as contributing buildings within a historic district or included in the surveys listed in Section III.A.2, Parts a through e, will be reviewed by the Commission on a case-by-case basis. The County and Certified Staff will submit the following documentation to the Commission for review:
  - a. Location (including map) and description of the property proposed for demolition or relocation, including views of the public.
  - b. Reasons for demolition, including documentation of building code violations, structural reports citing building deficiencies and estimated costs for rehabilitation; or reasons for relocation.
  - c. A cost comparison of rehabilitation versus property acquisition and demolition and summary of alternatives considered.
  - d. Photographs of the property depicting its current condition.
  - e. Future plans for the site.
  - f. Proposed site for relocation.

3. If the Certified Staff, in consultation with the Commission, determine that demolition or relocation cannot be avoided, the County will consult with the SHPO to develop a Standard Mitigation Agreement in accordance with Stipulation V. (If the SHPO specifies that the Standard Mitigation Measures do not apply, the County shall notify the Council and initiate the consultation process set forth in 36 CFR Part 800.5 (c).

**D. New Construction**

The County shall ensure that the design of new construction, infill construction, or additions to historic buildings is compatible with the historic qualities of the historic district or adjacent historic buildings in terms of size, scale, massing, design, features, and materials, and is responsive to the recommended approaches for new construction set forth in the Standards and/or in the Will County Historic Preservation Ordinance.

1. Program recipients shall develop preliminary design plans in consultation with the County. Final plans and specifications will be submitted to Certified Staff for review and approval prior to the initiation of construction activities.
2. If Certified Staff, in consultation with the Commission, determine that the design of the new construction does not meet the Standards or would otherwise result in an adverse effect to historic properties, the County shall consult with the SHPO to develop a Standard Mitigation Measures Agreement in accordance with Stipulation V.
3. If the SHPO determines that the Standard Mitigation Measures do not apply, the County shall notify the Council and initiate the consultation process set forth in 36 CFR Part 800.5(c).

**E. Handicapped Accessibility**

Handicapped Accessibility projects undertaken by the County to comply with the American Disabilities Act and other local and federal requirements will follow these guidelines:

1. The County will explore all alternative methods to provide handicapped accessibility to historic buildings consistent with the Standards, National Park Service Brief Number 32 "Making Historic Properties Accessible," and the Department of the Interior's report *Access to Historic Buildings for the Disabled: Suggestions for Planning and Implementations*.
2. To the extent feasible, handicapped accessibility features will not be located on primary elevations of historic buildings and will not result in the removal of significant historic or architectural features or materials. Final plans and specifications for handicapped accessibility projects shall be reviewed and approved by Certified Staff to determine if the projects meet these guidelines. If the Certified Staff, in consultation with the Commission, determine that the Standards cannot be met or if the project could have an adverse effect on a historic property, then prior to taking any action, the County will consult with the SHPO and initiate procedures set forth in Stipulation V.

**F. Site Improvements and Public Improvements**

1. Site and public improvements within historic districts including sidewalk improvements, repaving of streets, installation of landscaping, street lighting and street furniture and other infrastructure improvements will adhere to the Standards. These improvements will be designed to ensure that character-defining elements of historic properties are preserved through repair or replacement in kind. Any new materials or features introduced in a historic district will be responsive to the character of that district.
2. Final plans and specifications for site and public improvements shall be reviewed and approved by Certified Staff. If the Standards cannot be met or if the project could have an adverse effect on historic properties, then prior to taking any action the County will consult with the Commission.

**G. Emergency Undertakings**

1. When emergency demolition is required for historic properties associated with U.S. Department of Housing and Urban Development funded activities, Certified Staff will conduct an immediate review, if conditions allow. The existence of an emergency situation shall be based upon the need to eliminate an imminent threat of the health and safety of residents as identified by local building inspectors, fire department officials or other local officials.
2. The County shall forward documentation to Certified Staff to review immediately upon notification that an emergency exists. Documentation should include:
  - a. Nature of the emergency
  - b. Historic property involved
  - c. Current condition of the building, including photographs
  - d. Time frame allowed by local officials to respond to, or correct, the emergency situation.
3. The County shall consult with the SHPO to the greatest extent possible given particular circumstances.
4. The County shall ensure that any mitigation measures recommended by the Certified Staff or SHPO are implemented, if feasible.

**V. Resolution of Adverse Effects**

- A. If the County, in consultation with the Commission, determines that a project meets the Criteria of Adverse Effect, the County shall consult with the SHPO to determine whether the historic properties should be treated in accordance with the Standard Mitigation Measures outlined in Appendix A or reviewed, in accordance with 36CFR 800.6.
  1. The County shall submit to the SHPO, background documentation to include an analysis of alternatives, recent structural reports or assessments of conditions,



cost estimates for rehabilitation, programmatic and economic considerations, and marketing studies.

2. If the SHPO determines that a proposed demolition is an acceptable loss or no prudent and feasible alternatives exist to implementing the undertaking without adverse effects, the County and the SHPO, shall execute a Standard Mitigation Measures Agreement as outlined in Appendix A. No further review required by the Council.
- B. Standard Mitigation Measures Agreements shall not be executed when one of the following circumstances exist.
1. The SHPO determines that the Standard Mitigation Measures do not apply to an undertaking.
  2. The County fails to respond within 30 days.
  3. The undertaking will adversely affect a National Historic Landmark.
  4. The public objects during the open Will County Historic Preservation Commission meeting, the appropriate municipal preservation commission meetings or by certified letter.
  5. Historic or prehistoric human remains are present within the area of potential effect.

#### **VI. Treatment of Archeological Sites**

- A. The County shall notify the SHPO when ground-disturbing activities over an acre are part of a local undertaking.
1. The County shall request the SHPO's opinion regarding the potential effect of such activities on archeological properties prior to initiation of project activities. If the SHPO can determine that there is a high probability for the presence of significant archeological sites of cultural remains within the project area, the County or program recipients shall contract a qualified archeologist to conduct archeological surveys. The County shall forward the scope of work for the archeological survey to the SHPO for review and approval.
  2. If the County and the SHPO determine that there is the potential for archeological properties listed in or eligible for listing in the National Register, the County shall seek ways to avoid the archeological properties. If the properties cannot be avoided, the County and the SHPO shall develop a data recovery plan that is consistent with the Secretary of the Interior's Standards and Guidelines for Archeological Documentation (48 CFR 44734-37) and take into account the Council's publication, "Treatment of Archeological Properties", its subsequent revisions and appropriate State guidelines. The County shall ensure that a qualified archeologist will implement the approved plan.

**VII. Public Involvement**

- A. Each year the County will notify the public of the County's current CDBG, HH, HOME, LHCG, LHRDG, and NSP Programs and make available for public inspection documentation on the County's CDBG, HH, HOME, LHCG, LHRDG, and NSP Programs. Included in this documentation will be general information on the amount of CDBG and HOME funds available in the current program year, the types of activities undertaken with CDBG and HOME funds, and how interested persons can receive further information on the program.
- B. At any time during the implementation of the measures stipulated in this Programmatic Agreement, should the public raise an objection pertaining to the treatment of an historic property the County shall notify the Commission and take the objection into account. Program recipients, the County, the Commission, or the SHPO, when requested by the objector, shall consult to resolve the objection. Program recipients are not required to cease work while objections are being reviewed, but the County reserves the right to halt work in light of valid arguments from the public.

**VIII. Administration, Monitoring and Reporting**

- A. The SHPO shall provide comments within 30 days for reviews or comments requested by the County or the Commission, with the exception of emergency undertakings. In the event that the SHPO fails to comment, within the 30 day time period, the County can assume that the SHPO concurs.
- B. The SHPO shall conduct periodic training workshops for Certified Staff to review the requirements of this Programmatic Agreement. The SHPO shall also provide guidance related to implementation of the terms of the Programmatic Agreement.
- C. The County shall ensure the SHPO of documentation for local undertakings, which involve historic properties and were subject to the terms of the Programmatic Agreement in individual project or environmental files. Each project shall include at a minimum:
  - 1. Documentation as to why one of the exemptions from review is applicable.
  - 2. Comments from Certified Staff, the Commission or the SHPO regarding the National Register eligibility of the property.
  - 3. Proposed treatment of historic properties.
  - 4. Before and after photographs.
  - 5. Work write-ups.
  - 6. Date the project was completed.
- D. Documentation shall be available for review by the SHPO following reasonable notice.
- E. The SHPO shall conduct periodic monitoring visits of the County's project sites to ensure compliance with actions, plans, documents and agreements approved by the County or the SHPO pursuant to this Programmatic Agreement.
- F. Nothing in this agreement shall be construed as meaning that the County cannot request the advice or assistance of the SHPO at any time.

G. As a component of the Certified Local Government Annual Report, the County shall summarize activities carried out under the terms of this Programmatic Agreement. The report will be submitted no later than June 1 of each year. The Annual Report shall include:

1. List of property addresses submitted for review.
2. Program in which the undertaking took place.
3. Evaluation of National Register eligibility, and if eligible, the finding of effect.

**IX. Effective Date**

This Programmatic Agreement shall take effect on the date it is signed by all the parties, including the County and the SHPO. The Programmatic Agreement will remain in effect until December 1, 2009, unless terminated due to failure to comply with the terms of the agreement.

**X. Amendments**

- A. Any party to this Programmatic Agreement may request it be amended or modified, whereupon the County and the SHPO will consult in accordance with 36 CFR Part 800.14.
- B. Any resulting amendments or addenda shall be developed and executed among the County and the SHPO in the same manner as the original Programmatic Agreement.

**XI. Termination**

Any party to the Programmatic Agreement may terminate the Agreement by providing 30-calendar days notice to the other party, provided that the parties will consult during the period prior to termination to seek agreement on amendments or other actions that would avoid termination.

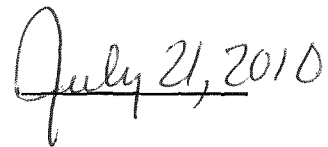
**XII. Compliance with Agreement**

Execution and implementation of this Programmatic Agreement and carrying out its provisions evidences that the County has satisfied its Section 106 responsibilities for all individual undertakings of the programs.

By:

  
ILLINOIS STATE HISTORIC PRESERVATION OFFICER

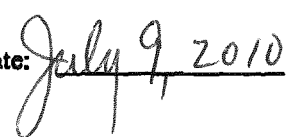
Date:

  
July 21, 2010

By:

  
WILL COUNTY EXECUTIVE

Date:

  
July 9, 2010

**36 CFR PART 800 – PROTECTION OF HISTORIC PROPERTIES (incorporating amendments effective August 5, 2004)**

**Subpart A – Purpose and Participants**

**Sec.**

**800.1 Purposes.**

800.2 Participants in the Section 108 process.

**Subpart B – The Section 108 Process**

800.3 Initiation of the section 108 process.

800.4 Identification of historic properties.

800.5 Assessment of adverse effects.

800.6 Resolution of adverse effects.

800.7 Failure to resolve adverse effects.

800.8 Coordination with the National Environmental Policy Act.

800.9 Council review of Section 108 compliance.

800.10 Special requirements for protecting National Historic Landmarks.

800.11 Documentation standards.

800.12 Emergency situations.

800.13 Post-review discoveries.

**Subpart C – Program Alternatives**

800.14 Federal agency program alternatives.

800.15 Tribal, State and Local Program Alternatives. (Reserved)

800.16 Definitions.

Appendix A – Criteria for Council involvement in reviewing individual section 108 cases

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

**Subpart A-Purpose and Participants**

**§ 800.1 Purposes.**

(a) *Purposes of the section 108 process.* Section 108 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 108 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 108 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 108 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 108 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 108 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 108, 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 108 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 108 process.**

(a) *Agency official.* It is the statutory obligation of the Federal agency to fulfill the requirements of section 108 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 108 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 108 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 108 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 108. 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 108 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 108,

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 taken 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 108 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 § 800.8(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 108.

(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 108 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 108 Process

§ 800.3 *Initiation of the section 108 process.*

(a) *Establish undertaking.* The agency official shall determine whether the proposed Federal action is an undertaking as defined in § 800.18(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 108 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 108 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 Archaeological 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 108.

(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 108 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 108 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 108 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 108 process, including taking actions that would conclude the section 108 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 108 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).

§ 800.6 *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 108 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 § 800.18(1), the agency official shall provide documentation of this finding, as set forth in § 800.11(d), to the SHPO/THPO. The agency official shall notify all consulting parties, including Indian tribes and Native Hawaiian organizations, and make the documentation available for public inspection prior to approving the undertaking.

(i) If the SHPO/THPO, or the Council if it has entered the section 108 process, does not object within 30 days of receipt of an adequately documented finding, the agency official's responsibilities under section 108 are fulfilled.

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

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

(iv)(A) Upon receipt of the request under paragraph (d)(1)(ii) of this section, the Council will have 30 days in which to review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with the Council's opinion regarding the finding. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. If the Council does not respond within 30 days of receipt of the request, the agency official's responsibilities under section 108 are fulfilled.

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

(C) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall then prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in

accordance with the revised finding. If the final decision of the agency is to affirm the initial agency finding of no historic properties affected, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 108 are fulfilled.

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

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

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

(2) *Disagreement with finding.*

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

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

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

(3) *Council review of findings.*

(i) When a finding is submitted to the Council pursuant to paragraph (c)(2)(i) of this section, the Council shall review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with its opinion as to whether the adverse effect criteria have

been correctly applied. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The finding from the agency official. The Council at its discretion may extend that time period for 15 days, in which case it shall notify the agency of such extension prior to the end of the initial 15 day period. If the Council does not respond within the applicable time period, the agency official's responsibilities under section 106 are fulfilled.

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

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

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

(d) *Results of assessment.*

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

(2) *Adverse effect.* If an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to § 800.8.

**§ 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).  
and/or other parties to the 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 executed 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. The agency official 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 § 800.6(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 review the objection and notify the agency as to its opinion on the objection.

(i) If the Council agrees with the objection:

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

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

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

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

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

...part shall then be satisfied when...  
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 § 800.8(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...  
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 agency official, determines to grant the...  
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 § 800.8(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 § 800.8(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 tribes 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.* The Council or an agency official may propose a program or category of undertakings that may be exempted



from review under the provisions of subpart B of this part, if the program or category meets the following criteria:

(i) The actions within the program or category would otherwise qualify as "undertakings" as defined in § 800.16;

(ii) The potential effects of the undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse; and

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

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

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

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

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

properties in accordance with section 214 of the act.

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

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

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

(d) *Standard treatments.*

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

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

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

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

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

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

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

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

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

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

(1) 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 1986, 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 80).

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

historic preservation that are significant to Native Hawaiians.

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

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

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

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

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

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

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

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

**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.

