

## ADVISORY COUNCIL ON HISTORIC PRESERVATION

### 36 CFR Part 800

#### Protection of Historic Properties

**AGENCY:** Advisory Council on Historic Preservation.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Advisory Council on Historic Preservation is proposing changes to its regulations in order to implement the 1992 amendments to the National Historic Preservation Act and to improve and streamline the regulations in accordance with the Administration's reinventing government initiatives. The proposed changes will modify the process by which Federal agencies consider the effects of their undertakings on historic properties. On October 3, 1994, the Council published for comment in the Federal Register a notice of proposed rulemaking that set forth changes to the Section 106 process. After reviewing the comments on the October 1994 proposal and in response to agency downsizing and restructuring, the Council substantially changed its proposal to better meet the streamlining goals of the Council. Therefore, the Council is publishing a new notice of proposed rulemaking. In its streamlined proposal, the Council seeks to balance the interests and concerns of various users of the Section 106 process, including Federal agencies, State Historic Preservation Officers (SHPOs), Native Americans and Native Hawaiians, industry and the public.

**DATES:** Comments must be received on or before November 12, 1996. The Council will provide on request an additional 30 days for an Indian tribe to submit comments. A representative of the tribal government must file a request with the Council no later than November 12, 1996.

**ADDRESSES:** Comments should be addressed to the Executive Director, Advisory Council on Historic Preservation, 1100 Pennsylvania Avenue, Suite 809, Washington, D.C. 20004. Fax 202-606-8672. Comments may be submitted via E-Mail to [achp@achp.gov](mailto:achp@achp.gov).

**FOR FURTHER INFORMATION CONTACT:** Stephanie Woronowicz, Information Assistant, Advisory Council on Historic Preservation, 1100 Pennsylvania Avenue, Suite 809, Washington, D.C. 20004 (202) 606-8503.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Section 106 of the National Historic Preservation Act of 1966, as amended,

16 U.S.C. 470f, requires Federal agencies to take into account the effect of their undertakings on properties included in or eligible for inclusion in the National Register of Historic Places and to afford the Council a reasonable opportunity to comment on such undertakings. Public Law 102-575 was enacted in October 1992, and contains amendments to the National Historic Preservation Act which affect the way Section 106 review is carried out under the Council's regulations. Additionally, as part of the Administration's National Performance Review and overall streamlining efforts, the Council undertook a review of the current regulatory process to identify potential changes that could improve the operation of the Section 106 process and conform it to the principles of this Administration. The Council commenced an information-gathering effort to assess the current Section 106 process and to identify desirable changes.

As a part of this effort, the Council sent a questionnaire to 1,200 users of the Section 106 process, including Federal agencies, SHPOs, State and local governments, applicants for Federal assistance, Native Americans, preservation groups, contractors involved in the process, and members of the public. The questionnaires sought opinions on the current regulatory process and ideas for enhancing the process. The Council received over 400 responses. After analyzing the responses and holding several meetings with Federal Preservation Officers and SHPOs, the Council staff presented its preliminary findings to a special Council member Task Force comprised of the Department of Transportation, the National Conference of State Historic Preservation Officers, the National Trust for Historic Preservation, and the Council's Native American representative, expert member and chairman.

The Task Force adopted the following findings and attempted to craft the regulations to reflect them: (1) Federal agencies and SHPOs should be given greater authority to conclude Section 106 review; (2) the Council should spend more time monitoring program trends and overall performance of Federal agencies and SHPOs and less time reviewing individual cases or participating in case-specific consultation; (3) Section 106 review requirements should be integrated with environmental review required by other statutes; (4) enforcement of Section 106 should be increased and specific remedies should be provided for failure to comply; and (5) there should be

expanded opportunities for public involvement in the Section 106 process.

In the proposed regulations published in the Federal Register on October 3, 1994, the Council sought to meet the stated findings and objectives adopted by the Task Force. The Council received approximately 370 comments on the October 1994 proposal. Generally, commenters supported the overall goals and direction adopted by the Task Force, but found that the proposed regulations failed to implement the stated goals. Particularly, many commenters disagreed with the role of the Council as arbiter of disputes over application of the regulations, the public appeals process, and provisions dealing with enforcement. At a Council membership meeting in February 1995, the Council decided to continue its dialogue with major user groups of the Section 106 process in an effort to resolve their concerns. The Council membership also reaffirmed the objective of reducing regulatory burdens on Federal agencies and SHPOs and focussing the review process on important historic preservation issues. The Council solicited the views of users of the Section 106 process once again by convening separate focus groups with local governments, industry representatives, Native Americans, and Federal agency officials in May 1995. As a result of these meetings, and after considering the views of commenters, the Council drafted a substantially revised proposal and circulated the draft informally in July 1995 to the 370 commenters who had commented on the October 1994 notice of proposed rulemaking.

The Council received approximately 80 comments on the informally distributed draft. Generally, the commenters found the July 1995 draft to be an improvement on the October 1994 proposal. Again, however, Federal agencies noted that the Council did not go far enough in removing itself from routine cases and in bringing finality to the process. Federal agencies also remained concerned that the public participation provisions were too open-ended and inadequately defined the roles and rights of participants in the process. Federal agencies also considered the (National Environmental Policy Act (NEPA) integration section to be a step forward, but submitted that its substitution provisions should be extended to environmental assessments as well as environmental impact statements and, overall, could provide

better integration of NHPA and NEPA. In contrast, the majority of SHPOs did not want the Council to remove itself further from the Section 106 process and did not want the NEPA integration section to be extended to environmental assessments. The National Conference of State Historic Preservation Officers, as well as many of its member SHPOs, supported the public participation process as set forth in the July 1995 draft, but sought clarification on the roles and responsibilities of Federal agencies under Section 106. Industry commenters deemed the July 1995 a vast improvement over the 1994 proposal, however, they remained concerned with the appeals procedures and found the process too burdensome. Industry also remained concerned about the public participation provisions. The current proposal is an attempt to balance the many views of the Section 106 users on how to achieve the Task Force's goals while fulfilling the Council's mission of ensuring reasonable consideration of historic properties in agency decision-making.

## II. Summary of Regulatory Changes

The proposed regulations would significantly modify the current Section 106 process. The regulations provide a greater opportunity for Federal agencies to resolve historic preservation issues with the SHPO and other involved parties, without direct Council involvement. As a result, the proposed regulations redefine the role of the Council to involve the Council in controversial cases where the Council's unique perspective and expertise can facilitate effective solutions. The proposed regulations also provide new flexible methods of obtaining Council comment on certain undertakings or effects.

### *Subpart A—Background and Policy*

This Subpart adds a section which describes the three methods of complying with Section 106: alternate procedures, exemptions or programmatic agreements, and general procedures set forth in Subpart B. As one of those methods, it encourages Federal agencies to meet their Section 110 (a)(2)(E) requirements by developing their own alternate procedures for compliance. This Subpart also modifies the description of the participants in the Section 106 process and the roles of the participants. Participants fall into three categories: principal parties, consulting parties, and the public. Principal parties are those with statutory responsibilities under Section 106: the Federal agency official and the Council. Consulting parties are

those with consultative responsibilities under the Act: the SHPO and Indian tribes and Native Hawaiian organizations. Affected parties are those with direct legal or financial interests in the effects on undertaking on historic properties: local governments and applicants for Federal assistance or permission. The public, under the proposed regulations, includes the general public at large and the "interested public." The proposed regulations define the interested public to include individuals and organizations that have indicated to the agency official a particular interest in the effect of the undertaking. Interested public includes owners of real property affected directly by the undertaking, traditional cultural authorities, the SHPO when the Indian tribe has assumed the function of the SHPO under Section 101(d)(2) of the Act and others that request to be treated as such.

### *Subpart B—Section 106 Procedures*

This Subpart provides the standard general procedures for compliance with the Act. It adds a new section which clarifies how a Federal agency should initiate the 106 process in order to emphasize the importance of early planning and coordination with reviews required by other statutes. By emphasizing the importance of proper initiation of the process, the Council seeks to address concerns regarding undue delay in projects. The identification step at Section 800.4 has been changed by adding two new concepts to enhance flexibility in the regulations. First, when locating historic properties, the proposed regulations provide that an agency must consider the scope and type of identification necessary based on a variety of factors, including the magnitude of the undertaking and its likely effects. It is intended that Federal agencies will focus their identification efforts on those portions of the area of potential effects most directly related to their jurisdictional or financial control. Second, the proposed regulations allow for "phased identification" to accommodate the practice of choosing several alternatives in a project. As specific aspects or locations of a project are determined, then the agency official completes the identification.

This Subpart also removes the separate "effect" determination step and now proposes combining the "no historic properties" finding and the "no effect" finding into a single "no historic properties affected" finding requiring 15 days for SHPO review. The agency moves directly to assessing adverse effects once it determines that historic

properties may be affected. The adverse effect criteria currently in Section 800.9(b) have been revised to better define adverse effects and have been moved to Section 800.5. The current exceptions to the criteria have been transformed into "standard treatments" listed in Section 800.5(a)(4) with the addition of a bridge replacement standard treatment and a modification of the exception for archeological resources that clarifies the basis for using the standard treatment and ensures public dissemination of any resulting archeological studies. The proposed regulations also remove the Council from review of no adverse effect determinations and standard treatment agreements. The amendments allow Federal agencies to conclude the Section 106 process at this level without Council review, subject to specific requests for Council review of agency findings under Section 800.9(a).

The proposed regulations, in Section 800.6(a)(1), specify instances when an agency official must request the Council to become involved in the consultation to resolve adverse effects. The Council may or may not participate after receiving such a request. The proposed regulations provide that the Council may enter the consultation on its own initiative if the Council determines it is necessary to ensure that the purposes of Section 106 are met, i.e., that an agency is properly taking into account the effects of the undertaking on historic properties and affording the Council its reasonable opportunity to comment. The proposed regulations, in 800.6(b)(1)(ii), also allow any principal party to request Council involvement in the consultation. If the Council does not participate in consultation, then the Council does not review two-party agreements negotiated between the SHPO and the Federal agency, but the regulations do require Federal agencies to file copies of the agreement with the Council as a basis for general Council oversight of agency compliance with Section 106. If the SHPO and the agency cannot reach a solution, the proposed regulations require that the Council join the consultation to attempt resolution before allowing for termination of consultation and the provision of formal comments by the Council membership. The proposed regulations provide that these formal Council comments be considered by the head of the agency in accordance with Section 110(l) of the Act.

Subpart B provides a new section on coordination with the National Environmental Policy Act (NEPA). It allows for the use of the NEPA process and documentation for the preparation

of an environmental impact statement (EIS) and environmental assessment (EA) to comply with Section 106 procedures as long as the draft EIS or EA meets certain specific standards. The agency must submit the EA or draft EIS to the Council, the SHPO, other consulting parties, and the interested public during the public comment period and any agreed upon mitigation measures must be incorporated in the record of decision. The purpose of this section is to encourage the integration of the resolution of adverse effects on historic properties into agency NEPA compliance.

The proposed regulations also clarify in Section 800.9 the process for assessing certain agency findings under Sections 800.4 and 800.5. Such requests may only be made by the SHPO, another consulting party or a member of the interested public that has participated in the Section 106 process and must be made before the undertaking is approved by the agency. The proposed regulations also provide strict time limits for the Council to act on the request and provide its views to the agency official. The Council may request the agency official to delay final action for up to 30 days while the Council considers the matter, but the agency official is not required to do so.

In shifting the emphasis from Council review of individual cases to assessing the overall quality of Federal agency or SHPO performance, the proposed regulations add a provision that requires agencies to maintain documentation of actions taken in compliance with Section 106 and to provide the Council with such information upon Council request.

Section 800.10 addresses special requirements for National Historic Landmarks and remains unchanged for the most part.

Documentation standards have been clarified to provide general requirements regarding adequacy, format and confidentiality in Section 800.11(a)-(c). Sections 800.11(d)-(h) remain largely unchanged from the current 800.8(a)-(d) except that a new documentation requirement has been added for a finding of no historic properties present or affected.

In order to comply with the 1992 amendments which mandated participation of Indian tribes and Native Hawaiian organizations, the Council added a new section in 800.12 on involving Indian tribes and Native Hawaiians in the consultation process. This section sets forth specific requirements for involvement at each step of the Section 106 process and is

designed to facilitate participation and agency planning for involvement.

Section 800.13 changes the Council's current emergency procedures contained in 800.12 by encouraging agencies to develop internal procedures, in consultation with the Council and the SHPO, which address how historic properties will be considered during emergencies. If an agency has not developed such procedures, the regulations encourage agencies to develop programmatic agreements that include provisions for dealing with historic properties during emergencies. If there is no applicable programmatic agreement, then the agency shall give the Council seven days to comment prior to the undertaking where the agency determines circumstances permit.

Section 800.14 is similar to the current Section 800.11 which addresses post review discoveries except that it adds the requirement that agencies must make reasonable efforts to avoid or minimize adverse effects on unplanned-for discoveries.

#### *Subpart C—Program Alternatives*

This Subpart provides new options for agencies to pursue in streamlining their Section 106 compliance activities and incorporates the current practice of developing Programmatic Agreements to facilitate coordination between Section 106 and an agency's particular program.

Section 800.15 provides five alternative methods of fulfilling Section 106 responsibilities, instead of following the procedures set forth in Subpart B. First, Section 800.15(a) states that Federal agencies may develop procedures and, when they are determined to be consistent with the Council's regulations, substitute them for comparable portions of the Council's regulations. Second, Section 800.15(b) provides for the development of Programmatic Agreements to govern particular agency programs or complex or multiple undertakings; this section is substantively unchanged from the current programmatic agreement section in 800.13 of the Council's regulations, but does change minor standards and requirements in the development of such agreements. Third, Section 800.15(c) allows for agencies to establish exempted categories for undertakings that have foreseeable effects which are not likely to be adverse. Fourth, Section 800.15(d) allows the Council to offer a streamlined method of treating a category of historic properties or a category of effects by allowing for standard treatments. Finally, Section 800.15(e) provides an efficient mechanism for fulfilling the

requirement of seeking Council comment. This section allows agencies to request Council comment on a category of routine or repetitive undertakings instead of conducting individual reviews.

The Council has reserved Section 800.16 to address state, tribal and local program alternatives, but has deleted the current Section 800.7 on state agreements.

Section 800.17 contains definitions. Several definitions have been changed or deleted. "Agency official" has been deleted as redundant in light of Section 800.2(a)(1). "Approval of the expenditure of funds" has been added to clarify the triggering event for many Section 106 reviews. "Area of potential effects" has been changed in light of the removal of the "effect" determination step in the process and is now limited to the area where adverse effects may occur. "Comment" and "consultation" and "effect" have been added for clarification. "Head of the agency" has been added as a result of the 1992 amendments. "Historic properties" definition has been changed to include properties of traditional religious and cultural importance to Indian tribes or Native Hawaiian organizations that meet the National Register criteria. "Indian lands" has been changed to "tribal lands" and redefined as in the statute. "Indian tribe" is changed and tracks the exact language in the statute. "Interested person" has been deleted because that term is no longer used by the regulations. "Memorandum of Agreement" has been added for clarification. "Native Hawaiian organization" is added and tracks the statutory language. "Programmatic Agreement" has been added for clarification. "Traditional cultural authority" has been added because the 1992 amendments refer to the involvement of such groups. "Tribal Preservation Officer" has been added because the 1992 amendments provide a new role for such an officer. "Undertaking" has been defined exactly as in the statute.

### III. Issues Deserving Special Attention From Commenters

#### *1. Public Participation*

The goal of the regulatory requirement that Federal agencies inform and involve the public in the Section 106 process is to ensure that the public has a reasonable opportunity to provide its views on a project. The Council has attempted to give the public an adequate chance to voice its concerns to Federal decision makers while recognizing legitimate concerns about avoiding

unnecessary procedural burdens and delays and protecting the privacy of non-governmental parties involved in the Section 106 process. How can the regulations be enhanced to provide for meaningful public involvement in a timely and effective fashion?

## 2. Local Governments

Several agencies seek an enhanced role for certified local governments in the Section 106 process and find that the regulations do not go far enough in providing for their involvement. The definition of "Head of the agency" provides that the head of a local government shall be considered the head of the agency where it has been delegated responsibility for Section 106 compliance. How can we better incorporate local governments into the process without confusing the regulations?

## 3. Council Involvement

In this proposal, the Council has removed itself from review of no adverse effect determinations and routine Memoranda of Agreement with the intent of deferring to agency-SHPO decision making as a general rule. At the same time, as the Federal agency assigned to review the policies and programs of Federal agencies on historic preservation matters, the Council has retained the right to enter the consultative process on its own motion or when asked requested by the Agency Official. The regulations set forth in 800.6 several criteria which indicate when an Agency Official must invite the Council to become involved in the consultation. They also set a general standard for when the Council will enter the process without a request. The Council intends on exercising its right to enter the process sparingly. Are the criteria set forth in 800.6(a)(1)(i) workable? Can the regulations better define when the Council will intervene on its own initiative?

## 4. Council Review of Agency Findings

Section 800.9 provides for Council review of agency findings where the Council has not participated in the consultative process pursuant to 800.6. The Council's right to review agency findings is limited to whether the agency followed the appropriate procedures when making an eligibility determination under 800.4(c)(2), a no historic properties present or affected finding under 800.4(d), or a no adverse effect finding or resolution by standard treatment under 800.5(c). The right to review is also limited by the requirement that the request be made prior to the agency approval of the

expenditure of funds or the issuance of a license, permit or other approval. The Council has 10 days to decide if the request warrants Council review and 30 days to decide the merits of the case. The Council finds that the above review process strikes a balance between allowing review of procedurally deficient agency decisions and limiting review to situations that could not have been corrected earlier in the process. Some Federal agencies find that the review process in 800.9 provides the Council too much authority to second guess agency decisions and promotes a lack of finality to the process. How can the regulations accommodate the Council's concerns and those of other Federal agencies?

## 5. Time Frames

Throughout the regulations, time frames are set for reviews conducted by SHPOs and the Council. Generally, they allow thirty days for responding to agency requests, although some are shorter. These have been established in an effort to balance the need for an expeditious process for Federal agencies and applicants with the recognition of the need for adequate time to evaluate submissions (as well as the limits on resources available in SHPO offices and at the Council to respond within the specified time). Do the time frames achieve this balance or should specific ones be increased or decreased?

## 6. Alternate Procedures

The proposed regulations allow Federal agencies to substitute their own procedures for those contained in subpart B. Section 110(a)(2)(E) of the Act requires that procedures implementing Section 106, including these substitute procedures, be consistent with the Council's regulations. The proposed regulations charge the Secretary with making final determinations on consistency. This is based on the Secretary's primary responsibility for implementing Section 110. Alternatively, the Council, as the agency charged by Section 211 of the Act with issuing the regulations to guide implementation of Section 106, could make such a determination. A third option is allowing the Federal agency itself to make a determination of consistency. Is the proposed approach the best solution?

## IV. Impact Analysis

### *Regulatory Flexibility Act*

The proposed rules will not have a significant economic impact on a substantial number of small entities. The Council's regulations, in their

current and revised form, only impose mandatory obligations on Federal agencies. If a Federal agency is legally authorized and chooses to delegate its responsibility to local governments, then that Federal agency must determine whether or not its delegation will have a significant economic impact on a substantial number of small entities.

### *The Paperwork Reduction Act*

The proposed regulations do not impose reporting requirements or the collection of information as defined in the Paperwork Reduction Act.

### *National Environmental Policy Act*

Pursuant to 36 CFR Part 805, the Council is developing a draft Environmental Assessment and will complete the NEPA evaluation prior to publication of its final rule.

### *Executive Orders 12866 and 12875*

The Council is exempt from compliance with Executive Orders 12866 pursuant to a memorandum issued by the Office of Management and Budget's Office of Information and Regulatory Affairs on October 12, 1993. The Council is also exempt from the documentation requirements of Executive Order 12875 pursuant to a memorandum issued by the same office on January 11, 1994. Although the Council is exempt, it has adhered to the principles in both orders by involving State, local and tribal entities, members of the public, and industry groups in the development of the proposed regulations as discussed above in the Background section of this preamble. The proposed regulations, like the current regulations, do not mandate State, local and tribal governments to participate in the Section 106 process. The State, local and tribal governments have the option of declining to participate, although the State Historic Preservation Officers are required to advise and assist Federal agencies, as appropriate, as part of their duties under Section 101(b)(3)(E) of the National Historic Preservation Act and as a condition of their Federal grant assistance. In accordance with Executive Order 12875, the proposed regulations provide flexible approaches to consideration of historic properties in Federal agency decision making by allowing for categorical exemptions, standard treatments, program comments, and programmatic agreements in Section 800.15 of the proposed regulations.

**Unfunded Mandates Reform Act of 1995**

The Council has determined that its regulations do not fall within the definition of a Federal mandate as defined in Section 421(6) of the Unfunded Mandates Reform Act of 1995.

**Executive Order 12898**

The regulations implementing Section 106 do not pose environmental risks, but rather, seek to avoid adverse effects on historic properties in all areas of the United States.

**Memorandum Concerning Government-to-Government Relations with Native American Tribal Governments**

The Council has fully complied with this Memorandum. A Native American representative served on the Council and was a member of the Council's Regulations Task Force. The proposed regulations enhance the opportunity for Native American involvement in the Section 106 process and clarify the obligation of Federal agencies to consult with Native Americans.

**List of Subjects in 36 CFR Part 800**

Administrative practice and procedure, Historic preservation, Indians, Inter-governmental relations.

Dated: September 10, 1996.

Robert D. Bush,  
*Executive Director.*

Title 36, chapter VIII is amended by revising part 800 to read as follows:

**PART 800—PROTECTION OF HISTORIC AND CULTURAL PROPERTIES****Subpart A—Purposes and Participants**

Sec.

800.1 Purposes.

800.2 Participants in the Section 106 process.

**Subpart B—Section 106 Procedures**

800.3 Initiation of the Section 106 process.

800.4 Identification of historic properties.

800.5 Assessment of adverse effects.

800.6 Resolution of adverse effects.

800.7 Failure to resolve adverse effects.

800.8 Coordination with the National Environmental Policy Act.

800.9 Council review of Section 106 compliance.

800.10 Special requirements for protecting National Historic Landmarks.

800.11 Documentation standards.

800.12 Consultation with Indian tribes and Native Hawaiian organizations.

800.13 Emergency situations.

800.14 Post-review discoveries.

**Subpart C—Program Alternatives**

800.15 Federal agency program alternatives.

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

800.17 Definitions.

**Subpart A—Purposes and Participants****§ 800.1 Purposes.**

(a) Purposes of the Section 106 process. Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings. The procedures in this part define how Federal agencies meet these statutory responsibilities. The Section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation between 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 avoid or minimize adverse effects on historic properties.

(b) Relation to other provisions of the Act. Section 106 is one of several provisions of the Act designed to further the national policy of historic preservation. References to those related provisions are included in the procedures in this part to identify circumstances where actions under the procedures in this part may be affected by the independent obligations of those other provisions. Such provisions may have their own implementing regulations or guidelines and are not intended to be implemented by the procedures in this part. Guidelines, policies and procedures issued by other agencies, including the Secretary, have been cited in the procedures in this part for ease of access and are not incorporated by reference.

(c) Methods of complying with section 106 of the Act. The procedures in this part provide several methods for Federal agencies to meet their Section 106 responsibilities.

(1) Alternate procedures. Section 110(a)(2)(E) of the Act directs Federal agencies to develop procedures for implementing section 106 of the Act that are consistent with the Council's regulations and meet standards specified in the Act. The Council encourages Federal agencies to adopt such procedures and, where appropriate, substitute them for the procedures in subpart B of this part in accordance with § 800.15(a).

(2) Exemptions and programmatic agreements. If a Federal agency does not

have alternate procedures in place, it should consider the use of exemptions (§ 800.15(c)) and programmatic agreements (§ 800.15(b)) to tailor Section 106 compliance to its program needs.

(3) General procedure. If a Federal agency has not adopted alternate procedures and the undertaking is not exempted or governed by a programmatic agreement, the Agency Official shall comply with the process set forth in subpart B of this part.

(d) Timing. Section 106 of the Act requires the Agency Official to complete the section 106 process prior to the approval of the expenditure of funds or prior to the issuance of any license, permit or other approval. An Agency Official may expend funds on, or authorize, nondestructive project planning activities, including field investigations, before completing compliance with section 106 of the Act, and may conduct phased compliance with the procedures in subpart B of this part at different stages of planning, provided that such actions do not restrict the subsequent consideration of alternatives to avoid or minimize the undertaking's adverse effects on historic properties. The Agency Official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered.

**§ 800.2 Participants in the section 106 process.**

(a) Principal parties. The following parties have statutory responsibilities in the section 106 process:

(1) Agency Official. It is the legal obligation of the Federal agency to fulfill the requirements of section 106 of this Act and to ensure that an Agency Official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part. The Agency Official has final approval authority for the undertaking and may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 of the Act in accordance with law or agency procedures established under section 110(a)(2)(E) of the Act.

(i) Section 112 of the Act requires each Federal agency to ensure that all actions taken by employees or contractors of the agency shall meet professional standards under applicable regulations of the Secretary and that agency personnel and contractors responsible for historic resources meet applicable qualification standards

established by the Office of Personnel Management.

(ii) If more than one Federal agency is involved in an undertaking, the agencies may designate a lead Federal agency. The lead Federal agency shall identify the appropriate official to serve as the Agency Official. Such Agency Official shall act on behalf of all participating Federal agencies, fulfilling their collective responsibilities under section 106 of the Act and subpart B of this subpart.

(2) Council. The Council is responsible for issuing regulations to implement section 106, provides guidance and advice on the application of the procedures in this part, and generally oversees the operation of the section 106 process. The Council also consults with and comments to Agency Officials on undertakings that affect historic properties and assists participants in meeting their legal obligations. Participants in the section 106 process may seek advice and guidance from the Council on the application of this part to specific undertakings even though the Council is not formally involved in the review of the undertaking.

(b) Consulting parties. The following parties have consultative roles in the section 106 process as defined in the Act.

(1) State Historic Preservation Officer. The State Historic Preservation Officer advises and assists Federal agencies in carrying out their historic preservation responsibilities and consults with Federal agencies on undertakings that affect historic properties and on the content and sufficiency of plans to protect, manage or mitigate harm to historic properties. If an Indian tribe has assumed the functions of the State Historic Preservation Officer for the section 106 process on tribal lands, the State Historic Preservation Officer shall participate in accordance with any plan referenced in § 800.2(b)(2) and may also participate as a member of the interested public. The role of the State Historic Preservation Officer with regard to effects on historic properties located off tribal lands is unchanged.

(2) Indian tribes and Native Hawaiian organizations. The Agency Official is required 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. To meet this responsibility, the Agency Official shall identify Indian tribes and Native Hawaiian organizations likely to have such interests in accordance with § 800.3(e) and consult with them in accordance with § 800.12 to ensure that

their views are fully considered by the Agency Official in reaching findings and decisions in the section 106 process. An Indian tribe may assume the functions of a State Historic Preservation Officer in the section 106 process with respect to tribal lands under section 101(d)(2) of the Act. If so, the Agency Official shall consult with the Tribal Preservation Officer in accordance with the plan prepared pursuant to that section regarding the effects of undertakings on tribal lands.

(c) Affected parties. The following parties have direct legal or financial interests in the effects of an undertaking on historic properties and may participate in the section 106 process as consulting parties when they so request.

(1) Representatives of local governments. If a representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur so requests, the Agency Official shall involve the local government as a consulting party. Under certain authorities, the local government may be authorized to act as the Agency Official for purposes of section 106 of the Act.

(2) Applicants for Federal assistance, permits, licenses and other approvals. If an applicant for Federal assistance or permission so requests, the Agency Official shall involve the applicant as a consulting party. The Agency Official may authorize an applicant to initiate consultation with the State Historic Preservation Officer and others under §§ 800.3 and 800.4, but remains legally responsible for all findings charged to the Agency Official. Where not inconsistent with the rights of the public to access the information that is the basis for the Agency Official's decisions under the procedures in this part, the Agency Official may take reasonable steps to protect the privacy of non-governmental applicants in accordance with applicable agency procedures.

(d) The public. The views of the public are essential to informed Federal decisionmaking as to taking into account effects of undertakings. The Act directs Federal agencies to consult with the interested public, as appropriate, in steps taken to comply with section 106 of the Act. The procedures in this part provide for notification and involvement of the public in the section 106 process and for the identification of and consultation with the interested public as appropriate.

(1) Responsibilities. The Agency Official is required at specific points in the section 106 process to provide the public with information about an undertaking and its effects on historic

properties and to seek public comment and input. Members of the public may also provide views on their own initiative and the Agency Official should consider those views in decisionmaking.

(2) Flexible application. The Agency Official's efforts to seek and consider the views of the public should reflect 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, and the nature of the Federal involvement in the undertaking. Evaluation of these factors for an individual undertaking may warrant the Agency Official to apply the specific public involvement requirements of subpart B of this part in a flexible manner.

(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, if they provide adequate opportunities for public involvement consistent with the procedures in subpart B of this part.

(4) Interested public. The interested public includes those individuals and organizations that have indicated to the Agency Official an interest in the effects of an undertaking on historic properties. Certain individuals and organizations may warrant direct involvement in the consultations conducted by the Agency Official due to the nature of their legal or economic relation to the undertaking or affected properties, or due to their representation of citizens or organizations concerned with the undertaking and its effects on historic properties. The Agency Official is required to take steps to identify the interested public and involve them at specific points in the section 106 process. The interested public includes:

(i) Owners of real property affected directly by the undertaking, provided that the Agency Official may limit participation to organizations representing such owners if necessary;

(ii) Traditional cultural authorities with an interest in the undertaking's effects on historic properties of traditional cultural and religious importance;

(iii) The State Historic Preservation Officer when an Indian tribe has assumed the functions of the State Historic Preservation Officer under section 101(d)(2) of the Act; and

(iv) Other individuals, organizations or entities that request to be treated as members of the interested public.

**Subpart B—Section 106 Procedures****§ 800.3 Initiation of the Section 106 process.**

(a) Establish undertaking. The Agency Official shall determine whether the proposed Federal action is an undertaking and, if so, whether it has the potential to affect historic properties and whether review is governed by a Federal agency program alternative established under § 800.15.

(1) If the action is not an undertaking or an undertaking that has no potential to affect historic properties, the Agency Official has no further obligations under section 106 of the Act.

(2) If the review of the undertaking is governed by a Federal agency program alternative, the Agency Official shall follow that alternative.

(b) Coordinate with other reviews. The Agency Official shall coordinate the steps of the Section 106 process, as appropriate, with the overall planning schedule for the undertaking and with any reviews required under other authorities such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act and agency specific legislation, such as section 303(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 or State law to meet the requirements of the section 106 process.

(c) Plan to involve the public. The Agency Official shall begin planning for involving the public in the Section 106 process, relating the steps to be taken to the likely level and nature of public interest in the undertaking and its effects on historic properties. The Agency Official shall consider what individuals and organizations may have an interest in the undertaking and its effects on historic properties and plan to involve them in the Section 106 process as members of the interested public. The Agency Official should give special attention to identifying those members of the interested public who should be consulted as the section 106 process proceeds and involve them as appropriate.

(d) Initiate consultation with the State Historic Preservation Officer. The Agency Official shall determine the appropriate State Historic Preservation Officer or Officers to be involved in the section 106 process and initiate consultation.

(1) If the State Historic Preservation Officer declines in writing to participate

in the Section 106 process or fails to respond in a timely manner at any point in these procedures, the Agency Official shall consult with the Council to complete the Section 106 process without the State Historic Preservation Officer.

(2) If more than one State is involved in an undertaking, the involved State Historic Preservation Officers may designate a lead State Historic Preservation Officer to act on behalf of all participating State Historic Preservation Officers in the Section 106 process.

(3) Requirements for consultation with the State Historic Preservation Officer should be implemented in a manner appropriate to the agency planning process for the undertaking and the nature and effect of the undertaking on historic properties. A single consultation by the Agency Official with the State Historic Preservation Officer may address multiple steps in the Section 106 process where it is consistent with the purposes of the procedures in this part.

(e) Identify consulting parties. The Agency Official shall determine whether there are any local governments or applicants that are entitled to be involved in consultations conducted under this subpart and plan to involve them as appropriate. The Agency Official shall identify the Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and plan for their participation in accordance with § 800.12 .

**§ 800.4 Identification of historic properties.**

(a) Determine scope of identification efforts. At the earliest feasible stage in planning an undertaking and coordinated with any steps being taken to meet the requirements of the National Environmental Policy Act, the Agency Official shall consult with the State Historic Preservation Officer and:

(1) Determine the area of potential effects;

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

(3) Seek information from individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area and identify issues relating to historic properties.

(b) Identify historic properties. Based on the information gathered under § 800.4(a) and in consultation with the State Historic Preservation Officer, 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, in consultation with the State Historic Preservation Officer, shall make a reasonable and good faith effort to carry out appropriate identification efforts. The Agency Official shall determine the appropriate scope and type of identification efforts, including background research, consultation, sample field investigation, and field survey, taking into account past planning or research studies and results, and based on the magnitude of the undertaking, the nature and extent of its 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.

(2) Phased identification. Where alternative locations are under consideration or access to properties is restricted, the Agency Official may conduct identification efforts designed to establish the likely presence of historic properties within the area of potential effects for each alternative through background research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration and the magnitude of the undertaking and likely effects. As specific aspects or location of a preferred alternative are determined, the Agency Official shall complete the identification of historic properties in accordance with § 800.4(b)(1).

(3) Consistent with applicable conflict of interest laws, the Agency Official may use the services of applicants, consultants, or designees to prepare information and analyses under this subpart, but remains legally responsible for all findings charged to the Agency Official. If a document or study is prepared by a non-Federal party, the Agency Official shall evaluate the document prior to its approval and be responsible for its content.

(c) Evaluate historic significance. (1) Apply National Register Criteria. In consultation with the State Historic Preservation Officer, guided by the Secretary's Standards and Guidelines for Evaluation and with consideration for the potential of the proposed undertaking to affect identified properties, the Agency Official shall apply the National Register Criteria 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 reevaluation of properties previously determined eligible or ineligible.

(2) Determine whether a property is eligible. If the Agency Official determines the criteria are met and the State Historic Preservation Officer agrees, the property shall be considered eligible for the National Register for Section 106 purposes. If the Agency Official determines the criteria are not met and the State Historic Preservation Officer agrees, the property shall be considered not eligible. If the Agency Official and the State Historic Preservation Officer do not agree, or if the Council or the Secretary so request, the Agency Official shall obtain a determination of eligibility from the Secretary pursuant to 36 CFR part 63.

(d) Results of identification and evaluation. (1) No historic properties present or affected. If the Agency Official finds that there are no historic properties either present or that may be affected by the undertaking, the Agency Official shall provide documentation of this finding as set forth in § 800.11(d) to the State Historic Preservation Officer. The Agency Official shall notify any consulting party and the interested public and make the documentation available for public inspection prior to approving the undertaking. If the State Historic Preservation Officer does not object within 15 days of receipt of an adequately documented finding, this completes the Agency Official's responsibilities under section 106 of the Act.

(2) Historic properties affected. If there are historic properties that may be affected by the undertaking, the Agency Official shall notify any consulting party and the interested public and assess adverse effects in accordance with § 800.5.

#### **§ 800.5 Assessment of adverse effects.**

(a) Apply criteria of adverse effect. In consultation with the State Historic Preservation Officer, 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 provided by consulting parties, the interested public and the public at large.

(1) Criteria of adverse effect. An undertaking is considered to have an adverse effect when it may alter 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. Adverse effects may include reasonably foreseeable effects caused by the undertaking that are later in time or farther removed in distance.

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

- (i) Physical destruction, damage, or alteration of all or part of the property;
- (ii) Removal of the property from its historic location;
- (iii) Alteration of the character of the property's setting or use when that character contributes to the property's qualification for the National Register;
- (iv) Introduction of visual or audible elements that are out of character with the property ;
- (v) Neglect of a property which causes its deterioration; and
- (vi) Transfer, lease, or sale of property out of Federal ownership or control.

(3) Avoidance of adverse effects. The Agency Official, in consultation with the State Historic Preservation Officer, may make a finding of no adverse effect when the Agency Official modifies the undertaking to avoid adverse effects.

(4) Standard treatment of potential adverse effects. The Agency Official may find, in consultation with the State Historic Preservation Officer, that certain adverse effects are satisfactorily resolved in accordance with one of the following standard treatments:

(i) The undertaking is limited to maintenance, repair, rehabilitation, or restoration of buildings or structures, including hazardous materials remediation or modifications for handicapped access, and will be conducted in accordance with construction plans and specifications that meet the Secretary's Standards for the Treatment of Historic Properties and applicable guidelines and that are reviewed by the State Historic Preservation Officer prior to implementation;

(ii) The undertaking is limited to construction or ground disturbance that would destroy, damage or alter an archaeological property of value only for its contribution to knowledge of the past, and a plan for studying the property with archeological methods, collecting important information, and disseminating the results to the public, or a plan for preserving the property for future study is prepared and implemented in accordance with applicable professional standards and guidelines;

(iii) The undertaking is limited to the transfer, sale or lease of a Federal historic property and adequate and legally enforceable restrictions or conditions are included to ensure

preservation of the property's significant historic features;

(iv) The undertaking is limited to the rehabilitation or replacement of a bridge and, in accordance with a State inventory and plan for historic bridges approved by the State Historic Preservation Officer, specific measures are provided for recordation and marketing, relocation or reuse of the bridge; or

(v) The undertaking meets another standard treatment specified by the Council under § 800.15(d).

(b) State Historic Preservation Officer review. If the Agency Official makes either a finding of no adverse effect or that adverse effects can be satisfactorily resolved by a standard treatment, the Agency Official shall submit the finding with the documentation specified in § 800.11(e) to the State Historic Preservation Officer for a 30-day review period.

(1) Agreement with finding. If the State Historic Preservation Officer agrees with the Agency Official's finding, the Agency Official may proceed and shall carry out the undertaking in accordance with § 800.5(c)(1).

(2) Disagreement with finding. If the State Historic Preservation Officer disagrees within 30 days of receipt of the finding, the Agency Official shall consider the effect adverse. The State Historic Preservation Officer shall specify the reasons for disagreeing with the finding. The Agency Official may request the Council to review the disagreement and shall proceed in accordance with the Council's opinion as to whether the effect is adverse.

(c) Results of assessment. (1) Finding of no adverse effect or resolution by standard treatment. The Agency Official shall maintain a record of the finding, notify any participating local government or applicant and the interested public, and make the record available for public review before approving the undertaking. Implementation of the undertaking in accordance with the finding as documented completes the Agency Official responsibilities under Section 106 of the Act. If the Agency Official fails to carry out the undertaking in accordance with the finding, the Agency Official shall follow § 800.6.

(2) Adverse effect found. If an adverse effect is found and not resolved by a standard resolution in accordance with this section, the Agency Official shall consult further to resolve the adverse effect pursuant to § 800.6.



**§ 800.6 Resolution of adverse effects.**

(a) Continue consultation. The Agency Official shall consult with the State Historic Preservation Officer to develop and evaluate alternatives or modifications to the undertaking to avoid or minimize adverse effects on historic properties.

(1) Determine Council involvement. The Agency Official shall determine whether to request Council involvement in the consultation and notify the Council by providing the documentation specified in § 800.11(f).

(i) The Agency Official shall request the Council to become involved in the consultation in accordance with § 800.6(b)(2):

(A) When the Agency Official determines that Council involvement will facilitate resolution of adverse effects;

(B) When the undertaking has an adverse effect upon a National Historic Landmark or is to be carried out on tribal lands;

(C) When a Programmatic Agreement under § 800.15(b) is prepared; or

(D) When the State Historic Preservation Officer, an Indian Tribe, a Native Hawaiian organization, a local government or an applicant requests Council involvement.

(ii) The Council shall advise the Agency Official of its decision to participate within 15 days of receipt of notice. The Council may enter the consultation on its own initiative when it determines that Council involvement is necessary to ensure that the purposes of section 106 and the Act are met.

(iii) If the criteria in § 800.6(a)(1)(i) are not met or the Council does not elect to join the consultation, the Agency Official may complete consultation in accordance with § 800.6(b)(1).

(2) Involve consulting parties and the interested public. The Agency Official shall involve consulting parties in the consultation as determined under § 800.3. When agreed to by the Agency Official, the State Historic Preservation Officer and the Council, if participating, members of the interested public may become consulting parties. If the Agency Official and the State Historic Preservation Officer do not agree, the Agency Official shall request the Council to decide. The Agency Official shall involve any member of the interested public that will assume a specific role or responsibility in a Memorandum of Agreement.

(3) Provide documentation. The Agency Official shall make available to the State Historic Preservation Officer and other consulting parties the documentation specified in § 800.11(f) and such other documentation as may

be developed during the consultation to resolve adverse effects.

(4) Involve the public. The Agency Official shall make available information to the public and provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking. The Agency Official shall use appropriate mechanisms, taking into account the magnitude of the undertaking and the nature of its effects upon historic properties, to ensure that the full range of the public's views is represented in the consultation.

(b) Resolve adverse effects. (1) Resolution without the Council. (i) The Agency Official shall consult with the State Historic Preservation Officer and other consulting parties to seek ways to avoid or minimize the adverse effects.

(ii) If during the consultation the Council decides to join the consultation, the Agency Official shall continue the consultation in accordance with § 800.6(b)(2).

(iii) If the Agency Official and the State Historic Preservation Officer agree on how the adverse effects will be resolved, they shall execute a Memorandum of Agreement. The Agency Official shall file a copy of the executed Memorandum of Agreement with the Council prior to approving the undertaking.

(iv) If the Agency Official and the State Historic Preservation Officer fail to agree on the terms of a Memorandum of Agreement, the Agency Official shall request the Council to join the consultation and proceed in accordance with § 800.6(b)(2).

(2) Resolution with Council participation. If the Council decides to participate, the Agency Official shall consult with the State Historic Preservation Officer, the Council, and other consulting parties to avoid or minimize the adverse effects. If the Agency Official, the State Historic Preservation Officer, and the Council agree on how the adverse effects will be resolved, they shall execute a Memorandum of Agreement.

(c) Memorandum of Agreement. (1) Signatories. The Agency Official and the State Historic Preservation Officer are the signatories to a Memorandum of Agreement executed pursuant to § 800.6(b)(1). The Agency Official, the State Historic Preservation Officer, and the Council are the signatories to a Memorandum of Agreement executed pursuant to § 800.6(b)(2). The signatories have sole authority to execute, amend or terminate the agreement.

(2) Concurrence by others. The signatories may agree to invite others to

concur in the Memorandum of Agreement. The Agency Official shall invite any consulting parties to concur.

(3) 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.

(4) 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.

(5) Legal status. A Memorandum of Agreement executed 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.

(6) 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. Failure to agree on amendments leaves the existing agreement in effect.

(7) Termination. If any signatory determines that the terms of a Memorandum of Agreement cannot be carried out, the signatories shall consult to seek amendment of the agreement. If the agreement is not amended, the Agency Official, the State Historic Preservation Officer, or the Council if a signatory, may terminate it and the Agency Official shall request the comments of the Council under § 800.7(b).

**§ 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 State Historic Preservation Officer, or the Council may determine that further consultation will not be productive and terminate consultation.

(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 the Council's comments, accompanied by the documentation in § 800.11(h), and notify the State Historic Preservation Officer, other consulting parties and the interested public of the request.

(2) If the State Historic Preservation Officer terminates consultation, the Agency Official and the Council may execute a Memorandum of Agreement without the State Historic Preservation Officer's involvement or either may terminate consultation.

(3) If the Council terminates consultation, the Council shall notify the Agency Official, the State Historic Preservation Officer, other consulting parties, and the interested public of the termination and comment under § 800.7(b).

(b) Comments by the Council. (1) Preparation. The Council shall prepare its comments with an adequate opportunity for the Agency Official, the State Historic Preservation Officer, other consulting parties, and the public to provide their views. 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 § 800.7(a)(1) or termination by the Council under § 800.7(a)(3), 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 State Historic Preservation Officer, other consulting parties, the interested public, and others as appropriate.

(4) Response to Council comment. The head of the agency shall consider the Council's comments in reaching a final decision on the undertaking. The head of the agency may not delegate his or her responsibilities pursuant to this paragraph. The head of the agency shall document the decision by:

(i) Preparing a record of the decision and the rationale for the decision, evidencing consideration of the Council's comments and providing it to the Council prior to approving the undertaking;

(ii) Providing a copy of the record of decision to the State Historic Preservation Officer, other consulting parties, and the interested public; and

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

#### **§ 800.8 Coordination with the National Environmental Policy Act.**

(a) General coordination. Federal agencies are encouraged to coordinate compliance with section 106 of the Act and the procedures in this part with any steps taken to meet the requirements of the National Environmental Policy Act (42 U.S.C. 4231 *et seq.*) (NEPA).

(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 qualifies as an undertaking requiring review under section 106 of the Act pursuant to § 800.3(a). If so, the Agency Official shall comply with the procedures in this subpart.

(c) Use of the NEPA process for section 106 of the Act purposes. An Agency Official may use the process and documentation for the preparation of an Environmental Impact Statement or an Environmental Assessment (EA) to comply with section 106 of the Act in lieu of the procedures set forth in §§ 800.3 through 800.6 if the following conditions are met.

(1) Preparation of the Draft Environmental Impact Statement (DEIS) or EA meets the following standards:

(i) The Agency Official has notified the Council, the State Historic Preservation Officer and the interested public during the preparation of the DEIS or EA that this section is being used to comply with section 106 of the Act;

(ii) Historic properties are identified and effects of the undertaking are evaluated in a manner consistent with the criteria and procedures of §§ 800.3 through 800.5 and the documentation standards of § 800.11;

(iii) The Agency Official has consulted with the State Historic Preservation Officer, other consulting parties, and the Council where appropriate as required by §§ 800.3 through 800.6 and § 800.12 when identifying historic properties, evaluating potential adverse effects, and considering measures to avoid or minimize adverse effects;

(iv) The Agency Official has involved the interested public and the public in accordance with the agency's NEPA procedures; and

(v) Alternatives and measures that would avoid or minimize any adverse effects of the undertaking on historic properties are described in the DEIS or EA.

(2) The Agency Official shall submit the DEIS or EA to the Council, the State Historic Preservation Officer, other consulting parties, and the interested public when circulating it for public comment. The Agency Official shall indicate that the DEIS or EA is intended to meet the requirements of section 106 of the Act under this section.

(3) If within the time allowed for public comment on the DEIS or EA the Council objects to how the Agency Official has taken into account the effects of the undertaking on historic properties, the Agency Official shall comply with § 800.6(b)(2). If the Agency Official receives an objection from the State Historic Preservation Officer, a

consulting party, or a member of the interested public within the time allowed for public comment on the document, the Agency Official shall provide the objection to the Council. Within 30 days, the Council shall notify the Agency Official either that it agrees with the objection, in which case the Agency Official shall comply with § 800.6(b)(2), or that it disagrees with the objection, in which case the Agency Official shall continue to follow this section.

(4) The Agency Official shall incorporate into the Final Environmental Impact Statement (FEIS) or final document resulting from the EA measures to avoid or minimize adverse effects on historic properties. Adoption of the proposed measures through a commitment, binding on the agency or the applicant for Federal assistance or permission, as appropriate, to carry them out and embodied in a Record of Decision (ROD) following or accompanying the FEIS or final document resulting from the EA satisfies the Agency Official's responsibilities under section 106 of the Act and the procedures in this part.

(5) If the undertaking is subsequently modified in a manner that alters the treatment of effects on historic properties or if the Agency Official fails to carry out the measures to avoid or minimize adverse effects as specified in the ROD, the Agency Official shall notify the State Historic Preservation Officer, any other consulting party, and the interested public and consult with the Council. The Council may either require the Agency Official to follow § 800.6 or provide comments to the Agency Official within 30 days of the request for consultation.

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

(a) Assessment of Agency Official findings for individual undertakings. (1) Basis for request. If the Council has not participated in the review of an undertaking under the procedures in this subpart, a State Historic Preservation Officer, a consulting party or a member of the interested public that has participated in the section 106 of the Act process may request the Council to assess whether an Agency Official has complied with the procedures in this subpart when making a determination whether a property is eligible for the National Register under § 800.4(c)(2), a finding that there are no historic properties present or affected under § 800.4(d), or a finding of no adverse effect or resolution by standard treatment under § 800.5(c). The request shall be in writing, state specific reasons

why the finding is not consistent with the provisions of the procedures in this subpart and include such documentation as the requestor may have available to support the request.

(2) Timing. The request must be made prior to the approval of the expenditure of funds or the issuance of any license, permit or other approval by the Agency Official.

(3) Council review of the finding. (i) The Council shall decide within 10 days of receipt of the request whether it states reasons that, if true, would warrant the Council determining that the finding was inconsistent with the procedures in this subpart.

(ii) If the Council decides that the request states reasons which would warrant the Council determining that the finding was inconsistent with the procedures in this subpart, the Council shall review the finding on its merits. The Council shall notify the Agency Official, provide a copy of the request and any accompanying supporting documentation and invite the views of the Agency Official on the merits of the request. The Council shall complete its assessment of the finding within 30 days of notifying the Agency Official and may request the Agency Official to refrain from taking final action on the undertaking during that period. The Council shall provide its views to the requestor, the Agency Official, the State Historic Preservation Officer, consulting parties and other members of the interested public, as appropriate.

(iii) If the Council decides that the request does not state reasons that would warrant the Council determining that the finding was inconsistent with these procedures, the Council shall decline to assess the finding and notify the requestor.

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

(b) Agency foreclosure of the Council's opportunity to comment. Where an Agency Official has failed to complete the requirements of section 106 of the Act 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 allow 30 days for the Agency Official to provide information as to whether foreclosure has occurred. If the Council determines foreclosure has occurred, the Chairman of the Council shall transmit

the determination to the head of the agency.

(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 of the Act, 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) Compliance with section 106 of the Act. If an Agency Official, after consulting with the Council, determines to grant the assistance, the Agency Official shall comply with the procedures in this subpart to take into account the effects of the undertaking on any other historic properties.

(d) Evaluation of Section 106 operations. The Council shall 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 oversight and evaluation of the Section 106 process. The Agency Official shall maintain documentation of actions taken to comply with section 106 of the Act that meet the standards of § 800.11 and applicable agency procedures. The Agency Official shall make such documentation available to the Council upon request. The Council may request available information and documentation from other participants in the Section 106 process.

(2) Peer review. The Council may use professional peer review to assist in any evaluation.

(3) Improving the operation of section 106 of the Act. 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, a State Historic Preservation Officer or a Tribal Preservation Officer who has assumed

the role of the State Historic Preservation Officer has failed to properly carry out the responsibilities assigned under the procedures in this part, the Council may participate in individual case reviews in a manner and for a period that it determines is necessary to improve performance or correct deficiencies.

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

(a) Agency official's responsibilities. 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 in accordance with this section.

(b) Resolution of adverse effects. Any consultation to resolve adverse effects conducted under § 800.6 shall include the Council, if the Council chooses to participate.

(c) Involvement of the Secretary. The Agency Official shall notify the Secretary of consultations involving National Historic Landmarks and invite the Secretary to participate in the consultation. The Council may request a report from the Secretary under Section 213 of the Act to assist in the consultation.

(d) Report of outcome. The Council shall report the outcome of the Section 106 process, including its comments or any Memoranda of Agreement, 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 any determination, finding or agreement under the procedures in this subpart is supported by sufficient documentation to enable reviewing parties to understand its factual and logical basis. If the Council, or the State Historic Preservation Officer in those situations where the Council is not involved, determines the applicable documentation standards are not met, the time period specified in the relevant section of this subpart shall be suspended until adequate documentation is submitted.

(b) Format. The Agency Official may use documentation prepared to meet the needs of other authorities to fulfill the requirements of the procedures in this subpart, provided that resulting

documentation meets the standards of this section.

(c) Confidentiality. Section 304 of the Act requires an Agency Official to 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 resource, or impede the use of a traditional religious site by practitioners.

(d) Finding of no historic properties present or affected. Documentation shall include:

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

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

(3) The basis for determining that no historic properties are present or affected.

(e) Finding of no adverse effect or standard treatment of potential adverse effects. Documentation shall include:

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

(2) A description of historic properties that may be affected by the undertaking, including appropriate information on the nature of their significance;

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

(4) A description of why the criteria of adverse effect were found inapplicable, or how potential adverse effects would be resolved; and

(5) Any views provided by consulting parties, the interested public and the public.

(f) Finding of adverse effect.

Documentation shall include:

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

(2) A description of the affected historic properties, with information on the characteristics that qualify them for the National Register; and

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

(g) Memorandum of Agreement. When a memorandum is filed with the Council, the documentation shall include an evaluation of any measures considered to avoid or minimize the undertaking's adverse effects and a summary of the views of consulting parties, the interested public and the public.

(h) Requests for comment when consultation is terminated. Documentation shall include that specified in paragraph (f) of this section and:

(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) The planning schedule for the undertaking; and

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

#### **§ 800.12 Consultation with Indian tribes and Native Hawaiian organizations.**

(a) Objectives. Consultation shall be designed to:

(1) Provide the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification of historic properties, including associated traditional religious and cultural importance, and articulate its views on the undertaking's effects on such properties.

(2) Involve designated representatives of the Indian tribe's or Native Hawaiian organization's governing body and those traditional cultural authorities and other tribal or organizational members identified by the designated representatives.

(3) Commence early in the planning process, in order to identify relevant preservation issues and resolve concerns about the confidentiality of information on historic properties and to allow adequate time for discussion of relevant preservation issues. Upon request, the Agency Official, after consultation with the Secretary, shall withhold information about historic properties in accordance with section 304 of the Act.

(b) Undertakings on tribal lands. Consultation with Indian tribes on tribal lands requires special consideration, as set forth in this paragraph, of the sovereignty of Indian tribes over such lands. Where an Indian tribe has not assumed the responsibilities of the State Historic Preservation Officer under section 101(d)(2) of the Act, the Agency Official shall involve the Indian tribe with jurisdiction over the tribal lands as a consulting party in accordance with this subsection.

(1) Identification of historic properties. When carrying out the provisions of § 800.4, the Agency Official shall consult with the Indian tribe when determining the area of potential effects, locating historic

properties and evaluating the historic significance of identified properties. The Indian tribe shall be consulted when reaching any determination of eligibility under § 800.4(c)(2) and its timely objection to an Agency Official's determination shall require the Agency Official to obtain a determination of eligibility from the Secretary pursuant to 36 CFR part 63. The Agency Official shall provide documentation of any finding that there are no historic properties present or affected to the Indian tribe. If the Indian tribe objects within 15 days of receipt of an adequately documented finding, the Agency Official shall consider that historic properties are affected by the undertaking.

(2) Assessment of adverse effects. When carrying out the provisions of § 800.5, the Agency Official shall consult with the Indian tribe when applying the criteria of adverse effect to historic properties within the area of potential effects, making findings of avoidance of adverse effect and determining satisfactory resolution of adverse effects. The Agency Official shall provide a copy of any findings of no adverse effect or that adverse effects have been satisfactorily resolved by a standard treatment to the Indian tribe when submitting them to the State Historic Preservation Officer for review. If the Indian tribe objects to the finding within 30 days of receipt and specifies the reasons for disagreeing, the effect shall be considered adverse, provided that the Agency Official may request the Council to review the disagreement and proceed in accordance with the Council's opinion as to whether the effect is adverse.

(3) Resolution of adverse effects. When carrying out the responsibilities of § 800.6, the Agency Official shall consult with the Indian tribe along with the State Historic Preservation Officer when determining participants in the consultation and resolving adverse effects. The Indian tribe shall be a signatory to any agreement reached under § 800.6.

(4) Failure to resolve adverse effects. When an Agency Official follows the provisions of § 800.7, the Indian tribe shall have the same opportunities to terminate consultation and participate in the Council comment process as the State Historic Preservation Officer.

(c) Undertakings not on tribal lands. Where the Agency Official has identified an Indian tribe or Native Hawaiian organization that attaches religious or cultural significance to historic properties within the area of potential effects under § 800.3(e), including one that does not reside in the

vicinity of the undertaking, the Agency Official shall involve them in accordance with this paragraph.

(1) Identification of historic properties. When carrying out the provisions of § 800.4, the Agency Official shall consult with the Indian tribe or Native Hawaiian organization when determining the area of potential effects, locating historic properties that may possess religious or cultural significance and applying the National Register Criteria to such properties when identified.

(2) Assessment of adverse effects. When carrying out the provisions of § 800.5, the Agency Official shall consult with the Indian tribe or Native Hawaiian organization when applying the criteria of adverse effect to historic properties that may possess religious or cultural significance within the area of potential effects, making findings of avoidance of adverse effect to such properties and determining satisfactory treatment of adverse effects to such properties.

(3) Resolution of adverse effects. When carrying out the responsibilities of § 800.6, the Agency Official shall consult with the Indian tribe or Native Hawaiian organization when determining Council involvement and resolving adverse effects with or without the Council. The governing body of the Indian tribe or Native Hawaiian organization shall be invited to concur in any Memorandum of Agreement reached when it concerns properties that possess religious or cultural significance.

(4) Failure to resolve adverse effects. When the Agency Official follows the provisions of § 800.7, the Indian tribe or Native Hawaiian organization shall have the same opportunities to provide views and receive information in the Council comment process as the State Historic Preservation Officer.

(d) Emergency situations and post-review discoveries. (1) Tribal lands. When an agency complies with the provisions of § 800.13 or § 800.14 for an undertaking on tribal lands, the Indian tribe shall have the same opportunities to participate as the State Historic Preservation Officer. The Agency Official shall also coordinate requirements under § 800.13 or § 800.14 with any applicable actions taken to meet the requirements of the Native American Graves Protection and Repatriation Act.

(2) Non-tribal lands. Where the Agency Official has identified an Indian tribe or Native Hawaiian organization that attaches religious or cultural significance to historic properties within the area of potential effects

under § 800.3(e) and subsequently complies with the provisions of § 800.13 or § 800.14, the Agency Official shall consult with them in carrying out the provisions of those sections.

#### § 800.13 Emergency situations.

(a) Agency procedures. The Agency Official, in consultation with the appropriate State Historic Preservation Officer or Officers 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, the Agency Official 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 800.7.

(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, the Agency Official or the governor of a State, and the agency has not developed procedures pursuant to § 800.13(a), the Agency Official may comply with section 106 of the Act by:

(1) Following a programmatic agreement developed pursuant to § 800.15(b) that contains specific provisions for dealing with historic properties in emergency situations; or

(2) Notifying the Council and the appropriate State Historic Preservation Officer 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 and the State Historic Preservation Officer and invite any comments.

(c) Local governments responsible for Section 106 compliance. When a local government is statutorily delegated responsibility for Section 106 compliance, § 800.13 (a) and (b) 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 State Historic Preservation Officer objects within seven days, the Agency Official shall comply with §§ 800.3 through 800.7.

(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 of the Act and this subpart.

#### § 800.14 Post-review discoveries.

(a) Planning for discoveries. 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, the Agency Official shall include in any finding of no adverse effect, standard treatment of potential adverse effects 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 of the Act and this subpart.

(b) Unplanned for discoveries. 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 § 800.14(a), the Agency Official shall make reasonable efforts to avoid or minimize adverse effects to such properties and:

(1) If the Agency Official has not approved the undertaking, consult to resolve adverse effects pursuant to § 800.6;

(2) If the Agency Official determines in consultation with the State Historic Preservation Officer that the affected property is significant solely for its scientific, prehistoric, historic or archeological data, comply with the Archeological and Historic Preservation Act, 16 U.S.C. 469 (a)–(c) instead of the procedures in this part, provided that the Agency Official shall consult with the State Historic Preservation Officer on the actions proposed and provide the Council with a report on the actions after they are completed; or

(3) If the Agency Official has approved the undertaking, the Agency Official shall:

(i) Determine actions that the Agency Official can take to resolve adverse effects;

(ii) Notify the State Historic Preservation Officer and the Council within 48 hours of the discovery;

(iii) Describe the actions proposed to resolve the adverse effects;

(iv) Take into account any recommendations provided by the Council and the State Historic Preservation Officer within 48 hours of the notification.

(v) Carry out appropriate actions; and

(vi) Provide the Council, the State Historic Preservation Officer and the interested public a report of the actions when completed.

(c) Eligibility of properties. When a newly discovered historic property has not previously been included in or determined eligible for the National Register, the Agency Official, in consultation with the State Historic Preservation officer, may assume the property to be eligible for purposes of section 106 of the Act.

### Subpart C—Program Alternatives

#### § 800.15 Federal agency program alternatives.

(a) Alternate procedures. A Federal agency may develop procedures to implement Section 106 and substitute them for the comparable provisions of subpart B if they are found consistent with the Council's regulations in accordance with section 110(a)(2)(E) of the Act.

(1) Development of procedures. The Federal agency shall consult with the Council in the development of alternate procedures and publish notice of the availability of proposed alternate procedures in the Federal Register.

(2) Council review. The Federal agency shall submit the final alternate procedure to the Council for review.

(i) If the Council finds the regulations to be consistent with this part, it shall notify the Federal agency and the Federal agency may adopt them as alternate procedures.

(ii) If the Council does not find the procedures consistent, the Council shall request the Secretary to make a final determination as to consistency. If the Secretary determines the procedures to be consistent, the Federal agency may adopt them as alternate procedures.

(3) Notice. The Federal agency shall publish notice of final alternate procedures in the Federal Register.

(4) Legal effect. Alternate procedures adopted pursuant to this section substitute for the Council's regulations for the purposes of the agency's compliance with section 106 of the Act, except that, where an Indian tribe has entered into an agreement with the Council to substitute tribal historic preservation regulations for the Council's procedures, the agency shall follow those regulations in lieu of the agency's procedures regarding undertakings on tribal lands.

(b) Programmatic Agreements. The Council and the Agency Official may negotiate a Programmatic Agreement to govern the implementation of a particular program or certain complex project situations that justify departure from the normal Section 106 process.

(1) Programmatic Agreements for agency programs. (i) The consultation shall involve State Historic Preservation Officers or the National Conference of State Historic Preservation Officers, Indian tribes and Native Hawaiian organizations, other Federal agencies, and other members of the interested public, as appropriate.

(ii) The Agency Official shall arrange for public participation appropriate to the subject matter and the scope of the program.

(iii) The Programmatic Agreement shall take effect when executed by the Council and the Agency Official. The President of the National Conference of State Historic Preservation Officers shall be invited to sign any agreement when the Conference has participated in the consultation developing it. Compliance with the procedures established by an approved Programmatic Agreement satisfies the agency's Section 106 responsibilities for all individual undertakings covered by the agreement until it expires or is terminated by the agency or the Council.

(iv) The Agency Official shall publish notice of an approved Programmatic Agreement in the Federal Register and make any agency procedures implementing the agreement readily available to the Council, State Historic Preservation Officers, 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 with regard to individual undertakings covered by the agreement.

(2) Programmatic Agreements for complex or multiple undertakings. (i) A Programmatic Agreement is a Memorandum of Agreement that establishes a process for dealing with the potential adverse effects of complex projects or multiple undertakings carried out over an extended period of time. A Programmatic Agreement shall be used:

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

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

(C) When nonfederal parties are delegated major decisionmaking responsibilities; or

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

(ii) Such a Programmatic Agreement shall be developed in the same manner as other Memoranda of Agreement under § 800.6, provided that 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.

(c) Exempted categories. (1) Criteria for establishing. An Agency Official may propose a program or category of agency undertakings that may be exempted from review under the provisions of subpart B, 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 § 800.17;

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

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

(2) Council review of proposed exemptions. The Council shall review a request for an exemption that is supported by documentation describing the program or category for which the exemption is sought and demonstrating that the criteria of § 800.15(c)(1) have been met. Unless it requests further information, the Council shall approve or reject the proposed exemption within 30 days of receipt. The Council decision shall be based on whether the exemption is consistent 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.

(3) Legal consequences. Any undertaking that falls within the exempted program or category approved by the Council shall require no further review pursuant to subpart B, 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.

(d) Standard treatments. (1) Establishment. The Council may establish standard methods for the treatment of a category of historic properties or a category of effects on historic properties to satisfy the requirements of subpart B of this part. The Council shall specify such treatments, conditions for their application and any procedural modifications attendant to their use in a notice published in the Federal Register.

(2) Legal consequence. An Agency Official may elect to follow a standard treatment to meet Section 106

responsibilities for a qualifying undertaking in accordance with § 800.5.

(e) Program comments. An Agency Official may request the Council to comment on a category of routine or repetitive undertakings in lieu of conducting individual reviews under §§ 800.4 through 800.7. 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 and the time period for which the comment is requested. Unless the Council requests additional documentation or notifies the Agency Official that it will decline to comment, the Council shall comment to the Agency Official within 45 days of the request. The Agency Official shall take into account the comments of the Council in carrying out the undertakings within the category and provide appropriate notice of the Council's comments and the Agency Official's action in response. If the Council objects to the proposed treatment or declines to comment, the Agency Official shall continue to comply with the requirements of §§ 800.4 through 800.7 for the individual undertakings. The Council may provide program comments at its own initiative.

**§ 800.16 State, Tribal and Local Program Alternatives. (Reserved)**

**§ 800.17 Definitions.**

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

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

*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 or rehearing procedure.

*Area of potential effects* means the geographic area or areas within which an undertaking could cause adverse effects on historic properties.

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

*Consultation* means the process of seeking and considering the views of other participants in a manner appropriate to the particular participants and the specific steps in the Section 106 process.

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

*Effect* means alteration to the characteristics of a historic property that qualified it for inclusion in or eligibility for the National Register.

*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 been delegated responsibility for Section 106 compliance, the head of that unit of government shall be considered the head of the agency.

*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 that meet the National Register criteria. 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.

*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.

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

*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.

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

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

*National Register Criteria* means the criteria established by the Secretary of the Interior for use in evaluating the

eligibility of properties for the National Register (36 CFR part 60).

*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. "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.

*Programmatic Agreement* means a document that records the terms and conditions agreed upon to resolve the potential adverse effects of a Federal agency program or other situations in accordance with § 800.15.

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

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

*Traditional cultural authority* means an individual or a group of individuals in an Indian tribe, Native Hawaiian organization, or other social or ethnic group who is recognized by members of the group as knowledgeable in the group's traditional history, cultural practices and living human values.

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

*Tribal Preservation Officer* means the tribal official appointed by the tribe's chief governing authority or as designated by a tribal ordinance or preservation program as provided for and approved under the provisions of section 101 of the Act.

*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 financed in whole or in part with Federal financial assistance; those requiring a Federal permit, license or approval; and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

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