

## Library of Congress

## § 705.8

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(b) Compilations shall be organized, to the greatest extent possible, in chronological order, and shall include the entirety of any particular news segment.

(c) No compilation by the Librarian shall be deemed for any purpose or proceeding to be an official determination of the subject matter covered by such compilation.

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(a) Library staff acting under the general authority of the Librarian of Congress may distribute a reproduction of a transmission program or a compilation of transmission programs made under this part, by loan to a researcher, provided that the researcher indicates the particular segments of the news broadcasts or compilations that he or she wishes to review, on the basis of an index or other finding aid prepared by the Librarian; and for deposit in a library or archives which meets the requirements of section 108(a) of title 17 of the United States Code.

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### § 705.8 Agreements modifying the terms of this part.

(a) The Library of Congress may, at its sole discretion, enter into an agreement whereby the provision of copies or phonorecords of transmission programs of regularly scheduled newscasts or on-the-spot coverage of news events on terms different from those contained in this part is authorized.

(b) Any such agreement may be terminated without notice by the Library of Congress.

## PARTS 706-799 [RESERVED]



## CHAPTER VIII—ADVISORY COUNCIL ON HISTORIC PRESERVATION

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## PART 800—PROTECTION OF HISTORIC PROPERTIES

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### Subpart A—Purposes and Participants

#### § 800.1 Purposes.

(a) *Purposes of the section 106 process.* Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings. The procedures in this part define how Federal agencies meet these statutory responsibilities. The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning.

The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.

(b) *Relation to other provisions of the act.* Section 106 is related to other provisions of the act designed to further the national policy of historic preservation. References to those provisions are included in this part to identify circumstances where they may affect actions taken to meet section 106 requirements. Such provisions may have their own implementing regulations or guidelines and are not intended to be implemented by the procedures in this part except insofar as they relate to the section 106 process. Guidelines, policies, and procedures issued by other agencies, including the Secretary, have been cited in this part for ease of access and are not incorporated by reference.

(c) *Timing.* The agency official must complete the section 106 process “prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license.” This does not prohibit agency official from conducting or authorizing non-destructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking’s adverse effects on historic properties. The agency official shall ensure that the section 106 process is initiated early in the undertaking’s planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.

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

(a) *Agency official.* It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part. The agency official has approval authority for the undertaking and can commit the Federal agency to take appropriate action

for a specific undertaking as a result of section 106 compliance. For the purposes of subpart C of this part, the agency official has the authority to commit the Federal agency to any obligation it may assume in the implementation of a program alternative. The agency official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law.

(1) *Professional standards.* Section 112(a)(1)(A) of the act requires each Federal agency responsible for the protection of historic resources, including archeological resources, to ensure that all actions taken by employees or contractors of the agency shall meet professional standards under regulations developed by the Secretary.

(2) *Lead Federal agency.* If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under section 106. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part.

(3) *Use of contractors.* Consistent with applicable conflict of interest laws, the agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines.

(4) *Consultation.* The agency official shall involve the consulting parties described in paragraph (c) of this section in findings and determinations made during the section 106 process. The agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes, as applicable, such as the National Environmental Policy Act, the Native American Graves Protection and Re-

atriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation. The Council encourages the agency official to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part.

(b) *Council.* The Council issues regulations to implement section 106, provides guidance and advice on the application of the procedures in this part, and generally oversees the operation of the section 106 process. The Council also consults with and comments to agency officials on individual undertakings and programs that affect historic properties.

(1) *Council entry into the section 106 process.* When the Council determines that its involvement is necessary to ensure that the purposes of section 106 and the act are met, the Council may enter the section 106 process. Criteria guiding Council decisions to enter the section 106 process are found in appendix A to this part. The Council will document that the criteria have been met and notify the parties to the section 106 process as required by this part.

(2) *Council assistance.* Participants in the section 106 process may seek advice, guidance and assistance from the Council on the application of this part to specific undertakings, including the resolution of disagreements, whether or not the Council is formally involved in the review of the undertaking. If questions arise regarding the conduct of the section 106 process, participants are encouraged to obtain the Council's advice on completing the process.

(c) *Consulting parties.* The following parties have consultative roles in the section 106 process.

(1) *State historic preservation officer.* (i) The State historic preservation officer (SHPO) reflects the interests of the State and its citizens in the preservation of their cultural heritage. In accordance with section 101(b)(3) of the act, the SHPO advises and assists Federal agencies in carrying out their section 106 responsibilities and cooperates with such agencies, local governments and organizations and individuals to

ensure that historic properties are taking into consideration at all levels of planning and development.

(ii) If an Indian tribe has assumed the functions of the SHPO in the section 106 process for undertakings on tribal lands, the SHPO shall participate as a consulting party if the undertaking takes place on tribal lands but affects historic properties off tribal lands, if requested in accordance with § 800.3(c)(1), or if the Indian tribe agrees to include the SHPO pursuant to § 800.3(f)(3).

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

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

(ii) *Consultation on historic properties of significance to Indian tribes and Native Hawaiian organizations.* Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native

Hawaiian organization shall be a consulting party.

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

(B) The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. Nothing in this part alters, amends, repeals, interprets, or modifies tribal sovereignty, any treaty rights, or other rights of an Indian tribe, or preempts, modifies, or limits the exercise of any such rights.

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

(D) When Indian tribes and Native Hawaiian organizations attach religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the act requires Federal agencies to consult with such Indian

tribes and Native Hawaiian organizations in the section 106 process. Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes and Native Hawaiian organizations and should consider that when complying with the procedures in this part.

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

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

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

(4) *Applicants for Federal assistance, permits, licenses, and other approvals.* An applicant for Federal assistance or for a Federal permit, license, or other approval is entitled to participate as a consulting party as defined in this part. The agency official may authorize an applicant or group of applicants to initiate consultation with the SHPO/THPO and others, but remains legally responsible for all findings and deter-

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

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

(d) *The public*—(1) *Nature of involvement.* The views of the public are essential to informed Federal decision-making in the section 106 process. The agency official shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking.

(2) *Providing notice and information.* The agency official must, except where appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking and its effects on historic properties and seek public comment and input. Members of the public may also provide views on their own initiative for the agency official to consider in decisionmaking.

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



**Subpart B—The section 106 Process****§ 800.3 Initiation of the section 106 process.**

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

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

(2) *Program alternatives.* If the review of the undertaking is governed by a Federal agency program alternative established under § 800.14 or a programmatic agreement in existence before January 11, 2001, the agency official shall follow the program alternative.

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

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

initiate consultation with the appropriate officer or officers.

(1) *Tribal assumption of SHPO responsibilities.* Where an Indian tribe has assumed the section 106 responsibilities of the SHPO on tribal lands pursuant to section 101(d)(2) of the act, consultation for undertakings occurring on tribal land or for effects on tribal land is with the THPO for the Indian tribe in lieu of the SHPO. Section 101(d)(2)(D)(iii) of the act authorizes owners of properties on tribal lands which are neither owned by a member of the tribe nor held in trust by the Secretary for the benefit of the tribe to request the SHPO to participate in the section 106 process in addition to the THPO.

(2) *Undertakings involving more than one State.* If more than one State is involved in an undertaking, the involved SHPOs may agree to designate a lead SHPO to act on their behalf in the section 106 process, including taking actions that would conclude the section 106 process under this subpart.

(3) *Conducting consultation.* The agency official should consult with the SHPO/THPO in a manner appropriate to the agency planning process for the undertaking and to the nature of the undertaking and its effects on historic properties.

(4) *Failure of the SHPO/THPO to respond.* If the SHPO/THPO fails to respond within 30 days of receipt of a request for review of a finding or determination, the agency official may either proceed to the next step in the process based on the finding or determination or consult with the Council in lieu of the SHPO/THPO. If the SHPO/THPO re-enters the Section 106 process, the agency official shall continue the consultation without being required to reconsider previous findings or determinations.

(d) *Consultation on tribal lands.* Where the Indian tribe has not assumed the responsibilities of the SHPO on tribal lands, consultation with the Indian tribe regarding undertakings occurring on such tribe's lands or effects on such tribal lands shall be in addition to and on the same basis as consultation with the SHPO. If the SHPO has withdrawn from the process, the agency official may complete the section 106 process

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with the Indian tribe and the Council, as appropriate. An Indian tribe may enter into an agreement with a SHPO or SHPOs specifying the SHPO's participation in the section 106 process for undertakings occurring on or affecting historic properties on tribal lands.

(e) *Plan to involve the public.* In consultation with the SHPO/THPO, the agency official shall plan for involving the public in the section 106 process. The agency official shall identify the appropriate points for seeking public input and for notifying the public of proposed actions, consistent with § 800.2(d).

(f) *Identify other consulting parties.* In consultation with the SHPO/THPO, the agency official shall identify any other parties entitled to be consulting parties and invite them to participate as such in the section 106 process. The agency official may invite others to participate as consulting parties as the section 106 process moves forward.

(1) *Involving local governments and applicants.* The agency official shall invite any local governments or applicants that are entitled to be consulting parties under § 800.2(c).

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

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

(g) *Expediting consultation.* A consultation by the agency official with the SHPO/THPO and other consulting parties may address multiple steps in §§ 800.3 through 800.6 where the agency official and the SHPO/THPO agree it is

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appropriate as long as the consulting parties and the public have an adequate opportunity to express their views as provided in § 800.2(d).

### § 800.4 Identification of historic properties.

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

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

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

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

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

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

(1) *Level of effort.* The agency official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation,

oral history interviews, sample field investigation, and field survey. The agency official shall take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects. The Secretary's standards and guidelines for identification provide guidance on this subject. The agency official should also consider other applicable professional, State, tribal, and local laws, standards, and guidelines. The agency official shall take into account any confidentiality concerns raised by Indian tribes or Native Hawaiian organizations during the identification process.

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

(c) *Evaluate historic significance*—(1) *Apply National Register criteria.* In consultation with the SHPO/THPO and

any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified properties and guided by the Secretary's standards and guidelines for evaluation, the agency official shall apply the National Register criteria (36 CFR part 63) to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility. The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible. The agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.

(2) *Determine whether a property is eligible.* If the agency official determines any of the National Register criteria are met and the SHPO/THPO agrees, the property shall be considered eligible for the National Register for section 106 purposes. If the agency official determines the criteria are not met and the SHPO/THPO agrees, the property shall be considered not eligible. If the agency official and the SHPO/THPO do not agree, or if the Council or the Secretary so request, the agency official shall obtain a determination of eligibility from the Secretary pursuant to 36 CFR part 63. If an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to a property off tribal lands does not agree, it may ask the Council to request the agency official to obtain a determination of eligibility.

(d) *Results of identification and evaluation*—(1) *No historic properties affected.* If the agency official finds that either there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them as defined in § 800.16(i), the agency official shall provide documentation of this finding, as set forth in § 800.11(d), to the SHPO/THPO. The agency official shall notify all consulting parties, including Indian tribes and Native Hawaiian organizations, and make the documentation available

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for public inspection prior to approving the undertaking.

(i) If the SHPO/THPO, or the Council if it has entered the section 106 process, does not object within 30 days of receipt of an adequately documented finding, the agency official's responsibilities under section 106 are fulfilled.

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

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

(iv) (A) Upon receipt of the request under paragraph (d)(1)(ii) of this section, the Council will have 30 days in which to review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with the Council's opinion regarding the finding. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. If the Council does not respond within 30 days of receipt of the request, the agency official's responsibilities under section 106 are fulfilled.

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

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

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

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

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

### § 800.5 Assessment of adverse effects.

(a) *Apply criteria of adverse effect.* In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified historic properties, the agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects. The agency official shall consider any views concerning such effects which have been provided by consulting parties and the public.

(1) *Criteria of adverse effect.* An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a

historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

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

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

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

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

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

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

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

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

(3) *Phased application of criteria.* Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a

phased process in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to § 800.4(b)(2).

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

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

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

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

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

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

(3) *Council review of findings.* (i) When a finding is submitted to the Council pursuant to paragraph (c)(2)(i) of this section, the Council shall review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with its opinion as to whether the adverse effect criteria have been correctly applied. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The Council will provide its opinion within 15 days of receiving the documented finding from the agency official. The Council at its discretion may extend that time period for 15 days, in which case it shall notify the agency of such extension prior to the end of the initial 15 day period. If the Council does not respond within the applicable time period, the agency official's responsibilities under section 106 are fulfilled.

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

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall prepare a summary of the decision that

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

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

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

(2) *Adverse effect.* If an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to §800.6.

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

#### § 800.6 Resolution of adverse effects.

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

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

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

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

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

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

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

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

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

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

(3) *Provide documentation.* The agency official shall provide to all consulting parties the documentation specified in § 800.11(e), subject to the confidentiality provisions of § 800.11(c), and such other documentation as may be devel-

oped during the consultation to resolve adverse effects.

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

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

(b) *Resolve adverse effects—(1) Resolution without the Council.* (i) The agency official shall consult with the SHPO/THPO and other consulting parties to seek ways to avoid, minimize or mitigate the adverse effects.

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

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

(iv) If the agency official and the SHPO/THPO agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement. The agency official must submit a copy of

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the executed memorandum of agreement, along with the documentation specified in § 800.11(f), to the Council prior to approving the undertaking in order to meet the requirements of section 106 and this subpart.

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

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

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

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

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

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

(iii) The agency official and the Council are signatories to a memo-

randum of agreement executed pursuant to § 800.7(a)(2).

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

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

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

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

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

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

(5) *Duration.* A memorandum of agreement shall include provisions for termination and for reconsideration of terms if the undertaking has not been implemented within a specified time.

(6) *Discoveries.* Where the signatories agree it is appropriate, a memorandum of agreement shall include provisions to deal with the subsequent discovery or identification of additional historic properties affected by the undertaking.

(7) *Amendments.* The signatories to a memorandum of agreement may amend it. If the Council was not a signatory



to the original agreement and the signatories execute an amended agreement, the agency official shall file it with the Council.

(8) *Termination.* If any signatory determines that the terms of a memorandum of agreement cannot be or are not being carried out, the signatories shall consult to seek amendment of the agreement. If the agreement is not amended, any signatory may terminate it. The agency official shall either execute a memorandum of agreement with signatories under paragraph (c)(1) of this section or request the comments of the Council under § 800.7(a).

(9) *Copies.* The agency official shall provide each consulting party with a copy of any memorandum of agreement executed pursuant to this subpart.

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

(a) *Termination of consultation.* After consulting to resolve adverse effects pursuant to § 800.6(b)(2), the agency official, the SHPO/THPO, or the Council may determine that further consultation will not be productive and terminate consultation. Any party that terminates consultation shall notify the other consulting parties and provide them the reasons for terminating in writing.

(1) If the agency official terminates consultation, the head of the agency or an Assistant Secretary or other officer with major department-wide or agency-wide responsibilities shall request that the Council comment pursuant to paragraph (c) of this section and shall notify all consulting parties of the request.

(2) If the SHPO terminates consultation, the agency official and the Council may execute a memorandum of agreement without the SHPO's involvement.

(3) If a THPO terminates consultation regarding an undertaking occurring on or affecting historic properties on its tribal lands, the Council shall comment pursuant to paragraph (c) of this section.

(4) If the Council terminates consultation, the Council shall notify the agency official, the agency's Federal preservation officer and all consulting parties of the termination and com-

ment under paragraph (c) of this section. The Council may consult with the agency's Federal preservation officer prior to terminating consultation to seek to resolve issues concerning the undertaking and its effects on historic properties.

(b) *Comments without termination.* The Council may determine that it is appropriate to provide additional advisory comments upon an undertaking for which a memorandum of agreement will be executed. The Council shall provide them to the agency official when it executes the memorandum of agreement.

(c) *Comments by the Council—(1) Preparation.* The Council shall provide an opportunity for the agency official, all consulting parties, and the public to provide their views within the time frame for developing its comments. Upon request of the Council, the agency official shall provide additional existing information concerning the undertaking and assist the Council in arranging an onsite inspection and an opportunity for public participation.

(2) *Timing.* The Council shall transmit its comments within 45 days of receipt of a request under paragraph (a)(1) or (a)(3) of this section or § 800.8(c)(3), or termination by the Council under § 800.6(b)(1)(v) or paragraph (a)(4) of this section, unless otherwise agreed to by the agency official.

(3) *Transmittal.* The Council shall provide its comments to the head of the agency requesting comment with copies to the agency official, the agency's Federal preservation officer, all consulting parties, and others as appropriate.

(4) *Response to Council comment.* The head of the agency shall take into account the Council's comments in reaching a final decision on the undertaking. Section 110(1) of the act directs that the head of the agency shall document this decision and may not delegate his or her responsibilities pursuant to section 106. Documenting the agency head's decision shall include:

(i) Preparing a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's comments and providing it to the Council prior to approval of the undertaking;

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(ii) Providing a copy of the summary to all consulting parties; and

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

### § 800.8 Coordination With the National Environmental Policy Act.

(a) *General principles*—(1) *Early coordination.* Federal agencies are encouraged to coordinate compliance with section 106 and the procedures in this part with any steps taken to meet the requirements of the National Environmental Policy Act (NEPA). Agencies should consider their section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner. The determination of whether an undertaking is a “major Federal action significantly affecting the quality of the human environment,” and therefore requires preparation of an environmental impact statement (EIS) under NEPA, should include consideration of the undertaking’s likely effects on historic properties. A finding of adverse effect on a historic property does not necessarily require an EIS under NEPA.

(2) *Consulting party roles.* SHPO/THPOs, Indian tribes, and Native Hawaiian organizations, other consulting parties, and organizations and individuals who may be concerned with the possible effects of an agency action on historic properties should be prepared to consult with agencies early in the NEPA process, when the purpose of and need for the proposed action as well as the widest possible range of alternatives are under consideration.

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

(b) *Actions categorically excluded under NEPA.* If a project, activity or program is categorically excluded from NEPA

review under an agency’s NEPA procedures, the agency official shall determine if it still qualifies as an undertaking requiring review under section 106 pursuant to § 800.3(a). If so, the agency official shall proceed with section 106 review in accordance with the procedures in this subpart.

(c) *Use of the NEPA process for section 106 purposes.* An agency official may use the process and documentation required for the preparation of an EA/FONSI or an EIS/ROD to comply with section 106 in lieu of the procedures set forth in §§ 800.3 through 800.6 if the agency official has notified in advance the SHPO/THPO and the Council that it intends to do so and the following standards are met.

(1) *Standards for developing environmental documents to comply with Section 106.* During preparation of the EA or draft EIS (DEIS) the agency official shall:

(i) Identify consulting parties either pursuant to § 800.3(f) or through the NEPA scoping process with results consistent with § 800.3(f);

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

(iii) Consult regarding the effects of the undertaking on historic properties with the SHPO/THPO, Indian tribes, and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, other consulting parties, and the Council, where appropriate, during NEPA scoping, environmental analysis, and the preparation of NEPA documents;

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

(2) *Review of environmental documents.*

(i) The agency official shall submit the EA, DEIS, or EIS to the SHPO/THPO, Indian tribes, and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, and other consulting parties prior to or when making the document available for public comment. If the document being prepared is a DEIS or EIS, the agency official shall also submit it to the Council.

(ii) Prior to or within the time allowed for public comment on the document, a SHPO/THPO, an Indian tribe or Native Hawaiian organization, another consulting party or the Council may object to the agency official that preparation of the EA, DEIS, or EIS has not met the standards set forth in paragraph (c)(1) of this section or that the substantive resolution of the effects on historic properties proposed in an EA, DEIS, or EIS is inadequate. If the agency official receives such an objection, the agency official shall refer the matter to the Council.

(3) *Resolution of objections.* Within 30 days of the agency official's referral of an objection under paragraph (c)(2)(ii) of this section, the Council shall review the objection and notify the agency as to its opinion on the objection.

(i) If the Council agrees with the objection:

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

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council. The head of the agency may delegate his or her duties under this paragraph to the agency's senior Pol-

icy Official. If the agency official's initial decision regarding the matter that is the subject of the objection will be revised, the agency official shall proceed in accordance with the revised decision. If the final decision of the agency is to affirm the initial agency decision, once the summary of the final decision has been sent to the Council, the agency official shall continue its compliance with this section.

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

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

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

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

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

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

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

(5) *Modification of the undertaking.* If the undertaking is modified after approval of the FONSI or the ROD in a manner that changes the undertaking or alters its effects on historic properties, or if the agency official fails to ensure that the measures to avoid, minimize or mitigate adverse effects (as specified in either the FONSI or the ROD, or in the binding commitment adopted pursuant to paragraph (c)(4) of this section) are carried out, the agency official shall notify the Council and all consulting parties that supplemental environmental documents will be prepared in compliance with NEPA or that the procedures in §§800.3

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through 800.6 will be followed as necessary.

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

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

(a) *Assessment of agency official compliance for individual undertakings.* The Council may provide to the agency official its advisory opinion regarding the substance of any finding, determination or decision or regarding the adequacy of the agency official's compliance with the procedures under this part. The Council may provide such advice at any time at the request of any individual, agency or organization or on its own initiative. The agency official shall consider the views of the Council in reaching a decision on the matter in question.

(b) *Agency foreclosure of the Council's opportunity to comment.* Where an agency official has failed to complete the requirements of section 106 in accordance with the procedures in this part prior to the approval of an undertaking, the Council's opportunity to comment may be foreclosed. The Council may review a case to determine whether a foreclosure has occurred. The Council shall notify the agency official and the agency's Federal preservation officer and allow 30 days for the agency official to provide information as to whether foreclosure has occurred. If the Council determines foreclosure has occurred, the Council shall transmit the determination to the agency official and the head of the agency. The Council shall also make the determination available to the public and any parties known to be interested in the undertaking and its effects upon historic properties.

(c) *Intentional adverse effects by applicants—(1) Agency responsibility.* Section 110(k) of the act prohibits a Federal agency from granting a loan, loan guarantee, permit, license or other assistance to an applicant who, with intent to avoid the requirements of section 106, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed such significant adverse effect to occur, unless the agency, after con-

sultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. Guidance issued by the Secretary pursuant to section 110 of the act governs its implementation.

(2) *Consultation with the Council.* When an agency official determines, based on the actions of an applicant, that section 110(k) is applicable and that circumstances may justify granting the assistance, the agency official shall notify the Council and provide documentation specifying the circumstances under which the adverse effects to the historic property occurred and the degree of damage to the integrity of the property. This documentation shall include any views obtained from the applicant, SHPO/THPO, an Indian tribe if the undertaking occurs on or affects historic properties on tribal lands, and other parties known to be interested in the undertaking.

(i) Within thirty days of receiving the agency official's notification, unless otherwise agreed to by the agency official, the Council shall provide the agency official with its opinion as to whether circumstances justify granting assistance to the applicant and any possible mitigation of the adverse effects.

(ii) The agency official shall consider the Council's opinion in making a decision on whether to grant assistance to the applicant, and shall notify the Council, the SHPO/THPO, and other parties known to be interested in the undertaking prior to granting the assistance.

(3) *Compliance with Section 106.* If an agency official, after consulting with the Council, determines to grant the assistance, the agency official shall comply with §§ 800.3 through 800.6 to take into account the effects of the undertaking on any historic properties.

(d) *Evaluation of Section 106 operations.* The Council may evaluate the operation of the section 106 process by periodic reviews of how participants have fulfilled their legal responsibilities and how effectively the outcomes reached advance the purposes of the act.

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(1) *Information from participants.* Section 203 of the act authorizes the Council to obtain information from Federal agencies necessary to conduct evaluation of the section 106 process. The agency official shall make documentation of agency policies, operating procedures and actions taken to comply with section 106 available to the Council upon request. The Council may request available information and documentation from other participants in the section 106 process.

(2) *Improving the operation of section 106.* Based upon any evaluation of the section 106 process, the Council may make recommendations to participants, the heads of Federal agencies, and the Secretary of actions to improve the efficiency and effectiveness of the process. Where the Council determines that an agency official or a SHPO/THPO has failed to properly carry out the responsibilities assigned under the process in this part, the Council may participate in individual case reviews conducted under such process in addition to the SHPO/THPO for such period that it determines is necessary to improve performance or correct deficiencies. If the Council finds a pattern of failure by a Federal agency in carrying out its responsibilities under section 106, the Council may review the policies and programs of the agency related to historic preservation pursuant to section 202(a)(6) of the act and recommend methods to improve the effectiveness, coordination, and consistency of those policies and programs with section 106.

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

(a) *Statutory requirement.* Section 110(f) of the act requires that the agency official, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic Landmark that may be directly and adversely affected by an undertaking. When commenting on such undertakings, the Council shall use the process set forth in §§800.6 through 800.7 and give special consideration to protecting National Historic Landmarks as specified in this section.

(b) *Resolution of adverse effects.* The agency official shall request the Council to participate in any consultation to resolve adverse effects on National Historic Landmarks conducted under §800.6.

(c) *Involvement of the Secretary.* The agency official shall notify the Secretary of any consultation involving a National Historic Landmark and invite the Secretary to participate in the consultation where there may be an adverse effect. The Council may request a report from the Secretary under section 213 of the act to assist in the consultation.

(d) *Report of outcome.* When the Council participates in consultation under this section, it shall report the outcome of the section 106 process, providing its written comments or any memoranda of agreement to which it is a signatory, to the Secretary and the head of the agency responsible for the undertaking.

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

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

(b) *Format.* The agency official may use documentation prepared to comply

with other laws to fulfill the requirements of the procedures in this subpart, if that documentation meets the standards of this section.

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

(2) *Consultation with the Council*. When the information in question has been developed in the course of an agency's compliance with this part, the Secretary shall consult with the Council in reaching determinations on the withholding and release of information. The Federal agency shall provide the Council with available information, including views of the SHPO/THPO, Indian tribes and Native Hawaiian organizations, related to the confidentiality concern. The Council shall advise the Secretary and the Federal agency within 30 days of receipt of adequate documentation.

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

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

(1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, includ-

ing photographs, maps, drawings, as necessary;

(2) A description of the steps taken to identify historic properties, including, as appropriate, efforts to seek information pursuant to § 800.4(b); and

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

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

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

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

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

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

(5) An explanation of why the criteria of adverse effect were found applicable or inapplicable, including any conditions or future actions to avoid, minimize or mitigate adverse effects; and

(6) Copies or summaries of any views provided by consulting parties and the public.

(f) *Memorandum of agreement*. When a memorandum of agreement is filed with the Council, the documentation shall include, any substantive revisions or additions to the documentation provided the Council pursuant to § 800.6(a)(1), an evaluation of any measures considered to avoid or minimize the undertaking's adverse effects and a summary of the views of consulting parties and the public.

(g) *Requests for comment without a memorandum of agreement*. Documentation shall include:

(1) A description and evaluation of any alternatives or mitigation measures that the agency official proposes to resolve the undertaking's adverse effects;

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

(3) Copies or summaries of any views submitted to the agency official concerning the adverse effects of the undertaking on historic properties and alternatives to reduce or avoid those effects; and

(4) Any substantive revisions or additions to the documentation provided the Council pursuant to § 800.6(a)(1).

#### § 800.12 Emergency situations.

(a) *Agency procedures.* The agency official, in consultation with the appropriate SHPOs/THPOs, affected Indian tribes and Native Hawaiian organizations, and the Council, is encouraged to develop procedures for taking historic properties into account during operations which respond to a disaster or emergency declared by the President, a tribal government, or the Governor of a State or which respond to other immediate threats to life or property. If approved by the Council, the procedures shall govern the agency's historic preservation responsibilities during any disaster or emergency in lieu of §§ 800.3 through 800.6.

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

(1) Following a programmatic agreement developed pursuant to § 800.14(b) that contains specific provisions for dealing with historic properties in emergency situations; or

(2) Notifying the Council, the appropriate SHPO/THPO and any Indian tribe or Native Hawaiian organization that may attach religious and cultural significance to historic properties likely to be affected prior to the undertaking and affording them an opportunity to comment within seven days of notification. If the agency official determines that circumstances do not permit seven days for comment, the agency official shall notify the Council, the SHPO/THPO and the Indian tribe or Native Hawaiian organization

and invite any comments within the time available.

(c) *Local governments responsible for section 106 compliance.* When a local government official serves as the agency official for section 106 compliance, paragraphs (a) and (b) of this section also apply to an imminent threat to public health or safety as a result of a natural disaster or emergency declared by a local government's chief executive officer or legislative body, provided that if the Council or SHPO/THPO objects to the proposed action within seven days, the agency official shall comply with §§ 800.3 through 800.6.

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

#### § 800.13 Post-review discoveries.

(a) *Planning for subsequent discoveries—(1) Using a programmatic agreement.* An agency official may develop a programmatic agreement pursuant to § 800.14(b) to govern the actions to be taken when historic properties are discovered during the implementation of an undertaking.

(2) *Using agreement documents.* When the agency official's identification efforts in accordance with § 800.4 indicate that historic properties are likely to be discovered during implementation of an undertaking and no programmatic agreement has been developed pursuant to paragraph (a)(1) of this section, the agency official shall include in any finding of no adverse effect or memorandum of agreement a process to resolve any adverse effects upon such properties. Actions in conformance with the process satisfy the agency official's responsibilities under section 106 and this part.

(b) *Discoveries without prior planning.* If historic properties are discovered or unanticipated effects on historic properties found after the agency official has completed the section 106 process

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without establishing a process under paragraph (a) of this section, the agency official shall make reasonable efforts to avoid, minimize or mitigate adverse effects to such properties and:

(1) If the agency official has not approved the undertaking or if construction on an approved undertaking has not commenced, consult to resolve adverse effects pursuant to § 800.6; or

(2) If the agency official, the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the affected property agree that such property is of value solely for its scientific, prehistoric, historic or archeological data, the agency official may comply with the Archeological and Historic Preservation Act instead of the procedures in this part and provide the Council, the SHPO/THPO, and the Indian tribe or Native Hawaiian organization with a report on the actions within a reasonable time after they are completed; or

(3) If the agency official has approved the undertaking and construction has commenced, determine actions that the agency official can take to resolve adverse effects, and notify the SHPO/THPO, any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the affected property, and the Council within 48 hours of the discovery. The notification shall describe the agency official's assessment of National Register eligibility of the property and proposed actions to resolve the adverse effects. The SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council shall respond within 48 hours of the notification. The agency official shall take into account their recommendations regarding National Register eligibility and proposed actions, and then carry out appropriate actions. The agency official shall provide the SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council a report of the actions when they are completed.

(c) *Eligibility of properties.* The agency official, in consultation with the SHPO/THPO, may assume a newly-discovered property to be eligible for the National Register for purposes of section 106. The agency official shall

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specify the National Register criteria used to assume the property's eligibility so that information can be used in the resolution of adverse effects.

(d) *Discoveries on tribal lands.* If historic properties are discovered on tribal lands, or there are unanticipated effects on historic properties found on tribal lands, after the agency official has completed the section 106 process without establishing a process under paragraph (a) of this section and construction has commenced, the agency official shall comply with applicable tribal regulations and procedures and obtain the concurrence of the Indian tribe on the proposed action.

### Subpart C—Program Alternatives

#### § 800.14 Federal agency program alternatives.

(a) *Alternate procedures.* An agency official may develop procedures to implement section 106 and substitute them for all or part of subpart B of this part if they are consistent with the Council's regulations pursuant to section 110(a)(2)(E) of the act.

(1) *Development of procedures.* The agency official shall consult with the Council, the National Conference of State Historic Preservation Officers, or individual SHPO/THPOs, as appropriate, and Indian tribes and Native Hawaiian organizations, as specified in paragraph (f) of this section, in the development of alternate procedures, publish notice of the availability of proposed alternate procedures in the FEDERAL REGISTER and take other appropriate steps to seek public input during the development of alternate procedures.

(2) *Council review.* The agency official shall submit the proposed alternate procedures to the Council for a 60-day review period. If the Council finds the procedures to be consistent with this part, it shall notify the agency official and the agency official may adopt them as final alternate procedures.

(3) *Notice.* The agency official shall notify the parties with which it has consulted and publish notice of final alternate procedures in the FEDERAL REGISTER.



(4) *Legal effect.* Alternate procedures adopted pursuant to this subpart substitute for the Council's regulations for the purposes of the agency's compliance with section 106, except that where an Indian tribe has entered into an agreement with the Council to substitute tribal historic preservation regulations for the Council's regulations under section 101(d)(5) of the act, the agency shall follow those regulations in lieu of the agency's procedures regarding undertakings on tribal lands. Prior to the Council entering into such agreements, the Council will provide Federal agencies notice and opportunity to comment on the proposed substitute tribal regulations.

(b) *Programmatic agreements.* The Council and the agency official may negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings.

(1) *Use of programmatic agreements.* A programmatic agreement may be used:

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

(ii) When effects on historic properties cannot be fully determined prior to approval of an undertaking;

(iii) When nonfederal parties are delegated major decisionmaking responsibilities;

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

(v) Where other circumstances warrant a departure from the normal section 106 process.

(2) *Developing programmatic agreements for agency programs.* (i) The consultation shall involve, as appropriate, SHPO/THPOs, the National Conference of State Historic Preservation Officers (NCSHPO), Indian tribes and Native Hawaiian organizations, other Federal agencies, and members of the public. If the programmatic agreement has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the agency official shall

also follow paragraph (f) of this section.

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

(iii) *Effect.* The programmatic agreement shall take effect when executed by the Council, the agency official and the appropriate SHPOs/THPOs when the programmatic agreement concerns a specific region or the president of NCSHPO when NCSHPO has participated in the consultation. A programmatic agreement shall take effect on tribal lands only when the THPO, Indian tribe, or a designated representative of the tribe is a signatory to the agreement. Compliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated by the agency, the president of NCSHPO when a signatory, or the Council. Termination by an individual SHPO/THPO shall only terminate the application of a regional programmatic agreement within the jurisdiction of the SHPO/THPO. If a THPO assumes the responsibilities of a SHPO pursuant to section 101(d)(2) of the act and the SHPO is signatory to programmatic agreement, the THPO assumes the role of a signatory, including the right to terminate a regional programmatic agreement on lands under the jurisdiction of the tribe.

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

(v) If the Council determines that the terms of a programmatic agreement are not being carried out, or if such an

agreement is terminated, the agency official shall comply with subpart B of this part with regard to individual undertakings of the program covered by the agreement.

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

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

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

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

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

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

(2) *Public participation.* The proponent of the exemption shall arrange for public participation appropriate to the subject matter and the scope of the exemption and in accordance with the standards in subpart A of this part. The proponent of the exemption shall consider the nature of the exemption and

its likely effects on historic properties and take steps to involve individuals, organizations and entities likely to be interested.

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

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

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

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

(7) *Termination.* The Council may terminate an exemption at the request of the agency official or when the Council determines that the exemption no longer meets the criteria of paragraph

(c)(1) of this section. The Council shall notify the agency official 30 days before termination becomes effective.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(6) *Withdrawal of comment.* If the Council determines that the consideration of historic properties is not being

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carried out in a manner consistent with the program comment, the Council may withdraw the comment and the agency official shall comply with the requirements of §§ 800.3 through 800.6 for the individual undertakings.

(f) *Consultation with Indian tribes and Native Hawaiian organizations when developing program alternatives.* Whenever an agency official proposes a program alternative pursuant to paragraphs (a) through (e) of this section, the agency official shall ensure that development of the program alternative includes appropriate government-to-government consultation with affected Indian tribes and consultation with affected Native Hawaiian organizations.

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

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

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

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

### § 800.16 Definitions.

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

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

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

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

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

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

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

(h) *Day or days* means calendar days.

(i) *Effect* means alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.

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

(k) *Head of the agency* means the chief official of the Federal agency responsible for all aspects of the agency's

actions. If a State, local, or tribal government has assumed or has been delegated responsibility for section 106 compliance, the head of that unit of government shall be considered the head of the agency.

(1)(1) *Historic property* means any pre-historic or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.

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

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

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

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

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

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

(r) *National Register criteria* means the criteria established by the Secretary of the Interior for use in evaluating the

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

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

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

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

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

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

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

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

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

(z) *Senior policy official* means the senior policy level official designated

by the head of the agency pursuant to section 3(e) of Executive Order 13287.

[65 FR 77725, Dec. 12, 2000, as amended at 69 FR 40555, July 6, 2004]

APPENDIX A TO PART 800—CRITERIA FOR COUNCIL INVOLVEMENT IN REVIEWING INDIVIDUAL SECTION 106 CASES

(a) *Introduction.* This appendix sets forth the criteria that will be used by the Council to determine whether to enter an individual section 106 review that it normally would not be involved in.

(b) *General policy.* The Council may choose to exercise its authorities under the section 106 regulations to participate in an individual project pursuant to the following criteria. However, the Council will not always elect to participate even though one or more of the criteria may be met.

(c) *Specific criteria.* The Council is likely to enter the section 106 process at the steps specified in the regulations in this part when an undertaking:

(1) *Has substantial impacts on important historic properties.* This may include adverse effects on properties that possess a national level of significance or on properties that are of unusual or noteworthy importance or are a rare property type; or adverse effects to large numbers of historic properties, such as impacts to multiple properties within a historic district.

(2) *Presents important questions of policy or interpretation.* This may include questions about how the Council's regulations are being applied or interpreted, including possible foreclosure or anticipatory demolition situations; situations where the outcome will set a precedent affecting Council policies or program goals; or the development of programmatic agreements that alter the way the section 106 process is applied to a group or type of undertakings.

(3) *Has the potential for presenting procedural problems.* This may include cases with substantial public controversy that is related to historic preservation issues; with disputes among or about consulting parties which the Council's involvement could help resolve; that are involved or likely to be involved in litigation on the basis of section 106; or carried out by a Federal agency, in a State or locality, or on tribal lands where the Council has previously identified problems with section 106 compliance pursuant to § 800.9(d)(2).

(4) *Presents issues of concern to Indian tribes or Native Hawaiian organizations.* This may include cases where there have been concerns raised about the identification of, evaluation of or assessment of effects on historic properties to which an Indian tribe or Native Hawaiian organization attaches religious and cultural significance; where an Indian tribe or Native Hawaiian organization has re-

quested Council involvement to assist in the resolution of adverse effects; or where there are questions relating to policy, interpretation or precedent under section 106 or its relation to other authorities, such as the Native American Graves Protection and Repatriation Act.

PART 801—HISTORIC PRESERVATION REQUIREMENTS OF THE URBAN DEVELOPMENT ACTION GRANT PROGRAM

Sec.

- 801.1 Purpose and authorities.
- 801.2 Definitions.
- 801.3 Applicant responsibilities.
- 801.4 Council comments.
- 801.5 State Historic Preservation Officer responsibilities.
- 801.6 Coordination with requirements under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*).
- 801.7 Information requirements.
- 801.8 Public participation.

APPENDIX 1 TO PART 801—IDENTIFICATION OF PROPERTIES: GENERAL

APPENDIX 2 TO PART 801—SPECIAL PROCEDURES FOR IDENTIFICATION AND CONSIDERATION OF ARCHEOLOGICAL PROPERTIES IN AN URBAN CONTEXT

AUTHORITY: Pub. L. 89-665, 80 Stat. 915 (16 U.S.C. 470); Pub. L. 94-422, 90 Stat. 1320 (16 U.S.C. 470(i)); Pub. L. 96-399, 94 Stat. 1619 (42 U.S.C. 5320).

SOURCE: 46 FR 42428, Aug. 20, 1981, unless otherwise noted.

§ 801.1 Purpose and authorities.

(a) These regulations are required by section 110(c) of the Housing and Community Development Act of 1980 (HCDA) (42 U.S.C. 5320) and apply only to projects proposed to be funded by the Department of Housing and Urban Development (HUD) under the Urban Development Action Grant (UDAG) Program authorized by title I of the Housing and Community Development Act of 1974, as amended (42 U.S.C. 5301). These regulations establish an expedited process for obtaining the comments of the Council specifically for the UDAG program and, except as specifically provided, substitute for the Council's regulations for the "Protection of Historic and Cultural Properties" (36 CFR part 800).

(b) Section 110(c) of the HCDA of 1980 requires UDAG applicants to: (1) Identify all properties, if any, which are included in the National Register of Historic Places and which will be affected by the project for which the application is made; (2) identify all other properties, if any, which will be affected by such project and which, as determined by the applicant, may meet the Criteria established by the Secretary of the Interior for inclusion in the National Register (36 CFR 60.6); and (3) provide a description of the effect, as determined by the applicant, of the project on properties identified pursuant to (1) and (2). If the applicant determines that such properties are affected, the Act requires that the information developed by the applicant must be forwarded to the appropriate State Historic Preservation Officer (SHPO) for review and to the Secretary of the Interior for a determination as to whether the affected properties are eligible for inclusion in the National Register.

(c) Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470), requires the head of any Federal agency with jurisdiction over a Federal, federally assisted or federally licensed undertaking that affects a property included in or eligible for inclusion in the National Register of Historic Places to take into account the effect of the undertaking on such property and afford the Council a reasonable opportunity to comment. Under the UDAG program, applicants assume the status of a Federal agency for purposes of complying with section 106.

#### § 801.2 Definitions.

The terms defined in 36 CFR 800.2 shall be used in conjunction with this regulation. Furthermore, as used in these regulations:

(a) *Urban Development Action Grant (UDAG) Program* means the program of the Department of Housing and Urban Development (HUD) authorized by title I of the Housing and Community Development Act (HCDA) of 1977 (42 U.S.C. 5318) to assist revitalization efforts in distressed cities and urban counties which require increased public and private investment.

(b) *Applicant* means cities and urban counties or Pocket of Poverty Communities which meet the criteria at 24 CFR 570.453. Except as specifically provided below, applicants, rather than the Secretary of HUD, must comply with these regulations.

(c) *Project* means a commercial, industrial, and/or neighborhood project supported by the UDAG program of the Department of HUD, as defined in 24 CFR 570.451(g). A project includes the group of integrally related public and private activities described in the grant application which are to be carried out to meet the objectives of the action grant program and consists of all action grant funded activities together with all non-action grant funded activities. A project is an *undertaking* as defined in 36 CFR 800.2(c).

(d) *State Historic Preservation Officer Review Period* is a 45 day period provided to the appropriate State Historic Preservation Officer by section 110(c) of the Housing and Community Development Act (HCDA) of 1980 for comment on the formal submission by the applicant of data on properties listed in the National Register or which may meet the Criteria and which will be affected by the proposed UDAG project. This period does not include any period during which the applicant seeks information from the State Historic Preservation Officer to assist the applicant in identifying properties, determining whether a property meets the Criteria for listing in the National Register of Historic Places and determining whether such property is affected by the project.

(e) *Secretary of the Interior Determination Period* is a 45 day period provided by section 110(c) of the HCDA of 1980 for a determination as to whether the identified properties are eligible for inclusion in the National Register.

#### § 801.3 Applicant responsibilities.

As early as possible before the applicant makes a final decision concerning a project and in any event prior to taking any action that would foreclose alternatives or the Council's ability to comment, the applicant should take the following steps to comply with the

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requirements of section 106 of the National Historic Preservation Act and section 110 of the HCDA of 1980.

In order to facilitate the commenting process the applicant should forward to the Council information on the proposed project at the earliest practicable time if it appears that National Register properties or properties which meet the Criteria for inclusion will be affected. This will allow the Council to assist the applicant in expeditiously meeting its historic preservation requirements and facilitate the development of the Council's comments.

(a) *Information required.* It is the primary responsibility of the applicant requesting Council comments to conduct the appropriate studies and to provide the information necessary for a review of the effect a proposed project may have on a National Register property or a property which meets the Criteria, as well as the information necessary for adequate consideration of modifications or alterations to the proposed project that could avoid, mitigate, or minimize any adverse effects. It is the responsibility of the applicant to provide the information specified in § 801.7, to make an informed and reasonable evaluation of whether a property meets the National Register Criteria (36 CFR 60.6) and to determine the effect of a proposed undertaking on a National Register property or property which meets the Criteria.

(b) *Identification of properties.* Section 110 of the HCDA of 1980 makes UDAG applicants responsible for the identification of National Register properties and properties which may meet the Criteria for listing in the National Register that may be affected by the project. An appendix to these regulations sets forth guidance to applicants in meeting their identification responsibilities but does not set a fixed or inflexible standard for such efforts. Meeting this responsibility requires the applicant to make an earnest effort to identify and evaluate potentially affected historic properties by:

(1) Consulting the National Register of Historic Places to determine whether the project's impact area includes such properties;

(2) Obtaining, prior to initiating the State Historic Preservation Officer Re-

view Period, relevant information that the State Historic Preservation Officer may have available concerning historic properties, if any are known, in the project's impact area;

(3) Utilizing local plans, surveys, and inventories of historic properties prepared by the locality or a recognized State or local historic authority;

(4) Utilizing other sources of information or advice the applicant deems appropriate;

(5) Conducting an on-the-ground inspection of the project's impact area by qualified personnel to identify properties which may meet the Criteria for evaluation taking into consideration the views of the State Historic Preservation Officer as to the need for and methodology of such inspections;

(6) Applying the Department of the Interior Criteria for Evaluation (36 CFR 60.6) to properties within the project's impact area.

(c) *Evaluation of effect.* Applicants are required by section 110(a) of the HCDA of 1980 to include in their applications a description of the effect of a proposed UDAG project on any National Register property and or any property which may meet the Criteria.

(1) *Criteria of Effect and Adverse Effect.* The following criteria, similar to those set forth in 36 CFR 800.3, shall be used to determine whether a project has an effect or an adverse effect.

(i) *Criteria of effect.* The effect of a project on a National Register or eligible property is evaluated in the context of the historical, architectural, archeological, or cultural significance possessed by the property. A project shall be considered to have an effect whenever any condition of the project causes or may cause any change, beneficial or adverse, in the quality of the historical, architectural, archeological, or cultural characteristics that qualify the property to meet the Criteria of the National Register. An effect occurs when a project changes the integrity of location, design, setting, materials, workmanship, feeling or association of the property that contributes to its significance in accordance with the National Register Criteria. An effect may be direct or indirect. Direct effects are caused by the project and occur at the same time and place. Indirect effects



include those caused by the undertaking that are later in time or farther removed in distance, but are still reasonably foreseeable. Such effects involve development of the project site around historic properties so as to affect the access to, use of, or significance of those properties.

(ii) *Criteria of adverse effect.* Adverse effects on National Register properties or properties which meet the Criteria may occur under conditions which include but are not limited to:

(A) Destruction or alteration of all or part of a property;

(B) Isolation from or alteration of the property's surrounding environment;

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

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

(iii) *Special considerations.* If rehabilitation is a project activity, such components of the project may be considered to have no adverse effect and need not be referred to the Council if they are undertaken in accordance with the Secretary of the Interior's Standards for Historic Preservation Projects (U.S. Department of the Interior, Heritage Conservation and Recreation Service, Washington, DC, 1979) and the State Historic Preservation Officer concurs in the proposed activity. Additionally, the following types of project components or elements will be considered to not normally adversely affect properties listed in the National Register or which meet the Criteria.

(A) Insulation (except for the use of granular or liquid injected foam insulation in exterior walls or other vertical surfaces);

(B) Caulking;

(C) Weatherstripping;

(D) Replacement of Heating, Ventilating and Air Conditioning (HVAC) equipment, provided that such equipment is not historic and that replacement equipment is screened from public view and that the State Historic Preservation Officer and the applicant agree the equipment will not affect those qualities of the property which qualify it to meet the 36 CFR 60.6 Criteria;

(E) In-kind refenestration (for example, replacement of deteriorated windows of a similar configuration, color and material);

(F) Lowering of ceilings, provided the ceilings will not be visible from outside of the building or from an interior public space and that the State Historic Preservation Officer and the applicant agree it will not affect a quality which qualified the building to meet the 36 CFR 60.6 Criteria;

(G) Replacement in-kind of substantially deteriorated material, provided that the State Historic Preservation Officer and the applicant agree;

(H) Installation of machinery, equipment, furnishings, fixtures, etc., in the interior of existing buildings, provided that the State Historic Preservation Officer and the applicant agree such installations will not affect a quality which qualified the building to meet the 36 CFR 60.6 Criteria.

(I) Site improvements such as sidewalk paving and landscaping, provided that the State Historic Preservation Officer and the applicant agree that the site improvement will not affect those qualities of the property which qualify it to meet the 36 CFR 60.6 Criteria.

(iv) *Special considerations for archeological sites.* Under certain conditions, alteration of land containing archeological resources in the project area may have no adverse effect on those resources. Procedures for determining whether such conditions exist were published by the Council in the FEDERAL REGISTER on November 26, 1980 (45 FR 78808), as part X of the "Executive Director's Procedures for Review of Proposals for Treatment of Archeological Properties." Because the identification of archeological sites in an urban context, and consideration of appropriate treatment methods, present special problems, further guidance is provided in Appendix 2.

(2) *Determinations of Effect.* Prior to submitting an application to HUD, the applicant shall apply the Criteria of Effect and Adverse Effect to all properties which are listed in the National

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Register or which may meet the Criteria in the area of the project's potential environmental impact. The determination of the Secretary of the Interior shall be final with respect to properties which are eligible for listing in the National Register. The Council will not comment on affected properties which are not either listed in or eligible for listing in the National Register. In order to facilitate the process, information to be requested from the State Historic Preservation Officer under § 801.3(b)(2) should include advice on applying the Criteria of Effect and Adverse Effect provided that this period shall not be included in the 45 day State Historic Preservation Officer Review Period. Special attention should be paid to indirect effects, such as changes in land use, traffic patterns, street activity, population density and growth rate. While some aspects of a project may have little potential to adversely affect the significant qualities of a historic property, other project components may meet the Criteria of Effect and Adverse Effect. If any aspect of the project results in an effect determination, further evaluation of the effect shall be undertaken in accordance with these regulations. The resulting determination regarding the effect shall be included in the application.

(i) *No effect.* If the applicant determines that the project will have no effect on any National Register property and/or property which meets the Criteria, the project requires no further review by the Council unless a timely objection is made by the Executive Director. An objection may be made by the Executive Director at any time during the UDAG application process prior to the expiration of the period for receiving objections to HUD's release of funds as specified in 24 CFR 58.31. The manner in which the Executive Director shall make an objection is set forth in § 801.4(a).

(ii) *Determinations of no adverse effect.* If the applicant finds there is an effect on the property but it is not adverse, the applicant after receiving the comments of the State Historic Preservation Officer during the State Historic Preservation Officer Review Period shall forward adequate documentation (see § 801.7(a)) of the Determination, in-

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cluding the written comments of the State Historic Preservation Officer, if available, to the Executive Director for review in accordance with § 801.4.

(iii) *Adverse effect determination.* If the applicant finds the effect to be adverse or if the Executive Director objects to an applicant's no adverse effect determination pursuant to § 801.4(a), the applicant shall proceed with the consultation process in accordance with § 801.4(b).

### § 801.4 Council comments.

The following subsections specify how the Council will respond to an applicant's request for the Council's comments required to satisfy the applicant's responsibilities under section 106 of the Act and section 110 of the HCDA of 1980. When appropriate, an applicant may waive the Council time periods specified in these regulations.

(a) *Executive Director's Objection to No Effect Determination.* If the Executive Director has reason to question an applicant's determination of no effect, he shall notify the applicant and HUD. If the Executive Director does not object within 15 days of such notification, the project may proceed. If the Executive Director objects, he shall specify whether or not the project will have an adverse effect on National Register property and/or property which meets the Criteria. Normally, the Executive Director will object to a determination of no effect when the record does not support the applicant's determination (see § 801.7(a)). The applicant must then comply with the provisions of subsection (b) if the Executive Director determines that the project will have no adverse effect or subsection (c) if the Executive Director has determined that the project will have an adverse effect.

(b) *Response to Determinations of No Adverse Effect.* (1) Upon receipt of a Determination of No Adverse Effect from an applicant, the Executive Director will review the Determination and supporting documentation required by § 801.7(a). Failure to provide the required information at the time the applicant requests Council comments will delay the process. The Executive Director will respond to the applicant within 15 days after receipt of the information

required in § 801.7(a). Unless the Executive Director objects to the Determination within 15 days after receipt, the applicant will be considered to have satisfied its responsibilities under section 106 of the Act and these regulations and no further Council review is required.

(2) If the Executive Director objects to a Determination of No Adverse Effect, the consultation process pursuant to § 801.4(c) shall be initiated.

(c) *Consultation process.* If any aspect of the project is found to have adverse effects on National Register property or property which has been determined by the applicant or the Secretary of the Interior to meet the Criteria, the applicant, the State Historic Preservation Officer and the Executive Director shall consult to consider feasible and prudent alternatives to the project that could avoid, mitigate, or minimize the adverse effect on the affected property.

(1) *Parties.* The applicant, the State Historic Preservation Officer and the Executive Director shall be the consulting parties. The Department of HUD, other representatives of national, State, or local units of government, other parties in interest, and public and private organizations, may be invited by the consulting parties to participate in the consultation process.

(2) *Timing.* The consulting parties shall have a total of 45 days from the receipt by the Executive Director of the information required in § 801.7(a) to agree upon feasible and prudent alternatives to avoid, mitigate, or minimize any adverse effects of the project. Failure of an applicant to provide the information required in § 801.7(b) will delay the beginning of the time period specified above.

(3) *Information requirements.* The applicant shall provide copies of the information required in § 801.7(b) to the consulting parties at the initiation of the consultation process and make it readily available for public inspection.

(4) *Public meeting.* An onsite inspection and a Public Information Meeting may be held in accordance with the provisions of 36 CFR 800.6(b). Public hearings or meetings conducted by the applicant in the preparation of the application may, as specified below, sub-

stitute for such Public Information Meetings. Upon request of the applicant, the Executive Director may find that such public meetings have been adequate to consider the effect of the project on National Register properties or properties which meet the Criteria, and no further Public Information Meeting is required.

(5) *Consideration of alternatives.* During the consultation period, the consulting parties shall, in accordance with the policies set forth in 36 CFR 800.6(b) (4) and (5), review the proposed project to determine whether there are prudent and feasible alternatives to avoid or satisfactorily mitigate adverse effect. If they agree on such alternatives, they shall execute a Memorandum of Agreement in accordance with § 801.4(c) specifying how the undertaking will proceed to avoid or mitigate the adverse effect.

(6) *Acceptance of adverse effect.* If the consulting parties determine that there are no feasible and prudent alternatives that could avoid or satisfactorily mitigate the adverse effects and agree that it is in the public interest to proceed with the proposed project they shall execute a Memorandum of Agreement in accordance with § 801.4(c) acknowledging this determination and specifying any recording, salvage, or other measures associated with acceptance of the adverse effects that shall be taken before the project proceeds.

(7) *Failure to agree.* Upon the failure of the consulting parties to agree upon the terms for a Memorandum of Agreement within the specified time period, or upon notice of a failure to agree by any consulting party to the Executive Director, the Executive Director within 15 days shall recommend to the Chairman whether the matter should be scheduled for consideration at a Council meeting. If the Executive Director recommends that the Council not consider the matter, he shall simultaneously notify all Council members and provide them copies of the preliminary case report and the recommendation to the Chairman. The applicant and the State Historic Preservation Officer shall be notified in writing of the Executive Director's recommendation.

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(d) *Memorandum of Agreement*—(1) *Preparation of Memorandum of Agreement.* It shall be the responsibility of the Executive Director to prepare each Memorandum of Agreement required under this part. As appropriate, other parties may be invited by the consulting parties to be signatories to the Agreement or otherwise indicate their concurrence with the Agreement. In order to facilitate the process, the applicant may provide the Executive Director a draft for a Memorandum of Agreement. At the applicant's option, such draft may be prepared at the time the applicant makes its determinations that properties listed in the National Register or which may meet the Criteria for listing in the National Register may be adversely affected. The applicant must provide the State Historic Preservation Officer an opportunity to concur in or comment on its draft Agreement.

(2) *Review of Memorandum of Agreement.* Upon receipt of an executed Memorandum of Agreement, the Chairman shall institute a 15 day review period. Unless the Chairman notifies the applicant that the matter has been placed on the agenda for consideration at a Council meeting, the Agreement shall become final when ratified by the Chairman or upon the expiration of the 15 day review period with no action taken. Copies will be provided to signatories. A copy of the Memorandum of Agreement should be included in any Environmental Assessment or Environmental Impact Statement prepared pursuant to the National Environmental Policy Act.

(3) *Effect of Memorandum of Agreement.* (i) Agreements duly executed in accordance with these regulations shall constitute the comments of the Council and shall evidence satisfaction of the applicant's responsibilities for the proposed project under section 106 of the Act and these regulations.

(ii) If the Council has commented on an application that is not approved by HUD and a subsequent UDAG application is made for the same project, the project need not be referred to the Council again unless there is a significant amendment to the project which would alter the effect of the project on previously considered properties or re-

sult in effects on additional National Register properties or properties which meet the Criteria.

(iii) Failure to carry out the terms of a Memorandum of Agreement requires that the applicant again request the Council's comments in accordance with these regulations. In such instances, until the Council issues its comments under these regulations the applicant shall not take or sanction any action or make any irreversible or irretrievable commitment that could result in an adverse effect with respect to National Register properties or properties which are eligible for inclusion in the National Register covered by the Agreement or that would foreclose the Council's consideration of modifications or alternatives to the proposed project that could avoid or mitigate the adverse effect.

(4) *Amendment of a Memorandum of Agreement.* Amendments to the Agreement may be made as specified in 36 CFR 800.6(c)(4).

(5) *Report on Memorandum of Agreement.* Within 90 days after carrying out the terms of the Agreement, the applicant shall report to all signatories on the actions taken.

(e) *Council Meetings.* Council meetings to consider a project will be conducted in accordance with the policies set forth in 36 CFR 800.6(d).

(1) *Response to recommendation concerning consideration at Council meeting.* Upon receipt of a recommendation from the Executive Director concerning consideration of a proposed project at a Council meeting, the Chairman shall determine whether or not the project will be considered. The Chairman shall make a decision within 15 days of receipt of the recommendation of the Executive Director. In reaching a decision the Chairman shall consider any comments from Council members. If three members of the Council object within the 15 day period to the Executive Director's recommendation, the project shall be scheduled for consideration at a Council or panel meeting. Unless the matter is scheduled for consideration by the Council the Chairman shall notify the applicant, the Department of HUD, the State Historic Preservation Officer and other parties known to be interested of

the decision not to consider the matter. Such notice shall be evidence of satisfaction of the applicant's responsibilities for the proposed project under section 106 of the Act and these regulations.

(2) *Decision to consider the project.* When the Council will consider a proposed project at a meeting, the Chairman shall either designate five members as a panel to hear the matter on behalf of the full Council or schedule the matter for consideration by the full Council. In either case, the meeting shall take place within 30 days of the Chairman's decision to consider the project, unless the applicant agrees to a longer time.

(i) A panel shall consist of three non-Federal members, one as Chairman, and two Federal members. The Department of HUD may not be a member of such panel.

(ii) Prior to any panel or full Council consideration of a matter, the Chairman will notify the applicant and the State Historic Preservation Officer and other interested parties of the date on which the project will be considered. The Executive Director, the applicant, the Department of HUD, and the State Historic Preservation Officer shall prepare reports in accordance with § 801.7(b). Reports from the applicant and the State Historic Preservation Officer must be received by the Executive Director at least 7 days before any meeting.

(3) *Notice of Council meetings.* At least 7 days notice of all meetings held pursuant to this section shall be given by publication in the FEDERAL REGISTER. The Council shall provide a copy of the notice by mail to the applicant, the State Historic Preservation Officer, and the Department of Housing and Urban Development. The Council will inform the public of the meeting through appropriate local media.

(4) *Statements to the Council.* An agenda shall provide for oral statements from the Executive Director; the applicant; the Department of HUD; parties in interest; the Secretary of the Interior; the State Historic Preservation Officer; representatives of national, State, or local units of government; and interested public and private organizations and individuals. Parties wish-

ing to make oral remarks should notify the Executive Director at least two days in advance of the meeting. Parties wishing to have their written statements distributed to Council members prior to the meeting should send copies of the statements to the Executive Director at least 5 days in advance.

(5) *Comments of the Council.* The written comments of the Council will be issued within 7 days after a meeting. Comments by a panel shall be considered the comments of the full Council. Comments shall be made to the applicant requesting comment and to the Department of HUD. Immediately after the comments are made to the applicant and the Department of HUD, the comments of the Council will be forwarded to the President and the Congress as a special report under authority of section 202(b) of the Act and a notice of availability will be published in the FEDERAL REGISTER. The comments of the Council shall be made available to the State Historic Preservation Officer, other parties in interest, and the public upon receipt of the comments by the applicant. The applicant should include the comments of the Council in any final Environmental Impact Statement prepared pursuant to the National Environmental Policy Act.

(6) *Action in response to Council comments.* The comments of the Council shall be taken into account in reaching a final decision on the proposed project. When a final decision regarding the proposed project is reached by the applicant and the Department of HUD, they shall submit written reports to the Council describing the actions taken by them and other parties in response to the Council's comments and the impact that such actions will have on the affected National Register properties or properties eligible for inclusion in the National Register. Receipt of this report by the Chairman shall be evidence that the applicant has satisfied its responsibilities for the proposed project under section 106 of the Act and these regulations. The Council may issue a final report to the President and the Congress under authority of section 202(b) of the Act describing the actions taken in response to the

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Council's comments including recommendations for changes in Federal policy and programs, as appropriate.

(f) *Suspense of Action.* Until the Council issues its comments under these regulations and during the State Historic Preservation Officer Review Period and the determination period of the Secretary of the Interior, good faith consultation shall preclude the applicant from taking or sanctioning any action or making any irreversible or irretrievable commitment that could result in an adverse effect on a National Register property or property which may meet the Criteria or that would foreclose the consideration of modifications or alternatives to the proposed project that could avoid, mitigate, or minimize such adverse effects. In no case shall UDAG funds be used for physical activities on the project site until the Council comments have been completed. Normal planning and processing of applications short of actual commitment of funds to the project may proceed.

(g) *Lead Agency.* If the project proposed by the applicant involves one or more Federal agencies, they may agree on a single lead agency to meet the requirements of section 106 of the National Historic Preservation Act and section 110 of the Housing and Community Development Act of 1980 and notify the Executive Director. If the applicant is the designated lead agency, these regulations shall be followed. If a Federal agency is designated lead agency, the process in 36 CFR part 800 shall be used.

(h) *Compliance by a Federal Agency.* An applicant may make a finding that it proposes to accept a Federal agency's compliance with section 106 of the Act and 36 CFR 800 where its review of the Federal agency's findings indicate that:

(1) The project is identical with an undertaking reviewed by the Council under 36 CFR part 800; and

(2) The project and its impacts are included within the area of potential environmental impact described by the Federal agency;

The applicant shall notify the State Historic Preservation Officer and the Executive Director of its finding of compliance with section 106 of the Act

and 36 CFR part 800 and provide a copy of the Federal agency's document where the finding occurs. Unless the Executive Director objects within 10 days of receipt of such notice the Council need not be afforded further opportunity for comment. If the Executive Director objects to the finding of the applicant, the applicant shall comply with § 801.4.

### § 801.5 State Historic Preservation Officer responsibilities.

(a) The State Historic Preservation Officer shall have standing to participate in the review process established by section 110(c) of the HCDA of 1980 whenever it concerns a project located within the State Historic Preservation Officer's jurisdiction by the following means: providing, within 30 days, information requested by an applicant under § 801.3(b); responding, within 45 days, to submittal of a determination by the applicant under section 110 of the HCDA of 1980 that National Register property or property which meets the Criteria may be affected by the proposed project; participating in a Memorandum of Agreement that the applicant or the Executive Director may prepare under this part; and participating in a panel or full Council meeting that may be held pursuant to these regulations. Pursuant to section 110(c) of the HCDA of 1980, the State Historic Preservation Officer has a maximum period of 45 days in which to formally comment on an applicant's determination that the project may affect a property that is listed in the National Register or which may meet the Criteria for listing in the National Register. This period does not include the time during which the applicant seeks information from the State Historic Preservation Officer for determining whether a property meets the Criteria for listing in the National Register and whether such property is affected by the project.

(b) The failure of a State Historic Preservation Officer to participate in any required steps of the process set forth in this part shall not prohibit the Executive Director and the applicant from concluding the section 106 process, including the execution of a Memorandum of Agreement.

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### § 801.6 Coordination with requirements under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*).

The National Historic Preservation Act and the National Environmental Policy Act create separate and distinct responsibilities. The National Historic Preservation Act applies to those aspects of a project which may affect National Register properties and those which are eligible for listing in the National Register. The requirements for the National Environmental Policy Act apply to the effect that the project will have on the human environment. To the extent that the applicant finds it practicable to do so, the requirements of these two statutes should be integrated. Some projects, for reasons other than the effects on historic properties, may require an Environmental Impact Statement (EIS) subject to the time requirements for a draft and final EIS, in which case the applicant may choose to separately relate to the State Historic Preservation Officer, the Department of the Interior, and the Council for purposes of section 110(c) of the HCDA of 1980. In that event, information in the draft EIS should indicate that compliance with section 106 and these regulations is underway and the final EIS should reflect the results of this process. Applicants are directed to 36 CFR 800.9, which describes in detail the manner in which the requirements of these two acts should be integrated and applies to all UDAG applicants under these regulations.

In those instances in which an Environmental Impact Statement will be prepared for the project, the applicant should consider phasing compliance with these procedures and the preparation of the Statement.

### § 801.7 Information requirements.

(a) *Information To Be Retained by Applicants Determining No Effect.* (1) Recommended Documentation for a Determination of No Effect. Adequate documentation of a Determination of No Effect pursuant to § 801.3(c)(2)(i) should include the following:

- (i) A general discussion and chronology of the proposed project;
- (ii) A description of the proposed project including, as appropriate, photographs, maps, drawings and specifications;

tographs, maps, drawings, and specifications;

(iii) A statement that no National Register property or property which meets the Criteria exist in the project area, or a brief statement explaining why the Criteria of Effect (See § 801.3(c)) was found inapplicable;

(iv) Evidence of consultation with the State Historic Preservation Officer concerning the Determination of No Effect; and

(v) Evidence of efforts to inform the public concerning the Determination of No Effect.

(2) The information requirements set forth in this section are meant to serve as guidance for applicants in preparing No Effect Determinations. The information should be retained by the applicant, incorporated into any environmental reports or documents prepared concerning the project, and provided to the Executive Director only in the event of an objection to the applicant's determination.

(b) *Reports to the Council.* In order to adequately assess the impact of a proposed project on National Register and eligible properties, it is necessary for the Council to be provided certain information. For the purposes of developing Council comments on UDAG projects the following information is required. Generally, to the extent that relevant portions of a UDAG application meet the requirements set forth below it will be sufficient for the purposes of Council review and comment.

(1) *Documentation for Determination of No Adverse Effect.* Adequate documentation of a Determination of No Adverse Effect pursuant to § 801.3(c)(1) should include the following:

- (i) A general discussion and chronology of the proposed project;
- (ii) A description of the proposed project including, as appropriate, photographs, maps, drawings and specifications;
- (iii) A copy of the National Register form or a copy of the Determination of Eligibility documentation for each property that will be affected by the project including a description of each property's physical appearance and significance;
- (iv) A brief statement explaining why each of the Criteria of Adverse Effect

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(See § 801.3(c)(1)) was found inapplicable;

(v) Written views of the State Historic Preservation Officer concerning the Determination of No Adverse Effect, if available; and,

(vi) An estimate of the cost of the project including the amount of the UDAG grant and a description of any other Federal involvement.

(2) *Preliminary Case Reports.* Preliminary Case Reports should be submitted with a request for comments pursuant to § 801.4(b) and should include the following information:

(i) A general discussion and chronology of the proposed project;

(ii) The status of the project in the HUD approval process;

(iii) The status of the project in the National Environmental Policy Act compliance process and the target date for completion of all the applicant's environmental responsibilities;

(iv) A description of the proposed project including as appropriate, photographs, maps, drawings and specifications;

(v) A copy of the National Register form or a copy of the Determination of Eligibility documentation for each property that will be affected by the project including a description of each property's physical appearance and significance;

(vi) A brief statement explaining why any of the Criteria of Adverse Effect (See § 801.3(c)(1)(b)) apply;

(vii) Written views of the State Historic Preservation Officer concerning the effect on the property, if available;

(viii) The views of Federal agencies, State and local governments, and other groups or individuals when known as obtained through the OMB Circular A-95 process or the environmental review process, public hearings or other applicant processes;

(ix) A description and analysis of alternatives that would avoid the adverse effects;

(x) A description and analysis of alternatives that would mitigate the adverse effects; and,

(xi) An estimate of the cost of the project including the amount of the UDAG grant and a description of any other Federal involvement.

(c) *Reports for Council Meetings.* Consideration of a proposed project by the full Council or a panel pursuant to § 801.4(b) is based upon reports from the Executive Director, the State Historic Preservation Officer and Secretary of the Interior. Requirements for these reports are specified in 36 CFR 800.13(c). Additionally, reports from the applicant and the Department of HUD are required by these regulations. The requirements for these reports consist of the following:

(1) *Report of the Applicant.* The report from the applicant requesting comments shall include a copy of the relevant portions of the UDAG application; a general discussion and chronology of the proposed project; an account of the steps taken to comply with the National Environmental Policy Act (NEPA); any relevant supporting documentation in studies that the applicant has completed; an evaluation of the effect of the project upon the property or properties, with particular reference to the impact on the historical, architectural, archeological, and cultural values; steps taken or proposed by the applicant to avoid or mitigate adverse effects of the project; a thorough discussion of alternate courses of action; and an analysis comparing the advantages resulting from the project with the disadvantages resulting from the adverse effects on National Register or eligible properties.

(2) *Report of the Secretary of Housing and Urban Development.* The report from the Secretary shall include the status of the application in the UDAG approval process, past involvement of the Department with the applicant and the proposed project or land area for the proposed project, and information on how the applicant has met other requirements of the Department for the proposed project.

### § 801.8 Public participation.

(a) The Council encourages maximum public participation in the process established by these regulations. Particularly important, with respect to the UDAG program, is participation by the citizens of neighborhoods directly or indirectly affected by projects, and by groups concerned with historic and cultural preservation.



(b) The applicant, in preparing and following its citizen participation plan called for by 24 CFR 570.456(c)(11)(i)(A), should ensure that adequate provision is made for participation by citizens and organizations having interests in historic preservation and in the historic and cultural values represented in affected neighborhoods. 24 CFR 570.431(c) sets forth criteria for citizen participation plans. These should be carefully considered with specific reference to ensuring that local concerns relevant to historic preservation are fully identified, and that citizens are provided with full and accurate information about each project and its effects on historic properties. The applicant should ensure that potentially concerned citizens and organizations are fully involved in the identification of properties which may meet the National Register Criteria, and that they are fully informed, in a timely manner, of determinations of No Effect, No Adverse Effect, and Adverse Effect, and of the progress of the consultation process. Applicants are referred to 36 CFR 800.15 for Council guidelines for public participation.

(c) The Council welcomes the views of the public, especially those groups which may be affected by the proposed project, during its evaluation of the applicant's determination of effect, and will solicit the participation of the public in Council and panel meetings held to consider projects.

#### APPENDIX 1 TO PART 801—IDENTIFICATION OF PROPERTIES: GENERAL

##### A. Introduction

Because of the high probability of locating properties which are listed in the National Register or which meet the Criteria for listing in many older city downtowns, this appendix is designed to serve as guidance for UDAG applicants in identifying such properties. This appendix sets forth guidance for applicants and does not set a fixed or inflexible standard for identification efforts.

##### B. Role of the State Historic Preservation Officer

In any effort to locate National Register properties or properties which meet the Criteria, the State Historic Preservation Officer is a key source of information and advice. The State Historic Preservation Officer will be of vital assistance to the applicant. The

State Historic Preservation Officer can provide information on known properties and on studies which have taken place in and around the project area. Early contact should be made with the State Historic Preservation Officer for recommendations about how to identify historic properties. For UDAG projects, identification of National Register properties and properties which meet the Criteria is the responsibility of the applicant. The extent of the identification effort should be made with the advice of the State Historic Preservation Officer. The State Historic Preservation Officer can be a knowledgeable source of information regarding cases wherein the need for a survey of historic properties is appropriate, recommended type and method of a survey and the boundaries of any such survey. Due consideration should be given to the nature of the project and its impacts, the likelihood of historic properties being affected and the state of existing knowledge regarding historic properties in the area of the project's potential environmental impact.

##### C. Levels of Identification

1. The area of the project's potential environmental impact consists of two distinct subareas: that which will be disturbed directly (generally the construction site and its immediate environs) and that which will experience indirect effects. Within the area of indirect impact, impacts will be induced as a result of carrying the project out. Historic and cultural properties subject to effect must be identified in both subareas, and the level of effort necessary in each may vary. The level of effort needed is also affected by the stage of planning and the quality of pre-existing information. Obviously, if the area of potential environmental impact has already been fully and intensively studied before project planning begins, there is no need to duplicate this effort. The State Historic Preservation Officer should be contacted for information on previous studies. If the area has not been previously intensively studied, identification efforts generally fall into three levels:

a. *Overview Study:* This level of study is normally conducted as a part of general planning and is useful at an early stage in project formulation. It is designed to obtain a general understanding of an area's historic and cultural properties in consultation with the State Historic Preservation Officer, by:

- (1) Assessing the extent to which the area has been previously subjected to study;
- (2) Locating properties previously recorded;
- (3) Assessing the probability that properties eligible for the National Register will be found if the area is closely inspected, and
- (4) Determining the need, if any, for further investigation.

An overview study includes study of pertinent records (local histories, building inventories, architectural reports, archeological survey reports, etc.), and usually some minor on-the-ground inspection.

b. *Identification Study*: An identification study attempts to specifically identify and record all properties in an area that may meet the criteria for listing in the National Register. In conducting the study, the applicant should seek the advice of the State Historic Preservation Officer regarding pertinent background data. A thorough on-the-ground inspection of the subject area by qualified personnel should be undertaken. For very large areas, or areas with uncertain boundaries, such a study may focus on representative sample areas, from which generalizations may be made about the whole.

c. *Definition and Evaluation Study*: If an overview and/or an identification study have indicated the presence or probable presence of properties that may meet the National Register Criteria but has not documented them sufficiently to allow a determination to be made about their eligibility, a definition and evaluation study is necessary. Such a study is directed at specific potentially eligible properties or at areas known or suspected to contain such properties. It includes an intensive on-the-ground inspection and related studies as necessary, conducted by qualified personnel, and provides sufficient information to apply the National Register's "Criteria for Evaluation" (36 CFR 60.6).

2. An overview study will normally be needed to provide basic information for planning in the area of potential environmental impact. Unless this study indicates clearly that no further identification efforts are needed (e.g., by demonstrating that the entire area has already been intensively inspected with negative results, or by demonstrating that no potentially significant buildings have ever been built there and there is virtually no potential for archeological resources), and identification study will probably be needed within the area of potential environmental impact. This study may show that there are no potentially eligible properties within the area, or may show that only a few such properties exist and document them sufficiently to permit a determination of eligibility to be made in accordance with 36 CFR part 60. Alternatively, the study may indicate that potentially eligible properties exist in the area, but may not document them to the standards of 36 CFR part 60. Should this occur, a definition and evaluation study is necessary for those properties falling within the project's area of direct effect and for those properties subject to indirect effects. If a property falls within the general area of indirect effect, but no indirect effects are actually anticipated on the property in question, a definition and evaluation study will normally be superfluous.

#### APPENDIX 2 TO PART 801—SPECIAL PROCEDURES FOR IDENTIFICATION AND CONSIDERATION OF ARCHEOLOGICAL PROPERTIES IN AN URBAN CONTEXT

A. Archeological sites in urban contexts are often difficult to identify and evaluate in advance of construction because they are sealed beneath modern buildings and structures. Prehistoric and historic sites within cities may be important both to science and to an understanding of each city's history, however, and should be considered in project planning. Special methods can be used to ensure effective and efficient consideration and treatment of archeological sites in UDAG projects.

1. If it is not practical to physically determine the existence or nonexistence of archeological sites in the project area, the probability or improbability of their existence can be determined, in most cases, through study of:

- a. Information on the pre-urban natural environment, which would have had an effect on the location of prehistoric sites;
- b. Information from surrounding areas and general literature concerning the location of prehistoric sites;
- c. State and local historic property registers or inventories;
- d. Archeological survey reports;
- e. Historic maps, atlases, tax records, photographs, and other sources of information on the locations of earlier structures;
- f. Information on discoveries of prehistoric or historic material during previous construction, land levelling, or excavation, and
- g. Some minor on-the-ground inspection.

2. Should the study of sources such as those listed in section (1)(a) above reveal that the following conditions exist, it should be concluded that a significant likelihood exists that archeological sites which meet the National Register Criteria exist on the project site:

- a. Discoveries of prehistoric or historic material remains have been reliably reported on or immediately adjacent to the project site, and these are determined by the State Historic Preservation Officer or other archeological authority to meet the Criteria for the National Register because of their potential value for public interpretation or the study of significant scientific or historical research problems; or
- b. Historical or ethnographic data, or discoveries of material, indicate that a property of potential cultural value to the community or some segment of the community (e.g., a cemetery) lies or lay within the project site; or
- c. The pre-urbanization environment of the project site would have been conducive to prehistoric occupation, or historic buildings or occupation sites are documented to have existed within the project site in earlier

times, and such sites or buildings are determined by the State Historic Preservation Officer or other archeological authority to meet the Criteria of the National Register because of their potential value for public interpretation or the study of significant scientific or historical research questions, and

d. The recent history of the project site has not included extensive and intensive ground disturbance (grading, blasting, cellar digging, etc.) in the location, or extending to the depth at which the remains of significant sites, buildings, or other features would be expected.

B. Where review of sources of information such as those listed in section (1)(a) above reveals no significant likelihood that archeological resources which meet the National Register Criteria exist on the project site, no further review is required with respect to archeology provided the State Historic Preservation Officer concurs.

C. Where review of sources of information such as those listed in section (1)(a) above, reveals that archeological resources which meet the National Register Criteria are likely to exist on the project site, but these resources are so deeply buried that the project will not intrude upon them, or they are in a portion of the project site that will not be disturbed, a determination of "No Effect" is appropriate in accordance with §801.3(c)(2)(i).

D. Where review of sources of information such as those listed in section (1)(a) above, reveals that archeological resources which meet the Criteria exist or are likely to exist on the project site, and that the project is likely to disturb them, a determination of "No Adverse Effect" may be made in accordance with §801.3(c)(2)(ii) if:

1. The applicant and/or developer is committed to fund a professionally supervised and planned pre-construction testing program, and to modification of the project in consultation with the State Historic Preservation Officer to protect or incorporate within the project the archeological resources discovered with a minimum of damage to them, or if:

2. The applicant and/or developer is committed to fund a professionally supervised and planned archeological salvage program, coordinated with site clearing and construction, following the standards of the Secretary of the Interior issued pursuant to the Archeological and Historic Preservation Act (16 U.S.C. 469) and the applicant finds that this program negates the adverse effect, in accordance with the standards set forth in section X of the Council's "Supplementary Guidance for Review of Proposals for Treatment of Archeological Properties" (45 FR 78808).

E. When archeological sites included in the National Register or which meet the Criteria are found to exist on the project site or in the area of the project's environmental im-

pact, and where the project is likely to disturb such resources, and where the adverse effect of such disturbance cannot be negated by archeological salvage, a determination of "Adverse Effect" is appropriate in accordance with §801.3(a)(2)(iii).

**PART 805—PROCEDURES FOR IMPLEMENTATION OF NATIONAL ENVIRONMENTAL POLICY ACT**

- Sec.
- 805.1 Background.
- 805.2 Purpose.
- 805.3 Applicability.
- 805.4 Ensuring environmental documents are actually considered in Council decisionmaking.
- 805.5 Typical classes of action.
- 805.6 Interagency cooperation.
- 805.7 Environmental information.

AUTHORITY: Pub. L. 89-665, 80 Stat. 915 (16 U.S.C. 470), as amended, 84 Stat. 204 (1970), 87 Stat. 139 (1973), 90 Stat. 1320 (1976), 92 Stat. 3467 (1978); E.O. 11593, 3 CFR 1971 Comp., p. 154; President's Memorandum on Environmental Quality and Water Resources Management, July 12, 1978.

SOURCE: 45 FR 4353, Jan. 22, 1980, unless otherwise noted.

**§805.1 Background.**

(a) The National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*) establishes national policies and goals for the protection of the environment. Section 102(2) of NEPA contains certain procedural requirements directed toward the attainment of such goals. In particular, all Federal agencies are required to give appropriate consideration to the environmental effects of their proposed actions in their decisionmaking and to prepare detailed environmental statements on recommendations or reports on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.

(b) Executive Order 11991 of May 24, 1977, directed the Council on Environmental Quality (CEQ) to issue regulations to implement the procedural provisions of NEPA. Accordingly, CEQ issued final NEPA regulations (40 CFR parts 1500-1508) on November 29, 1978, which are binding on all Federal agencies as of July 30, 1979. These regulations provide that each Federal agency shall as necessary adopt implementing

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procedures to supplement the regulations. Section 1507.3(b) of the NEPA regulations identifies those sections of the regulations which must be addressed in agency procedures.

**§ 805.2 Purpose.**

The purpose of this part is to establish Council procedures that supplement the NEPA regulations and provide for the implementation of those provisions identified in § 1507.3(b) of the regulations (40 CFR 1507.3(b)).

**§ 805.3 Applicability.**

(a) These procedures apply to actions of the full Council and the Council staff acting on behalf of the full Council.

(b) The following actions are covered by these procedures:

- (1) Recommendations for legislation.
- (2) Regulations implementing section 106 of the National Historic Preservation Act (NHPA).
- (3) Procedures implementing other authorities.
- (4) Policy recommendations that do not require implementation by another Federal agency.

(c) In accordance with § 1508.4 of the NEPA regulations (40 CFR 1508.4), Council comments on Federal, federally assisted and federally licensed undertakings provided pursuant to section 106 of the NHPA and 36 CFR part 800 are categorically excluded from these procedures. This exclusion is justified because Federal agencies seeking the Council's comments under section 106 have the responsibility for complying with NEPA on the action they propose. The Council's role is advisory

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and its comments are to be considered in the agency decisionmaking process. Coordination between the section 106 and the NEPA processes is set forth in 36 CFR 800.9.

**§ 805.4 Ensuring environmental documents are actually considered in Council decisionmaking.**

(a) Section 1505.1 of the NEPA regulations (40 CFR 1505.1) contains requirements to ensure adequate consideration of environmental documents in agency decisionmaking. To implement these requirements the Council shall:

- (1) Consider all relevant environmental documents in evaluating proposals for action;
- (2) Ensure that all relevant environmental documents, comments, and responses accompany the proposal through internal Council review processes;
- (3) Consider only those alternatives encompassed by the range of alternatives discussed in the relevant environmental documents when evaluating proposals for the Council action; and,
- (4) Where an environmental impact statement (EIS) has been prepared consider the specific alternative analyzed in the EIS when evaluating the proposal which is the subject of the EIS.

(b) For each of the Council's principal activities covered by NEPA, the following chart identifies the point at which the NEPA process begins, the point at which it ends, and the key officials required to consider environmental documents in their decisionmaking.

Activity	Start of NEPA process	Completion of NEPA process	Key officials required to consider environmental documents
Recommendations for legislation.	During staff formulation of proposal.	Prior to submission to Congress or OMB.	Executive Director and full Council, as appropriate.
Regulations and procedures ...	Prior to publication of draft regulations in FEDERAL REGISTER.	Prior to publication of final regulations in FEDERAL REGISTER.	Executive Director and full Council as appropriate.
Policy recommendations .....	During staff formulation of proposal.	Prior to adoption by full Council or Executive Director.	Executive Director and full Council, as appropriate.

**§ 805.5 Typical classes of action.**

(a) Section 1507.3(c)(2) (40 CFR 1507.3(c)(2)) in conjunction with § 1508.4 requires agencies to establish three typical classes of action for similar

treatment under NEPA: actions normally requiring EIS; actions normally requiring assessments but not necessarily EISs; and actions normally not requiring assessments or EISs. Each of

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the covered categories of Council actions generally falls within the second category, normally requiring an assessment but not necessarily an EIS.

(b) The Council shall independently determine whether an EIS or an environmental assessment is required where:

(1) A proposal for Council action is not covered by one of the typical classes of action above; or

(2) For actions which are covered, the presence of extraordinary circumstances indicates that some other level of environmental review may be appropriate.

### § 805.6 Interagency cooperation.

The Council shall consult with appropriate Federal and non-Federal agencies and with interested private persons and organizations when it is considering actions involving such parties and requiring environmental assessments. Where other Federal agencies are involved in the proposed action, the Council shall cooperate in the required environmental assessment and the preparation of necessary environmental documents. Where appropriate as determined by the nature and extent of Council involvement in the proposed action, the Council shall assume the status of lead agency.

### § 805.7 Environmental information.

Interested persons may contact the Executive Director for information regarding the Council's compliance with NEPA.

## PART 810—FREEDOM OF INFORMATION ACT REGULATIONS

Sec.

810.1 Purpose and scope.

810.2 Procedure for requesting information.

810.3 Action on requests.

810.4 Appeals.

810.5 Fees.

810.6 Exemptions.

AUTHORITY: Pub. L. 89-665, 80 Stat. 915 (16 U.S.C. 470) as amended by Pub. L. 91-243, Pub. L. 93-54, Pub. L. 94-422, Pub. L. 94-458, Pub. L. 96-199, Pub. L. 96-244, Pub. L. 96-515.

SOURCE: 46 FR 45334, Sept. 11, 1981, unless otherwise noted.

### § 810.1 Purpose and scope.

This subpart contains the regulations of the Advisory Council on Historic Preservation implementing the Freedom of Information Act (5 U.S.C. 552). Procedures for obtaining the records covered by the Act are established in these regulations. Persons seeking information or records of the Council are encouraged to consult first with the staff of the Council before filing a formal request under the Act pursuant to these regulations. The informal exchange of information is encouraged wherever possible.

### § 810.2 Procedure for requesting information.

(a) Requests for information or records not available through informal channels shall be directed to the Administrative Officer, Advisory Council on Historic Preservation, 1522 K Street NW., Washington, DC 20005. All such requests should be clearly marked "FREEDOM OF INFORMATION REQUEST" in order to ensure timely processing. Requests that are not so marked will be honored, but will be deemed not to have been received by the Council, for purposes of computing the response time, until the date on which they are identified by a member of the Council staff as being a request pursuant to the Freedom of Information Act.

(b) Requests should describe the records sought in sufficient detail to allow Council staff to locate them with a reasonable amount of effort. Thus, where possible, specific information, including dates, geographic location of cases, and parties involved, should be supplied.

(c) A request for all records falling within a reasonably specific category shall be regarded as conforming to the statutory requirement that records be reasonably described if the records can be identified by any process that is not unreasonably burdensome or disruptive of Council operations.

(d) If a request is denied on the ground that it does not reasonably describe the records sought, the denial shall specify the reasons why the request was denied and shall extend to the requester an opportunity to confer

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with Council staff in order to reformulate the request in sufficient detail to allow the records to be produced.

#### § 810.3 Action on requests.

(a) Once a requested record has been identified, the Administrative Officer shall notify the requester of a date and location where the records may be examined or of the fact that copies are available. The notification shall also advise the requester of any applicable fees under § 810.5.

(b) A reply denying a request shall be in writing, signed by the Administrative Officer and shall include:

(1) Reference to the specific exemption under the Act which authorizes the denial of the record, a brief explanation of how the exemption applies to the record requested, and a brief statement of why a discretionary release is not appropriate; and,

(2) A statement that the denial may be appealed under § 810.4 within 30 days by writing to the Executive Director, Advisory Council on Historic Preservation, 1522 K Street NW., Washington, DC 20005.

(c) The requirements of § 810.3 (b)(1) and (2) do not apply to requests denied on the ground that they are not described with reasonable specificity and consequently cannot be identified.

(d) Within 10 working days from receipt of a request, the Administrative Officer shall determine whether to grant or deny the request and shall promptly notify the requester of the decision. In certain unusual circumstances specified below, the time for determinations on requests may be extended up to a total of 10 additional working days. The requester shall be notified in writing of any extension and of the reason for it, as well as of the data on which a determination will be made. Unusual circumstances include:

(1) The need to search for and collect records from field offices or other establishments that are separate from the Washington office of the Council;

(2) The need to search for, collect, and examine a voluminous amount of material which is sought in a request; or,

(3) The need for consultation with another agency having substantial inter-

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est in the subject matter of the request.

If no determination has been made by the end of the 10-day period or the end of the last extension, the requester may deem his request denied and may exercise a right of appeal in accordance with § 810.4.

#### § 810.4 Appeals.

(a) When a request has been denied, the requester may, within 30 days of receipt of the denial, appeal the denial to the Executive Director of the Council. Appeals to the Executive Director shall be in writing, shall be addressed to the Executive Director, Advisory Council on Historic Preservation, 1522 K Street NW., Washington, DC 20005, and shall be clearly marked "FREEDOM OF INFORMATION APPEAL." Requests that are not so marked will be honored, but will be deemed not to have been received by the Council, for purposes of computing the response time, until the date on which they are identified by a member of the Council staff as being an appeal pursuant to the Freedom of Information Act.

(b) The appeal will be acted on within 20 working days of receipt. A written decision shall be issued. Where the decision upholds an initial denial of information, the decision shall include a reference to the specific exemption in the Freedom of Information Act which authorizes withholding the information, a brief explanation of how the exemption applies to the record withheld, and a brief statement of why a discretionary release is not appropriate. The decision shall also inform the requester of the right to seek judicial review in the U.S. District Court where the requester resides or has his principal place of business, or in which the agency records are situated, or in the District of Columbia.

(c) If no decision has been issued within 20 working days, the requester is deemed to have exhausted his administrative remedies.

#### § 810.5 Fees.

(a) Fees shall be charged according to the schedules contained in paragraph (b) of this section unless it is determined that the requested information

will be of primary benefit to the general public rather than to the requester. In that case, fees may be waived. Fees shall not be charged where they would amount to less than \$3.00.

(b) The following charges shall be assessed:

(1) Copies of documents—\$0.10 per page.

(2) Clerical searches—\$1.00 for each one quarter hour in excess of the first quarter hour spent by clerical personnel in searching for requested records.

(3) Professional searches—\$2.00 for each one quarter hour in excess of the first quarter hour spent by professional or managerial personnel in determining which records are covered by a request or other tasks that cannot be performed by clerical personnel.

(c) Where it is anticipated that fees may amount to more than \$25.00, the requester shall be advised of the anticipated amount of the fee and his consent obtained before the request is processed. The time limits for processing the request under §810.3 shall not begin to run until the requester's written agreement to pay the fees has been received. In the discretion of the Administrative Officer, advance payment of fees may be required before requested records are made available.

(d) Payment should be made by check or money order payable to the Advisory Council on Historic Preservation.

#### §810.6 Exemptions.

(a) The Freedom of Information Act exempts from disclosure nine categories of records which are described in 5 U.S.C. 552(b).

(b) When a request encompasses records which would be of concern to or which have been created primarily by another Federal agency, the record will be made available by the Council only if the document was created primarily to meet the requirements of the Council's regulations implementing section 106 of the National Historic Preservation Act or other provisions of law administered primarily by the Council. If the record consists primarily of materials submitted by State or local governments, private individuals, organizations, or corporations, to another

Federal agency in fulfillment of requirements for receiving assistance, permits, licenses, or approvals from the agency, the Council may refer the request to that agency. The requester shall be notified in writing of the referral.

### PART 811—EMPLOYEE RESPONSIBILITIES AND CONDUCT

AUTHORITY: 5 U.S.C. 7301 and 16 U.S.C.470, as amended.

SOURCE: 63 FR 54355, Oct. 9, 1998, unless otherwise noted.

#### §811.1 Cross-references to employees' ethical conduct standards, financial disclosure and financial interests regulations and other conduct rules.

Employees of the Advisory Council on Historic Preservation are subject to the executive branch-wide standards of ethical conduct, financial disclosure and financial interests regulations at 5 CFR Parts 2634, 2635 and 2640, as well as the executive branch-wide employee responsibilities and conduct regulations at 5 CFR Part 735.

### PART 812—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE ADVISORY COUNCIL ON HISTORIC PRESERVATION

Sec.

812.101 Purpose.

812.102 Application.

812.103 Definitions.

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812.110 Self-evaluation.

812.111 Notice.

812.112-812.129 [Reserved]

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812.131-812.139 [Reserved]

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812.149 Program accessibility: Discrimination prohibited.

812.150 Program accessibility: Existing facilities.

812.151 Program accessibility: New construction and alterations.

812.152-812.159 [Reserved]

812.160 Communications.

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812.161-812.169 [Reserved]  
812.170 Compliance procedures.  
812.171-812.999 [Reserved]

AUTHORITY: 29 U.S.C. 794.

SOURCE: 51 FR 22896, June 23, 1986, unless otherwise noted.

### §812.101 Purpose.

This part effectuates section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

### §812.102 Application.

This part applies to all programs or activities conducted by the agency.

### §812.103 Definitions.

For purposes of this part, the term—  
*Assistant Attorney General* means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

*Auxiliary aids* means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, brailled materials, audio recordings, telecommunications devices and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

*Complete complaint* means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe

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or identify (by name, if possible) the alleged victims of discrimination.

*Facility* means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

*Handicapped person* means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

As used in this definition, the phrase:

(1) *Physical or mental impairment* includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term *physical or mental impairment* includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) *Major life activities* includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major



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life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the agency as having such an impairment.

*Historic preservation programs* means programs conducted by the agency that have preservation of historic properties as a primary purpose.

*Historic properties* means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under a statute of the appropriate State or local government body.

*Qualified handicapped person* means—

(1) With respect to preschool, elementary, or secondary education services provided by the agency, a handicapped person who is a member of a class of persons otherwise entitled by statute, regulation, or agency policy to receive education services from the agency.

(2) With respect to any other agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, a handicapped person who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature;

(3) With respect to any other program or activity, a handicapped person who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(4) *Qualified handicapped person* is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by § 812.140.

*Section 504* means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617), and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955). As used in this part, section 504 applies only to programs or activities con-

ducted by Executive agencies and not to federally assisted programs.

*Substantial impairment* means a significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

### §§ 812.104–812.109 [Reserved]

#### § 812.110 Self-evaluation.

(a) The agency shall, by August 24, 1987, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, until three years following the completion of the self-evaluation, maintain on file and make available for public inspection:

(1) A description of areas examined and any problems identified, and

(2) A description of any modifications made.

#### § 812.111 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the head of the agency finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

### §§ 812.112–812.129 [Reserved]

#### § 812.130 General prohibitions against discrimination.

(a) No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied

the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified handicapped persons to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a

program or activity with respect to handicapped persons.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude handicapped persons from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to handicapped persons.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified handicapped persons to discrimination on the basis of handicap.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified handicapped persons to discrimination on the basis of handicap, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified handicapped persons to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the agency are not, themselves, covered by this part.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or Executive order to a different class of handicapped persons is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

**§§ 812.131–812.139 [Reserved]**

**§ 812.140 Employment.**

No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of

1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1613, shall apply to employment in federally conducted programs or activities.

§§ 812.141–812.148 [Reserved]

**§ 812.149 Program accessibility: Discrimination prohibited.**

Except as otherwise provided in § 812.150, no qualified handicapped person shall, because the agency's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

**§ 812.150 Program accessibility: Existing facilities.**

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by handicapped persons;

(2) In the case of historic preservation programs, require the agency to take any action that would result in a substantial impairment of significant historic features of an historic property; or

(3) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 812.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by

a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity.

(b) *Methods*—(1) *General.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by handicapped persons. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified handicapped persons in the most integrated setting appropriate.

(2) *Historic preservation programs.* In meeting the requirements of § 812.150(a) in historic preservation programs, the agency shall give priority to methods that provide physical access to handicapped persons. In cases where a physical alteration to an historic property is not required because of § 812.150(a)(2) or (a)(3), alternative methods of achieving program accessibility include—

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

## § 812.151

(ii) Assigning persons to guide handicapped persons into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section by October 21, 1986, except that where structural changes in facilities are undertaken, such changes shall be made by August 22, 1989, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by February 23, 1987, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

### **§ 812.151 Program accessibility: New construction and alterations.**

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by handicapped persons. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151-4157), as established

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in 41 CFR 101-19.600 to 101-19.607, apply to buildings covered by this section.

### **§§ 812.152-812.159 [Reserved]**

### **§ 812.160 Communications.**

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the handicapped person.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf person (TDD's) or equally effective telecommunication systems shall be used.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 812.160 would result in such alteration or burdens. The

decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, handicapped persons receive the benefits and services of the program or activity.

§§ 812.161–812.169 [Reserved]

§ 812.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) The General Counsel shall be responsible for coordinating implementation of this section. Complaints may be sent to the General Counsel, Advisory Council on Historic Preservation, 1100 Pennsylvania Avenue, NW., Washington, DC 20004.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), or section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 792), is not readily accessible to and usable by handicapped persons.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by § 812.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

[51 FR 22896, June 23, 1986, as amended at 51 FR 22893, June 23, 1986]

§§ 812.171–812.999 [Reserved]

PARTS 813–899 [RESERVED]