ADVISORY COUNCIL ON HISTORIC PRESERVATION

36 CFR Part 800

RIN 3010–AA04

Protection of Historic Properties

AGENCY: Advisory Council on Historic Preservation.

ACTION: Final rule; revision of current regulations.

SUMMARY: The Advisory Council on Historic Preservation is publishing its final rule, replacing the previous regulations in order to implement the 1992 amendments to the National Historic Preservation Act (NHPA) and to improve and streamline the regulations in accordance with the Administration's reinventing government initiatives and public comment. The final rule modifies the process by which Federal agencies consider the effects of their undertakings on historic properties and provide the Council with a reasonable opportunity to comment with regard to such undertakings, as required by section 106 of the NHPA. The Council has sought to better balance the interests and concerns of various users of the Section 106 process, including Federal agencies, State Historic Preservation Officers (SHPOs), Tribal Historic Preservation Officer (THPOs), Native Americans and Native Hawaiians, industry and the public. After engaging in extensive consultation through more than four years, the Council has developed this final rule.

DATES: This final rule is effective June 17, 1999.

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

SUPPLEMENTARY INFORMATION: The information that follows has been divided into eight sections. The first one provides background information introducing the agency and summarizing the history of the rulemaking process. The second section provides a general summary of the comments received in response to the September 1996 notice of proposed rulemaking. The third section summarizes consultations that took place with Native Americans. Such summary is included in the preamble of these regulations to reflect the fact that regulations incorporate the 1992 amendments to the NHPA which had a large impact on the role of Native Americans on the section 106 process.

The September 1996 notice of proposed rulemaking highlighted six issues on which the Council particularly wanted to received comments. The fourth section summarizes those comments, and generally reflects the Council reaction to them. The fifth section relates, section by section, the Council's response in these new regulations to the comments received. The sixth section highlights the major changes to the section 106 process that these new regulations implement. The seventh section provides a description of the meaning and intent behind specific sections of the new regulations. Finally, the eight section provides the impact analysis section, which addresses various legal requirements, including the Regulatory Flexibility Act, the Paperwork Reduction Act, the National Environmental Policy Act, the Unfunded Mandates Act, the Congressional Review Act and various relevant Executive Orders.

I. Background

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

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

In October, 1992, Pub. L. 102–575 amended the NHPA and affected the way section 106 review is carried out. The Council thereafter began its efforts to amend its regulations accordingly. Additionally, as part of the Administration's National Performance Review and overall streamlining efforts, the Council undertook a review of its regulatory process to identify potential changes that could improve the operation of the section 106 process an conform it to the principles of the Administration. The Council commenced an information-gathering effort to assess the existing section 106 process and to identify desirable changes.

As a part of these efforts, the Council sent a questionnaire to 1,200 users of the Section 106 process, including Federal agencies, State Historic Preservation Officers (SHPOs), State and local governments, applicants for Federal assistance, Indian tribes, preservation groups, contractors involved in the process, and members of the public. The questionnaires sought opinions on the existing regulatory process and ideas for enhancing the process. The Council received over 400 responses. After analyzing the responses and holding several meetings with Federal Preservation Officers and SHPOs, the Council staff presented its preliminary findings to a special Task Force comprised of Council members representing the Department of Transportation, the National Conference of State Historic Preservation Officers, the National Trust of Historic Preservation, the Council's Native American representative, an expert member and the chairman. The Council member representing the Department of the Interior was later added to the Task Force. This diverse, special Council member Task Force worked closely with the Council staff, reviewing comments and numerous drafts of the regulations.

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

opportunities for involvement in the Section 106 process. These principles have guided the regulatory reform effort.

The Council drafted proposed regulations, seeking to meet the stated findings and objectives adopted by the Task Force. On October 3, 1994, the Council published those draft proposed regulations on the **Federal Register** and sought public comment, on a notice of proposed rulemaking (59 FR 50396). The notice provided for a 60 day public comment period, and a 30 day extension of that period for Indian tribes who requested it. The Council received approximately 370 comments on the October 1994 proposal. Generally, commenters supported the overall goals and direction adopted by the Task Force, but found that the proposed regulations failed to implement the stated goals. Particularly, many commenters disagreed with the role of the Council as arbiter of disputes over application of the regulations, the public appeals process, and provisions dealing with enforcement.

At a Council membership meeting in February, 1995, the Council decided to continue its dialogue with major user groups of the section 106 process in an effort to resolve these concerns. The Council membership also reaffirmed the objective of reducing regulatory burdens on Federal agencies and SHPOs and focusing the review process on important historic preservation issues. The Council solicited the views of users of the Section 106 process once again by convening separate focus groups with local governments, industry representatives, Native Americans and Federal agency officials in early 1995. As a result of these meetings, and after considering the views of commenters, the Council drafted a substantially revised proposal and circulated the draft informally in July, 1995 to those who had commented on the October, 1994, notice of proposed rulemaking. The Council received approximately 80 comments on the informally distributed draft. Generally, the commenters found the July, 1995, draft to be an improvement on the October, 1994, proposal. Again, however, Federal agencies noted that the Council did not go far enough in removing itself from routine cases and in bringing finality to the process. Federal agencies also remained concerned that the public participation provisions were too open-ended and inadequately defined the roles and rights of participants in the process. Federal agencies also considered the National Environmental Policy Act (NEPA) integration section to be a step forward, but submitted that its substitution provisions should be extended to environmental assessments as well as environmental impact statements and, overall, could provide better integration of NHPA and NEPA. In contrast, the majority of SHPOs did not want the Council to remove itself further from the Section 106 process and did not want the NEPA integration section to be extended to environmental assessments. The National Conference of State Historic Preservation Officers, as well as many of its member SHPOs, supported the public participation process as set forth in the July, 1995, draft, but sought clarification on the roles and responsibilities of Federal agencies under section 106. Although industry commenters deemed the July, 1995, draft a vast improvement over the 1994 proposal, they remained concerned with the appeals procedures and found the process too burdensome. Industry also remained concerned about the public participation provisions.

In accordance with the general approach described above, after reviewing the comments on the October, 1994, proposal, and in response to agency downsizing and restructuring, the Council substantially changed its proposal. The new proposed regulations were published on the **Federal Register** on a second notice of proposed rulemaking on September 13, 1996 (61 FR 48580). Again, the notice provided for a 60 day public comment period, and a 30 day extension of that period for Indian tribes who requested it. The notice highlighted six specific issues to focus commenters' review on what the Council believed to be the most critical issues of concern. The six issues were: public participation, local government involvement, Council review of agency findings, time frames, and alternate procedures. The Council received 221 comments. Most commenters focused on the six issues listed above. A summary of the comment received in response to the September, 1996, notice is presented below, under its own section (See Section II of the preamble, below).

On November 12, 1996, reauthorization legislation for the Council was signed into law. It directed the Council, within 18 months, to submit a report to Congress containing an analysis of alternatives for modifying the regulatory process under Section 106 and section 110(f) of the NHPA, and ''alternatives for future promulgation and oversight of regulations for implementation of Section 106 of the (NHPA).'' The report was submitted to Congress in May, 1998. In summary, the report concluded that the basic implementation of the Section 106 process was sound, though it certainly merited continuing improvement. It also stated that some improvements sought in the rulemaking process should result in more thoughtful and efficient decisionmaking and better protection of significant historic properties. It noted that only a small number of the thousands of projects and programs considered under the Section 106 process each year were problematic or controversial, and that those should continue to receive an appropriate level of attention and public debate even while the Council worked to improve the planning and review process to forestall or minimize potential disputes of this nature that could arise in the future. The Council also reaffirmed its commitment to ensuring that it would continue to develop program and operational enhancements that promote the effectiveness, consistency, and coordination of other public policies and programs with the purposes Congress articulated in the NHPA.

Through the process of considering public comments, the Council formulated a draft regulation on June 5, 1997. During August and September of 1997, the Council conducted consultations with Indian tribes regarding the June, 1997, draft regulations. These special consultations were held to respond to tribal concerns about prior insufficient consultation, to meet Administration directives regarding government-to-government consultation with Indian tribes and to recognize the special role given Indian tribes in the 1991 NHPA amendments. A summary of these consultations is provided under Section II, below.

After further, careful consideration of all public comments and the results of its tribal consultations, the Council revised the June, 1997, draft regulations. On October 24, 1997, the Council membership approved this draft of the regulations. On November 20, 1997, the Council submitted its draft regulations to the OMB Office of Information and Regulatory Affairs for their required review. This review involved numerous interagency meetings over the course of 15 months and resulted in certain changes in the October, 1997, draft to meet agency concerns.

At its business meeting on February 12, 1999, the Council formally adopted the draft of the regulations resulting from the OMB review process. Previously, the Council Chairman and the Regulations Task Force, in response to concerns raised by certain commenters, carefully considered whether the final regulation should be published once more for public comment. They determined that the changes made in response to public

comment and interagency review did not make substantial changes in the section 106 process as presented for public comment in September, 1996, and were rather the Council's reasonable response to and incorporation of suggested refinements that emerged from the public review process.

After the Council's Regulations Task Force adopted final technical and editorial changes to the regulations, and the preamble was finalized, this preamble and regulation were submitted to the OMB for final review, and then to the **Federal Register** for publication.

II. General Summary of Comments From the September, 1996, Notice of Proposed Rulemaking

Following is a summary of the major issues raised in the comments received in response to the notice of proposed rulemaking in September 1996. These comments led to the drafting of the proposed regulations that were then handed to the OMB Office of Information and Regulatory Affairs for their required review. Note that the terms ''most'' or ''a majority'' or other like phrases on the particular issue discussed. Please refer to Section V of this preamble for a discussion on the Council's response to the comments received.

A. Federal Agencies (35 Comments, Including Those From Field Offices and Regions)

General

A majority of agencies found that the regulations proposed on the September 1996 notice of proposed rulemaking (''September 1996 draft'') either streamlined the existing regulatory process or were an improvement over the proposal on the October 1994 notice of proposed rulemaking (''October 1995 draft''). Nevertheless, almost all suggested further changes.

Council Role

Most agencies were pleased with the general approach of deferring to Federal agency-SHPO decision making. Some felt that the Council did not go far enough in removing itself from the process. Others did not see the value in filing Memoranda of Agreement (MOAs) with the Council. One agency expressed its concern that the deference to agency-SHPO decision making would create inconsistencies and delays and would leave SHPOs subject to political pressure.

In addressing the Council's role in the 106 process, some agencies recognized and supported the Council's right to intervene in a case on its own initiative, while others opposed this provision. Specifically, some agencies expressed problems with the Council's right to intervene when projects involve tribal lands and whenever the SHPO fails to respond to an agency. On the Council's role in agencies' alternate procedures, most agencies opined that the Council approval should not be required for such procedures, although one agency found this role for the Council to be appropriate. Related to the Council's role, a number of agencies objected to the appeals process as set forth in the provision relating to the Council review of section 106 compliance, finding that it was too open-ended and inappropriately allowed the Council to enter the process after decisions had been made. Other agencies liked that appeals process, while one agency found it too restrictive. A few agencies viewed the Council as exceeding its authority in general in the regulations.

Public Involvement

The issue of public involvement was one of concern to agencies. Most agencies found that there were too many opportunities for the public to become involved. Specifically, agencies were concerned that the public could protest late in the process. Some agencies believed that existing agency procedures could better address public involvement, that guidelines on the goal of public involvement would be more appropriate than regulations, and that public involvement requirements should be lessened for minor projects. Agencies also expressed concern about the description of various participants in the process and their corresponding rights and responsibilities. Several agencies also took issue with the requirement that agencies consult with traditional cultural authorities because of the difficulty in identifying them.

NEPA Coordination

Several agencies found the goal of NEPA coordination beneficial, but did not find that the NEPA coordination section achieved its goal. Agencies found the section inconsistent with NEPA, particularly where agencies prepare an Environmental Assessment (EA), because of the public involvement and documentation requirements in the Council's regulations. Some agencies found the section helpful.

Time Frames

The issue of time frames for the different steps of the 106 process was also raised by agencies, with some suggesting that additional time frames were needed to make the process more efficient. Other agencies found the time frames appropriate as proposed. One agency objected to the suspension of the process where the Council or SHPO determines there is inadequate documentation.

Other Issues

Agencies favorably noted the new provisions on phased compliance and consideration of the magnitude of the undertaking and nature of property and effects. Agencies also liked the section on alternative means of satisfying 106, but some noted that the same result could be achieved through Programmatic Agreements (PAs). Agencies also expressed concern over the requirements that agency heads document decisions involving terminations, finding it inappropriate to elevate such decisions.

B. SHPOs (45 Comments, Including Those From Deputies and Staff)

General

Overall, the majority of SHPOs were satisfied with the direction of the proposed regulations or believed that the Council had made substantial progress in achieving streamlined regulations.

Council Role

An overwhelming concern of SHPOs was the proposal that the Secretary of the Interior decide disputes over consistency of agency procedures with section 106. Almost all SHPOs found that the Council should determine consistency. The majority of the SHPOs found that Council's role and criteria for involvement appropriate, although many noted that the regulations should clarify that the SHPO could directly seek the Council's involvement in a case. Some noted that the Council should be required to participate when asked by a SHPO.

Public Involvement

Most SHPOs supported the public participation provision, although some were still concerned that the public would be precluded from the process and would not have a real opportunity to provide input. The delineation of the roles and rights of participants was also viewed as somewhat confusing, according to several SHPOs. Some SHPOs found that the proposal could preclude the public from meaningful participation in the process. Several SHPOs also noted that Federal agencies should be required to consult with SHPOs when identifying interested parties. With respect to the public's right to appeal agency decisions under the provision regarding Council review

of Section 106 compliance, a number of SHPOs commented that appeals should not be restricted to members of the public who participated in the process. Further, several SHPOs found that the public appeal section set too high of a standard on the public in making a case for an appeal.

Alternative Procedures

With regard to program alternatives, SHPOs were supportive of the proposal, but many suggested that the National Conference of State Historic Preservation Officers (NCSHPO), individual SHPOs, and the public participate in the development of standard treatments, alternative agency procedures and categorical exemptions. SHPOs also overwhelmingly expressed the opinion that NCSHPO be given the right to terminate nationwide Programmatic Agreements. A number of SHPOs commented that they found the bridge replacement standard treatment as proposed in Section 800.5 of the September 1996 version to be inappropriate.

Time Frames

The most common concern of almost all SHPOs was the 15-day deadline for a finding of no historic properties affected. SHPOs believed this was an unreasonable short turn-around time for them to make a proper determination. With the exception of the 15-day deadline, most SHPOs found the time frames appropriate. Some noted that the different time periods were confusing and suggested adding time frames wherever the regulations referred to the phrase ''timely manner.''

C. Industry (24 Comments)

General

The majority of industry commenters stated that the September 1996 draft was substantially improved over either the existing regulations or the October 1994 draft. However, all commenters offered suggestions for further amending the regulations. Several other commenters, primarily associated with the mining industry, noted that while the September 1996 draft was an improvement, changes were still necessary to make the proposal acceptable. The question of the Council overstepping its authority was the primary concern of industry.

Council Role

The mining industry and several other commenters were concerned that the Council had overstepped its statutory mandate in the existing regulations and those proposed. They found that the regulations allowed the Council to ''second guess'' Federal agency decisions, particularly in the appeals section regarding Council review of section 106 compliance. Some commenters recognized that the proposed regulations provided a more limited role for the Council and, therefore, supported this change. Most industry commenters found that the Federal agency, not the Council, should decide whether agency procedure were consistent with section 106.

Public Involvement

The role of participants in the process, particularly the public and applicants was a major issue of concern for the industry. Generally, many commenters found the roles poorly defined and confusing. Several commenters suggested the regulations delineate and limit participants entitled to partly status and those entitled to notice status. Many commenters liked the enhanced role of applicants, but some suggested that applicants deserved equal status with principal parties. On the role of the public in appeals of agency decisions (in the provision regarding Council review of section 106 compliance), some commenters noted approvingly that appeals were limited to parties who had participated in the process. However, most commenters on the issue wanted the appeals process further limited to parties that met legal standing requirements. Industry commenters, primarily from the mining industry, viewed public participation as too open-ended and lacking finality.

NEPA Coordination

Industry commenters approved of the concept of NEPA coordination, but found that the proposed regulations would not reduce burdens because the NEPA documents still have to meet the Council's criteria.

Alternative Procedures

Almost all industry commenters approved of the concept of standard treatments, categorical exemptions, PAs, and alternate procedures.

Time Frames

On the issue of time frames, commenters suggested inserting deadlines at each step in the process, including consultation, and found references to the words ''timely'' or ''before'' too vague and unworkable.

Other Issues

Several industry commenters viewed the requirement to consult with traditional cultural authorities as burdensome. Generally, industry found that the regulations provided too much ''special treatment'' for Native Americans. Industry commenters were also interested in having the regulations address the question of agency jurisdiction on non-Federal lands.

D. Indian Tribes (28 Comments)

General

Tribes overall were dissatisfied with the direction of the regulations.

Council Role

Tribes were troubled by the Council's removal from routine case review and found that the proposed regulations did not provide a balanced process. However, several tribes stated that the Council should participate on projects on tribal lands only if requested by the tribe.

Public Involvement

Tribes found the public appeals provision in the section regarding Council review of section 106 compliance to be too restrictive. They also suggested that the regulations clarify that Federal agencies must solicit the views of Indian tribes as members of the public, as well as consult on a government-to-government basis.

NEPA Coordination

Tribes viewed the NEPA coordination provision as troublesome because sensitive tribal information gathered in fulfilling the Council's criteria would be included in an Environmental Impact Statement (EIS) and thus available for public distribution.

Alternative Procedures

Tribes wanted to be included in the development of standard treatments, categorical exemptions, PAs and alternate agency procedures. Tribes were most concerned about the standard treatment for archaeology as proposed in § 800.5 of the September 1996 version, finding it discouraged consideration of the broader values of a site.

Other Issues

Tribes were most concerned with the identification and evaluation of historic properties, including properties to which they attach religious and cultural significance. They were concerned that Federal agencies' identification efforts would be incomplete and that agencies would make ''no historic properties affected'' determinations without prior consultation with the tribes. They also found that the standard treatment provision covering data recovery for archaeological sites a proposed in § 800.5 of the September 1996 version, encouraged evaluation of sites only for

criterion D of the National Register and discouraged consideration of the broader range of values of the site. The relationship between tribal and SHPO responsibilities was also of concern to tribes. When undertakings were on tribal lands, tribes did not want SHPO involvement. When undertakings were on non-tribal lands, but affected properties to which they attach religious and cultural significance or other historic properties of tribal concern, then tribes wanted equal status with SHPOs and NCSHPO in the process. Tribes also suggested that the regulations require determinations of eligibility from the Keeper where tribes disputed an agency decision on eligibility.

E. Local Governments (11 Comments)

General

Local governments were supportive of the concept of allowing agencies and SHPOs to conclude the 106 process without Council review.

Council Role

Local government commenters overall found the proposed role of the Council appropriate, but expressed concern about the loss of the Council as a balancing force in the process.

Public Involvement

The public participation requirements were viewed as redundant with NEPA. The National Association for County Community and Economic Development opposed the requirement to consult with tribes on non-tribal lands.

Alternative Procedures

Local governments supported the use of standard treatments, but wanted more flexible application of the Secretary's Standards for Rehabilitation. Some were concerned about the standard treatment for bridge replacements as proposed in § 800.5 of the September 1996 version.

F. Preservation Organizations (21 Comments)

General

Presevation organizations were most concerned about the diminished role of the Council as set forth in the general framework of the proposed regulations. They also viewed the public participation provisions as preventing meaningful public involvement.

Council Role

Preservation organizations opposed the decreased role of the Council in the 106 process, finding that it displaced the check and balance system of the process in place at the time. They also considered the proposal as placing too many constraints on the Council's ability to review agency findings. The Council's withdrawal from commenting on standard treatments under the section on the assessment of adverse effects was also of great concern to preservationists. On the issue of the Council's role in determining consistency of agency procedures, the few groups that commented found that the Council should make the determination.

Public Involvement

The public's role in the process as proposed was of great concern to preservation organizations. They found the public participation provisions confusing, complicated, and circumscribed, leaving the public with no meaningful role in the 106 process. The proposal, according to preservation organizations, would increase litigation, last minute appeals and Council foreclosures.

NEPA Coordination

Preservation organizations supported the concept of compliance coordination with NEPA, but found that the September 1996 draft did not go far enough to protect preservation interests.

Alternative Procedures

Commenters were supportive of the concept of alternative procedures, but wanted provisions to explicitly ensure that the public participate in their development and implementation.

Time Frames

Commenters strongly opposed the 15-day deadline for SHPO review of a ''no historic properties affected'' finding, as not giving SHPOs adequate time to conduct such review.

Other Issues

Preservation organizations were opposed to the standard treatments as proposed in § 800.5 of the September 1996 draft, finding that the public, tribes and Council would have little or no role in projects involving bridges or archeology. The § 800.5 standard treatment for archeology, according to the commenters, would encourage agencies only to consider criterion D and, thus, to not properly consider other values.

G. General Public (14 Comments)

General

There were no significant trends in the comments from the general public. Individuals raised particular concerns based on their own interests and experience. Several commenters noted that, overall, the regulations appeared to be too complex. Three commenters expressed concern that the regulations could affect their rights as private landowners.

Council Role

A few commenters found that the removal of the Council from routine cases would create too much pressure and work for SHPOs.

Public Involvement

Several comments found that the proposed public participation provision failed to provide sufficient opportunities for public involvement.

Alternate Procedures

A few commenters expressed concern about the standard treatment for bridge replacements and archaeological sites as proposed in § 800.5 of the September 1996 version.

H. Experts/Consultants (33 Comments)

Council Role

Most commenters found that the proposal did not provide enough opportunities for Council involvement in the process. Commenters expressed concern that the proposal did not set forth an adequate check and balance system, leaving SHPOs subject to political pressure. Several experts suggested that the regulations focus more on substantive outcomes and less on removing the Council from the process.

Public Involvement

Experts and consultants found that the terms and procedures in the proposal were too complicated and vague and would, thus, discourage meaningful public involvement. Commenters found the delineation of participants too confusing. Overall, commenters noted that the proposal provided few opportunities for public participation and gave the Federal agencies to much control over public involvement.

NEPA Coordination

Experts and consultants found the NEPA coordination section to be inadequate, since they believed it did not go far enough in allowing use of NEPA for 106 purposes.

Alternative Procedures

Experts and consultants expressed concern about the standard treatment for archaeology as proposed in § 800.5 of the September 1996 version, finding it would encourage sites to be evaluated as significant only for the data they contain. A few commenters found the

proposed bridge replacement standard treatment problematic.

III. Summary of Native American Consultations

As stated before, these regulations seek, among other things, to incorporate the 1992 amendments to the NHPA. Such amendments include important changes that significantly alter the role of Indian tribes in the 106 process. The Council members decided that before submitting a draft proposed regulation to the OMB for the mandatory review, additional input should be sought from Native Americans. The meetings focused on obtaining comments on the June 5, 1997 draft of the revised regulations (See Section I of the preamble, above). Each meeting of the four meetings was two days long. A total of eight days were spent discussing various aspects and concerns with tribal representatives.

The tenor of each meeting varied but all of the meetings proved productive. The attendees in Seattle were few but, as a result, the discussion was detailed. At Leech Lake Reservation, where the land base is shared by both the Forest Service and the Leech Lake Tribe, discussion focused on land jurisdictions and authorities. The meeting in Albuquerque solicited highly constructive suggestion due to the participants' extensive Section 106 experience. The Washington, DC meeting had the greatest number of participants from tribes and legal firms representing tribes.

The format of each meeting was consistent for all four meetings. The Executive Director briefed the group on the administrative structure of the Council, the existing steps of the regulation revision process and the proposed changes. The floor was then opened for discussion and recommendations. Some participants handed in written comments as well. The Native American/Native Hawaiian Council Member, Mr. Raynard Soon, attended the Seattle meeting and had the opportunity to convey his interest and listen to other Native American concerns.

This summary is presented in three sections of primary concerns that were stated at every meeting. The primary issues clearly became the focus points of the discussions as almost every participant reiterated in similar form the same concerns. They are presented in the following manner: (1) General overall comments and observations, (2) comments on sections pertaining to the Section 106 process on tribal lands, and (3) comments pertaining to the section 106 process off tribal lands.

General Comments

General observations in all of the meetings included the concern that the Council did not give the Native Americans adequate time to consult with them on the proposed regulations. The time constraint of potential adoption of the revised regulations at the October, 1997, Council meeting, before submission to OMB for review, was consistently questioned by many participants. The overriding sentiment was that the time frame was not adequate. Many tribal representatives explained that they had to take the information back to their Tribal Councils to receive directions and comments.

The proposed June 5, 1997 draft of the regulations was perceived by tribes as being heavily weighted toward the SHPO interest. Requests were made to take the state-oriented bias out of the draft. At every meeting, suggestions were made to change the ''SHPO'' citation to ''SHPO/THPO'' (Tribal Historic Preservation Office) or simply HPO (Historic Preservation Officer). There was consistency in the recommendation that even if tribes have not assumed SHPO duties, as delegated by the National Park Service (NPS) in accord with section 101(d)(2) of the NHPA, that the tribe or Native Hawaiian Organization should still be consulted if places of religious and cultural significance would be affected by a federal undertaking.

It became apparent that the word ''consultation'' is interpreted differently by Indians and non-Indians. In general, American Indian participants believed that the word implies a ''give-and-take'' dialogue, not just listening or recording their concerns. From the tribal perspective, consultation is more closely aligned with the process of negotiation. The tribes described that consultation means working toward a consensus. For non-Indians, consultation has another meaning: if the tribe had been contacted, attended the meetings, and had the opportunity to discuss its views with the agency, then the tribes had been consulted regardless of the outcome. For the majority of the American Indian participants, this kind of exchange did not represent adequate or effective consultation.

Where the proposed regulatory process addressed the requirements of Federal involvement regarding the places of religious and cultural significance to Native Americans, participants were adamant that they be involved in the process of decision making for an acceptable outcome. Requests were repeated to insert clear procedures within the regulations regarding ''adequate consultation.'' The stated preference of the American Indian participants was a clear definition in the regulations so that all parties in the section 106 process would perform what the tribes saw as adequate consultation.

On-Tribal Lands

The issues consistently raised for tribal lands reflected the underlying issue of a tribal nation's sovereignty. The primary concern was the ability of a SHPO to make or agree to a decision by a federal agency on tribal lands when there was no THPO. Tribal representatives explained why this was a problem for tribal governments and why the regulatory process under the June, 1997, draft regulations that enabled a State to have overriding decision-making authority on tribal lands, questioned their sovereign status. By delegating the authority vested in the Council by the NHPA for commenting on Determinations of No Adverse Effect and Adverse Effect, the proposed regulations effectively shifted the authority from a federal agency (the Council) to a State on tribal lands when there was no THPO. This shift of delegation from Federal to State clearly presented legal jurisdiction issues from the tribes' perspectives. Participants in the meetings maintained that, regardless of whether the tribe had formally assumed SHPO duties, the State did not have the jurisdictional authority to have final oversight for a federal undertaking on tribal lands.

Off-Tribal Lands

There are several issues that were raised in each meeting for those Federal undertakings that would affect religious and culturally significant places located off tribal lands. Much of the time was spent discussing American Indian involvement in the process on ancestral lands, ceded lands, fee lands and other types of land titles. A consensus of tribal representatives maintained that sovereignty, treaty rights, trust responsibility and government-to-government status entitled the tribes to a role in the process that was greater than the other ''consulting parties'' or general public as defined in the draft proposal.

The discussion surrounding the identification, evaluation determination of effect and potential mitigation proposals for properties to which the tribes attach religious and cultural significance resulted in recommendations that tribes should be involved early in the process and required signatories to a Memorandum

of Agreement, or at least have the ability to concur or object to the part of a project or plan that will affect an area of tribal or Native American interest.

IV. Summary of Comments Received Regarding the Six Issues Specially Raised in the September 1996 Notice of Proposed Rulemaking

On the preamble of the proposed regulations published for public comment on the **Federal Register** on September 1996, the Council presented six issues that it believed, based on comments received, deserved special attention from the commenters. What follows is a discussion of the commenters' response to these six issues and the Council's general reaction to them. For a discussion on the Council's response to comments, please refer to Section V of the preamble.

Finally, please note that these issues are stated in the same language as presented in the published preamble to the September 1996 draft.

1. Public Participation

The goal of the regulatory requirement that Federal agencies inform and involve the public in the section 106 process is to ensure that the public has a reasonable opportunity to provide its views on a project. The Council has attempted to give the public an adequate chance to voice its concerns to Federal decisionmakers while recognizing legitimate concerns about avoiding unnecessary procedural burdens and delays and protecting the privacy of non-governmental parties involved in the section 106 process. How can the regulations be enhanced to provide for meaningful public involvement in a timely and effective fashion?

Summary of comments: Federal agencies were still concerned about the role of the public in the process. Agencies believed that the roles and responsibilities of various participants were unclear. They still found that the public could delay a project by using the 106 process. Most SHPOs supported the public participation provision, although some still found the role of the public as set forth on the September 1996 draft to be unclear. Several SHPOs found the public appeals provision too restrictive. Local governments found the public participation provisions excessive and duplicative of NEPA, noting that the public involvement requirements would discourage local governments from seeking Federal monies for projects. Tribes found the public appeals provisions to be too restrictive. In addition, they wanted the regulations to clarify that agencies must consult with the general populace of tribes as members of the public. The role of the public was a major concern of the industry. Their comments viewed the public participation provisions as unclear and excessive. They wanted to further limit the public's right to appeal agency decisions. Many specific comments were received from all categories of commenters that were critical of the clarity and timing of public participation provisions.

Council general reaction: The public participation provisions needed a thorough overhaul with the objective of making them clearer, achieving earlier effective public involvement and providing better public access to the Council when it was not involved in a case. The Council thought that the provisions should be redrafted to achieve these goals, while honoring the Council's original policy of encouraging the use of agency public participation procedures, reducing duplication of effort and having clear points of involvement and points of closure for the Section 106 process. The Council believed that the question of public participation could be effectively addressed by careful examination of the provisions, following the preceding principles, rather than adopting some significant departure from the Council's original objectives in this area.

2. Local Governments

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

Summary of comments: Federal agencies were not concerned with this issue overall, but those that commented found the local government role appropriate as proposed. HUD wanted the regulations to set forth an enhanced role for local governments. Some SHPOs felt that Certified Local Governments (CLGs) should be given recognition in the procedures, although others found the role appropriate as set forth in the proposed regulations. Some SHPOs noted that increased CLG involvement would bring a lack of consistency to the regulations, others noted CLGs may not be equipped to handle compliance. Local governments did not question their role in the process as set forth in the regulations, although they expressed general concern about SHPOs having too much power in the process. Tribes were not concerned about this issue. Industry was for the most part not concerned about this issue, although those that did comment found the level of local government involvement appropriate as drafted.

Council general reaction: Based on these comments, the Council believed that no major changes should be made in the role of local government. We suggested continuing to work with HUD to determine if there are specific amendments that could be made to advance their interest in enhancing the role of local governments while remaining consistent with overall direction of the regulations and avoiding further complicating the regulations. It is intended to pursue this in the development of local government program alternatives (§ 800.15), which as been reserved for future issuance.

3. Council Involvement

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

Summary of comments: Federal agencies like the general approach of deference to agency-SHPO decisionmaking, although some found that the Council did not go far enough in removing itself from the process or did not see the value in filing MOAs with the Council. Most agencies recognized the Council's right to intervene in a case on its own initiative, although some opposed this provision. SHPOs were satisfied overall with the Council's role in the process, although many SHPOs noted that they should have the right to go directly to the Council to seek Council intervention in a case. Local governments were concerned that the level of Council involvement may be too low and believed the SHPO would gain too much control under this proposal. Tribes were greatly concerned about the Council's removal from routine case review and found that the September 1996 draft failed to achieve a balance of power in the section 106 process.

Industry suggested the direction of removal of the Council from routine cases, but still found the Council had too must authority in the process to intervene and second-guess agency decisions. Preservation consultants expressed concern over possible abuses by agencies and SHPOs without adequate checks and balances.

Council general reaction: This was a critical point of the regulations and one that raised a lot of concern from a variety of sources. We believed that the basic principle of deferring to Federal agency-SHPO decisions was valid, but that the draft needed to better define when and how the Council would get involved. The Council did not believe in a policy change, but rather a refinement of the published provisions to clarify the Council's role and how parties invoked our involvement, responding to the specific comments. In particular, the involvement of the Council when undertakings affected Indian tribes and their interests needed to be expanded, as did the SHPO's right to directly request Council involvement. Changes made to address this issue had to be closely coordinated with those dealing with Council review of agency findings.

4. Council Review of Agency Findings

Section 800.9 provides for Council review of agency findings where the Council has not participated in the consultative process pursuant to § 800.6. The Council's right to review agency findings is limited to whether the agency followed the appropriate procedures when making an eligibility determination under § 800.4(c)(2), a no historic properties present or affected finding under § 800.4(d), or a no adverse effect finding or resolution by standard treatment under § 800.5(c). The right to review is also limited by the requirement that the request be made prior to the agency approval of the expenditure of funds or the issuance of a license, permit or other approval. The Council has 10 days to decide if the request warrants Council review and 30 days to decide the merits of the case. The Council finds that the above review process strikes a balance between allowing review of procedurally deficient agency decisions and limiting review to situations that could not have been corrected earlier in the process. Some Federal agencies find that the review process in § 800.9 provides the Council too much authority to second guess agency decisions and promotes a lack of finality to the process. How can the regulations accommodate the Council's concerns and those of other Federal agencies?

Summary of comments: Federal Agencies were divided in commenting on the appeals provision in the proposal. Some found that the September 1996 draft provisions were too open-ended and allowed the Council to enter the process after decisions had been made. Others liked the appeal procedures. SHPOS found the appeals provision satisfactory with respect to the Council's role. Local governments did not express concern over the Council's role in appeals over agency decisions. Tribes found the appeals provision too restrictive in general. Industry still was dissatisfied with the appeals section, finding it would create delays and allow review of agency decisions too late in a project's development. Industry maintained that the Council was overstepping its authority in this section by reviewing agency decisions. Comments from individuals and preservation organizations expressed concern that the appeals provisions were too restrictive and needed to be expanded.

Council general reaction: The Council believed that ready access to the Council was an essential counterbalance to the removal of the Council from routine case involvement. This access must be effective for a broad range of parties in the Section 106 process while maintaining a system that has definite points of closure for agencies and applicants. The September 1996 draft formulation was too restrictive and the regulation should be revised to provide a wider range of parties with more time to bring issues to the Council. However, this process must continue to have effective protections against groundless claims and potential for process abuse.

5. Time Frames

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

Summary of comments: All groups of commenters noted that vague references to ''timely'' or ''before'' should be replaced with specific time frames. Federal agencies suggested adding time frames for each step in the process. SHPOs overwhelmingly expressed concern about the 15-day deadline for a ''no historic properties affected'' determination, finding the period of time too short. SHPOs also noted that the different time periods listed in the September 1996 draft would foster confusion. Local governments stated that the overall process was too time consuming. Tribes did not express concern about the issue. Industry is most concerned about time frames, finding the different time frames too confusing. They find the 45 days for Council comment, 30 days for review of an EA and 15 days for SHPO review of a ''no historic properties affected'' finding to be too long. Overall, they found the process could be tightened up and made more predictable by adding more time frames. Preservation organizations expressed concern about time frames being too short, particularly the 15-day provision.

Council general reaction: The concern for the 15-day limit on SHPO responses was valid and that to fail to address it would pace an unreasonable burden on SHPOs. It was decided that the entire assemblage of specified time frames should be carefully examined for clarity, specificity and consistency. The 15-day limit in question was changed to 30 days, which is the general standard for review in the entire regulation.

6. Alternate Procedures

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

Summary of comments: Almost all Federal agencies found that they should make the determination on consistency of agency procedures with section 106. All SHPOs found that the Council should make the determination as to consistency and viewed the Secretary of Interior's role as final arbiter to be inappropriate. Local governments did not express concern on this issue. Tribes view the Council as a protector of their interests and view the Council as a check against agency decisionmaking. Industry overwhelmingly finds that the Federal agency should determine consistency of agency procedures. Preservation organizations were generally silent on this point.

Council general reaction: The Council believed that the proper entity to determine consistency was the Council membership and changed the regulation accordingly. Among other things, the Council has the statutory responsibility

to oversee the section 106 process, the internal experience and expertise to make such evaluations, and the diversity of membership to ensure that a balanced perspective is brought to final determinations regarding consistency.

V. Response to Comments

This section of the preamble relates, section by section, how the Council responded to comments from the public regarding these regulations.

Section 800.1

There were few comments on § 800.1. One comment stated that the goal of consultation was inappropriately described in the September 1996 notice of proposed rulemaking draft (''September 1996 draft'') as avoiding or minimizing adverse effect on historic properties. The comment found this language to be inconsistent with the procedural nature of section 106 of the NHPA. The Council agreed and therefore modified the § 800.1(a) of the regulation in response to this comment by adding that the goal is to ''seek ways to avoid, minimize or mitigate any adverse effects on historic properties.''

Another comment expressed concern about the reference in the September 1996 draft to other guidelines, policies and procedures issued by other agencies. The Council and the OMB were acutely aware of such concerns and carefully crafted the language in § 800.1(b) to make it clear that such references in these regulations do not implement those policies, procedures or guidelines as regulations.

Section 800.1(c) of the September 1996 draft explained the different methods of complying with these regulations. One comment found that, rather than showing the flexibility of the regulations, this subsection gave the impression that the regulations were inflexible. The Council decided to delete this subsection as redundant, unnecessary, and confusing.

The ''Timing'' section of the September 1996 draft is now in § 800.1(c). One comment noted that while this section allows nondestructive project planning activities before completing compliance with section 106, it would be nonsensical to include the proviso that such actions cannot restrict subsequent consideration of alternatives to avoid, minimize or mitigate adverse effects. The Council, however, decided that this provision should remain since the Council believes that the section 106 process should not be circumvented by the early foreclosure of mitigating options.

Several other comments noted that including field investigations as nondestructive planning activities could open the door to actions that could actually alter the character of historic properties, thereby circumscribing the 106 process. The Council deleted the reference to field investigations in the final regulation. The Council believes that such investigations could sometimes, depending on the particular project, constitute non-destructive planning. However, for the reasons stated above, the Council believed that the blanket statement in the September 1996 draft should be deleted.

Another comment suggested that a Federal agency notify the SHPO if phased compliance is anticipated. However, the Council believed this could only be a marginally beneficial practice, and did not want to further lengthen the process by adding another notification requirement to its regulations.

Section 800.2

The September 1996 draft created various categories of participants in the Section 106 process: Principal parties, consulting parties, affected parties, the public and the interested public. Many comments stated that the proposed ''classes'' of parties were confusing and inappropriate, and that they unfairly designated status to certain parties while excluding others. In response to these comments, the final regulation eliminates these categories of parties. Instead, the final regulation creates one group of parties, known as ''consulting parties'' which includes the SHPO/THPO, certain Indian tribes and Native Hawaiian organizations, local governments, applicants, and additional consulting parties with a demonstrated legal or economic relationship to the undertaking or affected properties, or concern with the undertaking's effects on historic properties. The rights and responsibilities of the Federal agency, the Council and the public are identified separately throughout the regulation and are not placed in a group or category. The Council believes this eliminates confusion and clarifies the roles of the different parties.

Section 800.2(a)(2) of the final regulation sets forth the concept of a lead Federal agency. One comment stated that Federal agencies should be required to select a lead agency where multiple Federal agencies are involved in a project. The Council rejected this suggestion as it deemed it appropriate for Federal agencies to maintain sole discretion in deciding whether to select a lead agency to represent multiple agencies throughout the section 106 process. The Council believes Federal agencies are in a better position to determine whether selecting a lead agency would facilitate the 106 process on a particular undertaking.

Section 800.2(a)(4) was added to respond to concerns raised about the nature of consultation in the section 106 process. It incorporates provisions taken from other sections of the regulations.

Responding to concerns that there were no limitations in the Council's decision to enter the 106 process, with the possibility of added delays, the Council added § 800.2(b)(1) defining the circumstances under which it would enter the Section 106 process. Specific criteria guiding Council decisions to enter are found in a new Appendix A.

Section 800.2(c)(6) provides for ''additional consulting parties'' to be added to the consultation process. Some comments sought more detail in the regulation on the nature and extent of such parties' role in the process and how such parties are designated as consulting parties. The Council decided to provide such information in guidance material rather than in the regulation. The Council also points out that § 800.3(f) provides some detail on how additional consulting parties may be added.

Other comments expressed concern, believing that consulting party status should be given only to those individuals or entities with a ''real'' interest in the undertaking. Among other things, the concern was that, without somehow limiting this group of participants, the 106 process would be severely slowed down, increasing the economic and time costs of compliance without adequate justification. The Council responded to this concern by adding language stating that those with a ''demonstrated interest in the undertaking may participate * * * 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.'' The involvement of private property owners is contemplated by this language. In response to several comments, the Council deleted the language in the September 1996 draft which allowed Agency Officials to limit participation of owners of real property to organizations representing such owners. The Council agreed that the limitation could unfairly restrain property owner participation by virtually requiring they organize before being allowed to participate in the 106 process.

Section 800.3

This section changed minimally from the September 1996 draft. The Council simplified the language in subsection (a). One comment noted that the regulation provided no guidance as to how a Federal agency determines if an undertaking ''has the potential to affect historic properties.'' The comment acknowledged that the existing regulations also did not provide specific criteria for such a determination. The Council decided that due to the broad differences among undertakings which would make such guidance too lengthy, this issue will be more appropriately addressed in supplementary guidance material to Federal agencies.

With regard to subsection (b), several comments stated that the Council exceeded its authority by requiring coordination of the section 106 process with reviews under other authorities. The Council maintains that coordination with other environmental reviews is extremely beneficial in achieving the best outcome under section 106. In response to comments questioning the Council's authority to mandate coordination, however, the Council made such coordination discretionary.

Subsection (c) in the September 1996 draft was moved to subsection (e) of the final rule. It was also amended to remove superfluous language in response to comments. It now requires the Agency Official to consult with the SHPO/THPO in planning for public involvement, in recognition of the inherent, specialized knowledge that such local entities possess regarding local parties which could have an interest on historic properties.

Subsection (c) of the final rule pertains to identification of the appropriate SHPO/THPO. It also includes general rules regarding consultation with the SHPO/THPO. The substance of this subsection was formally contained in subsection (d) of the September 1996 draft, although it has been amended to respond to comments. During the consultation meetings with Indian tribes, and as reflected in Indian tribe written comments, tribes expressed the concern that the role of tribal historic preservation officers who had assumed the role of state historic preservation officers under section 101 (d) (2) of the NHPA was not adequately addressed in the regulations. Because THPOs that have formally assumed SHPO duties on tribal lands act in lieu of SHPOs, many tribal comments suggested referencing ''SHPO/THPO.'' By using this reference, Federal agencies will be reminded that they must not only determine if their actions are on or will affect historic properties on tribal land, but they also must determine whether or not the tribe's THPO has formally assumed the role of SHPO. This change is a clarification of the language in § 800.12(B) of the September 1996 draft which set forth the rights of Indian tribes when undertakings are on tribal lands. That subsection addressed what would happen if an Indian tribe did not formally assume the responsibilities of the SHPO, but did not explain the role of the THPO vis-a-vis the SHPO where formal assumption did occur under 101(d)(2) of the NHPA.

With regard to the role of the THPO that has formally assumed the SHPO's role on tribal land, and responding to concerns that certain rights of property owners given by the NHPA could be overlooked or disregarded, the Council added a reference to the statutory language in section 101(d)(2)(D)(iii) of the NHPA, which authorizes certain property owners on tribal lands to request SHPO participation.

The September 1996 draft included in its subsection (d)(1), language directing Federal agencies to consult with the Council ''if the State Historic Preservation Officer declines in writing to participate in the Section 106 process * * *.'' This language was deleted from the final rule in response to comments made, particularly during the OMB inter-agency review, that such language in the regulation appeared to condone SHPO refusal to participate in the 106 process as long as it was done in writing. Language referring to SHPO failure to respond was retained, but amended in response to comments. Many comments disapproved of the language ''in a timely manner,'' as vague and confusing. The Council intended this language to refer back to the periods of time specified in the regulation for SHPO response. However, to avoid confusion and to also respond to other comments requesting definite time periods, the Council deleted the language and specified a 30 day response time. Additionally, in response to Federal agency comments asking for certainty and finality to the process, the Council included language on the regulation stating that the Federal agency could either proceed to the next step in the process or consult with the Council if the SHPO fails to respond. In response to SHPO concerns of being permanently left out of the rest of the 106, process, the Council allowed for SHPO re-entry into the process. However, in response to concerns about the need to cut down on delays and providing for timing certainty in the process, the final regulations do not provide for reconsideration of previous findings or determinations that the SHPO failed to review.

Subsection (d) of the final rule contains language similar to that of § 800.12(b) of the September 1996 draft. However, the intent of the language has been clarified in response to tribal comments that the Council must make it clear that the Indian tribe's consent is necessary when on tribal lands, whether or not the THPO has formally assumed the SHPO's responsibilities.

Subsections (e) and (f) of the final rule contain similar language to that of subsection (c) and (e) in the September 1996 draft. In response to various comments that asked for clarity regarding participation and showed concern that participants could be left out of the process, the Council made it clear, under §§ 800.2(c)(5) and 800.3(f)(1), that applicants must be invited to be consulting parties.

The September 1996 draft stated that Agency Officials ''shall identify'' Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects. The language was changed so that Agency Officials ''shall make a reasonable and good faith effort'' to identify such tribes. This change was strongly requested by Federal agencies during the OMB review process, on the basis that there would be an inherent, extreme difficulty in identifying all such tribes when there is no clear guidance or list showing such tribes for each property in the entire United States that could be affected by an undertaking. After discussions with OMB, the Council acceded to the change, believing it strikes an adequate balance, consistent with the statute, between the need to consult such tribes and the practical concerns of identifying them. The Council, however, notes its understanding that a Federal agency is not making ''a reasonable and good faith effort'' to identify Indian tribes under this subsection if it possesses knowledge, through communication from Indian tribes or otherwise, that a particular Indian tribe attaches religious and cultural significance to a property to be affected by an undertaking, but still fails to identify such tribe in the 106 process. Such a lack of a reasonable and good faith effort would be contrary to the requirements of the NHPA.

Subsection (g) of the final rule contains language that was formally in subsection (d)(3). It was moved as a separate subsection to highlight the opportunity for expediting consultation. Language was added to clarify when

multiple steps in the process could be condensed, further streamlining the 106 process.

Section 800.4

The substance of § 800.4(a) changed minimally from the September 1996 draft. The first sentence in subsection (a) was deleted as it was determined to be redundant with the coordination subsection in § 800.3. The Federal agency responsibilities during the scoping of identification efforts also remained largely unchanged, except that reference to the documentation requirement for area of potential effects was added here. The duty to document the area of potential effects was listed in § 800.12 in the September 1996 draft and was added in § 800.3 to emphasize the significance of this step. The Council plans to provide further guidance on development of the area of potential effect to address comments seeking assistance in defining the area of potential effect. Some comments questioned the duty to consult with the SHPO/THPO during the determination of the area of potential effect. Consultation with the SHPO/THPO at this critical decision making point has always been viewed as an important part of the process. The Council decided to retain the duty to consult with the SHPO/THPO since the Council believes that SHPO/THPOs have special expertise as to the historic areas in their jurisdiction and the idiosyncracies of such areas, and can greatly assist the Agency Official, using such expertise, in determining an accurate area of potential effects. Nevertheless, it is noted that the Federal agency is ultimately responsible for making the final determination about the area of potential effect (i.e., the concurrence of the SHPO/THPO in such determination is not required).

One comment noted that, under the existing regulations, the public was not involved early in the identification efforts. Section 800.4(a)(3) requires that Federal agencies seek information from individuals or organizations likely to have knowledge of or concerns with historic properties in the area. This is an avenue for early public involvement.

Subsection (b) sets the standards for a Federal agency's identification of historic properties. This subsection was modified minimally to address several comments. In response to tribal concerns, the requirement to consult with Indian tribes and Native Hawaiian organizations that attach religious and cultural significance to properties was moved to this part of the regulations. The substantive requirement had been set forth under § 800.12(c)(1) of the September 1996 draft. In response to tribal concerns regarding the need for adequate safeguards for sensitive information, the Council added a sentence requiring Federal agencies to consider ''confidentiality concerns'' of Indian tribes and Native Hawaiian organizations.

The final rule also tied the ''reasonable and good faith effort'' standard to examples listed in subsection (b)(1). Council guidance will be developed to elaborate on the use of the various methods of identification depending on the facts of each undertaking to respond to those comments seeking clarification. One comment noted that the regulations should provide a mechanism for disputes over what constitutes a ''reasonable and good faith effort.'' Section 800.2(b)(2) of the final rule sets forth that the Council can provide advice and assistance in resolution of disputes during the process.

The concept of ''phased identification'' was well received in the comments. The final rule, under § 800.4(b)(2), clarifies the applicability of phased identification. It also expands the notion of phasing to the evaluation step in the process, as suggested by several comments.

Section 800.4(b)(3) of the September 1996 draft, regarding the use of contractors by Agency Officials, was moved to § 800.2(a)(3) of the final rule.

With regard to the evaluation of historic properties, one comment stated the importance of allowing consensus determinations on eligibility whereby Federal agencies assume eligibility for the National Register without conducting a full evaluation, thus expediting the section 106 process. The Council provided for consensus determinations in subsection (c)(2) of the final rule and in the September 1996 draft in (c)(2).

In response to tribal comments about the importance of § 800.12(c)(1) of the September 1996 draft regarding determinations of eligibility, the Council incorporated language from that section into § 800.4(c)(2) of the final rule. In response to strong tribal concerns about the treatment of properties to which they attach religious and cultural significance and concerns that they would not be properly evaluated by those that do not attach such significance to the properties, the Council amended the regulatory language to provide an avenue for tribes that disagree with eligibility determinations regarding such properties to ask the Council to request the Federal agency to obtain a determination of eligibility.

Many SHPO comments strongly expressed concern about the 15-day review period in subsection (d) of the September 1996 draft, finding it too short for an adequate review of a determination of ''no historic properties affected.'' In light of the sometimes limited resources and workloads of the SHPOs and the fact that the complexity of some determinations require more time for an adequate review, the Council agreed and extended the time for SHPO response to 30 days. The Council believes that the need for proper evaluation of this determination and the danger that an improper evaluation could result in damage to historic properties outweighs the interests of expediting the process by 15 days.

Section 800.5

Subsection (a)(1) changed only in that it incorporated the duty to consult with Indian tribes and Native Hawaiian organizations, that was found in § 800.12(c)(1) of the September 1996 draft. Other minor wording changes were made in response to comments to clarify that there is no new notice and comment requirement at this step. Thus, the words ''which have been'' were added to the last sentence. References to the term ''interested public'' were deleted, as such a category of participants was dropped, as described above.

With regard to subsection (a)(1), some comments took issue with the last sentence which contains the concept of indirect effects as not being included in the regulations to be superseded. The Council has always considered that ''effect'' as contained in the statutory language of Section 106 includes both direct and indirect effects. Therefore, it specified that in regulatory language, thereby retaining the requirement that indirect effects be considered by Federal agencies during section 106 process, as it similarly is during the NEPA process.

The wording of some of the examples of adverse effects in subsection (a)(2) was modified from the September 1996 draft to clarify the intent and application in response to comments.

Subsection (a)(3) was eliminated in the final rule, but the concept of avoidance as justifying a no adverse effect determination is incorporated into subsection (b). The subsection (a)(3) of the final rule expands upon the phasing of identification and evaluation efforts to include phasing of the application of adverse effect criteria under certain circumstances. Comments observed that such flexibility at this step in the process was essential if a Federal agency opted for phasing at the earlier identification and evaluation stages.

Subsection (a)(4), the standard treatment provision, in the September 1996 draft was completely removed from this section in the regulation. The standard treatment option is still contained generally in § 800.14(d) of the final rule. The Council removed the Standard Treatments on subsection (a)(4) because it believes that all such treatments should be arrived at through specific consultation about them, as provided under the final rule's § 800.14(d). This does not change their availability as a streamlining device under the regulations.

With regard to review of ''no adverse effect'' determinations, the final rule was amended to acknowledge that, although the Council will not review ''no adverse effect'' determinations as a routine matter, there may be certain circumstances where the Council will intervene and review the finding, even where there is SHPO/THPO agreement with the Federal agency. This would likely happen when a consulting party disagrees with the Agency Official's determination or when the Council, guided by the criteria in appendix A, decides that it should review the determination. Subsection (c)(1) of the final rule acknowledges this by adding the language ''Unless the Council is reviewing the finding pursuant to § 800.5(c)(3) * * *.'' This was added in response to comments made by Indian tribes and preservation organizations that articulated the importance of the Council retaining its authority to overturn no adverse effect determinations.

Subsection (c)(2) of the final rule also amended the language, formerly in subsection (b)(2), that provided for disagreements between the SHPO and the Federal agency. The Council deleted the language requiring Federal agencies to ''consider the effect adverse'' if the SHPO/THPO disagreed with a no adverse effect finding. In the last sentence of (c)(2), the Council also changed the word ''may'' in the September 1996 draft to ''shall'' in the final rule, in response to several comments. Federal agency comments and others suggested giving the Federal agency the option of going back to the SHPO/THPO to resolve the disagreement or requesting Council review. Most Federal agencies, however, did not want the Council's position to be binding on the Federal agency, but merely advisory. The Council considered this concern, but rejected it as the Council maintains it has the right to interpret the correct application of its regulations. If an agency incorrectly applied the criteria of adverse effect, the Council viewed this as a misapplication of its procedures. In response to comments which found it problematic that there was no time limit for Council review of no adverse effect determinations, the Council set a 15 day review period for such reviews in subsection (c)(3) and added language stating that the Agency Official could assume Council concurrence with the finding if the Council had not responded within that time frame.

Subsection (d) of § 800.5 of the final rule contains the language that was formerly in subsection (c) of the September 1996 draft. The first sentence of (d)(1) has been modified to remove notification requirements, but to make information available upon request. The notification requirement was moved to subsection (c) of the final rule. This was done in response to comments about the importance of early involvement of consulting parties.

Section 800.6

Subsection (a)(1) was modified to clarify that whenever an adverse effect determination was made, the Council was to receive notification, whether or not its participation was being requested. Several comments noted that this was not clear in the language of the September 1996 draft. The criteria for requesting Council involvement was also modified by moving (a)(1)(i)(D) to (a)(1)(ii) so that the parties listed in the provision could directly request Council involvement rather than going through the Federal agency. This was suggested by several comments as a more efficient, streamlined method to request Council intervention. The Council deleted the reference to its right to enter the process on its own initiative as was mentioned in the September 1996 draft at subsection (a)(1)(ii). Nevertheless, the Council maintains that right in the final rule pursuant to § 800.2(b)(1) and the Criteria in Appendix A.

Subsection (a)(2) of the final rule sets forth the duty to involve and invite, as appropriate, other individuals or entities to be consulting parties. This subsection changed minimally from the September 1996 draft, except that the sentence allowing the Council to serve as arbiter of disputes over consulting party status was removed in response to negative comments from Federal agencies that believed such Council involvement was inconsistent with its authority.

Subsection (a)(3) of the final rule was amended by adding the proviso that disclosure of information was subject to the confidentiality provision in the regulation. This was added in response to Federal agency concerns about disclosure of proprietary information regarding private property owners and archeological sites, as well as Indian tribe concerns about disclosure of sensitive information regarding properties of traditional religious and cultural importance.

Subsection (a)(4) of the final rule was also amended by adding language on confidentiality for the reasons stated above.

Language was also added, in response to Federal agency comments, to elaborate on the factors that Federal agencies should consider when determining the appropriate way to involve members of the public. Additionally, in response to Federal agency comments concerned with duplicate efforts, particularly during the inter-agency review, the Council added a new sentence to acknowledge that earlier public involvement conducted by Federal agencies may, in certain circumstances affect the level of public notice and involvement at the resolution of adverse effect stage. For example, if all relevant information is provided at earlier stages in the process in such a way that a wide audience is reached, and no new information is available at that stage in the process that would assist in the resolution of adverse effects, then a new public notice may not be warranted.

Reference to section 304 of the NHPA was added in the final rule, under subsection (a)(5), in response to strong concerns expressed by Indian tribes regarding disclosure of sensitive information.

The subsection on resolution without the Council, § 800.6(b)(1), was amended in response to several comments questioning the meaning of the term ''file'' as used in the September 1996 draft. The term ''file'' was changed to ''submit,'' and the documentation requirement was added to ensure that the Council had the information that it needed if it were to review the Memorandum of Agreement, as suggested by some comments. Language was added in § 800.6(b)(1)(iii) that the Council would notify the head of an agency when the Council decided to enter the section 106 process. This was in response to comments in the interagency review process and was intended to ensure that policy-level officials in the agency were aware of cases that warranted Council involvement. The last sentence in § 800.6(b)(1)(v) was added to explain the outcome if the Council decides not to join the consultation despite the request to do so.

Subsection (b)(2) was changed so that the phrase ''avoid or minimize the adverse effects'' was changed to ''seek

ways to avoid, minimize or mitigate the adverse effects.'' This change was made in response to comments, in order to more appropriately reflect the essence of consultation behind the 106 process.

The final rule clarifies the status and rights of parties involved in the development of a Memorandum of Agreement as set forth in subsection (c). Many comments had found the treatment of these issues section in the September 1996 draft to be confusing. The Council redrafted the subsection by first moving the provision describing the legal effect of a Memorandum of Agreement to the beginning of the subsection. This was formerly in subsection (c)(5) of the September 1996 draft. Under § 800.6(c)(1) of the final rule, the Council also separated out the various signatories for different kind of agreements, adding a reference to the fact that the Council and the Federal agency can enter into a Memorandum of Agreement under § 800.7(a)(2). The final rule adds a new category of parties that may or should be invited to become signatories to the agreement as listed in subsections (c)(2)(i) and (ii); these parties will have the rights of signatories if they choose to sign the agreement after being invited. Subsection (c)(2)(iii) clarifies the outcome of such parties' refusal to sign the agreement. Another category of parties, different from signatories or those invited to become signatories, is concurring parties as set forth in subsection (c)(3). The remaining subsection on Memoranda of Agreement remained essentially the same except that, in response to comments, subsections (6) and (9) regarding subsequent discoveries were added.

Section 800.7

There were few comments on § 800.7. The Council made minimal changes to this section. In subsection (a), the Council added a sentence requiring the party terminating consultation to notify the consulting parties and to state in writing the reasons for terminating. This was done to ensure that termination was grounded in sound reasons and that other parties had full understanding of the basis for termination. The requirement that the head of the agency or an Assistant Secretary or other officer with major department-wide or agency-wide responsibility request Council comment when the Federal agency terminates was criticized in several comments that believed it was burdensome, unnecessary or beyond the authority of the Council. The Council retained the requirement for several reasons. First, section 110(1) of the NHPA, which was added in the 1992 amendments to require this. That section requires that the head of such agency ''shall document any decision made pursuant to section 106'' where the Federal agency has not entered into a Memorandum of Agreement regarding undertakings which adversely affect historic properties. Second, as a matter of protocol, since the Council members, many of whom are Presidential appointees and include the heads of six Federal agencies, are responsible for commenting on a termination, the Council determined that it was appropriate for the request to be made at that level.

Subsection (a)(3) was added in response to tribe comment and in recognition of an Indian tribe's sovereign status with regard to its tribal lands. The requirement that a tribe must be a signatory to any agreement negotiated pursuant to § 800.6 was contained in the last sentence of § 800.12(b)(3) of the September 1996 draft.

Subsection (a)(4) was amended by giving the Council the option to avoid termination by going to the Federal agency Federal Preservation Officer to attempt resolution of issues. This option was suggested by several Federal agencies.

Subsection (b) was added to allow the Council to provide advisory comments even when a Memorandum of Agreement has been signed. This provision will give the Council the flexibility to agree to certain Memoranda of Agreement, but to supplement its signature with additional comments. This was suggested in one comment, and was determined by the Council to be a valuable vehicle for issuing advisory opinions to assist Federal agencies in their 106 compliance efforts.

In subsection (c)(3) the Council added the Federal Preservation Officer (FPO) as a recipient of a copy of the Council comments. This should assist the FPO in his/her agency-wide management of section 106 compliance.

Subsection (c)(4) pertaining to Federal agency response to Council comments was changed by adding the requirement that the agency head prepare a summary of the decision. This was added to ensure that the decision received adequate consideration by the agency head and, therefore, was properly documented, as required by section 110(1).

Section 800.8

This section of the regulations responds to the desire to streamline the 106 process and to coordinate it with the National Environmental Policy Act (NEPA) process. As stated before, most commenters approved of the concept of NEPA coordination. However, many believed it did not streamline the process enough. The Council believes it has streamlined coordination with the NEPA process to the largest extent possible without unduly sacrificing the key components of the section 106 process. The standards by which NEPA coordination must be conducted reflect our understanding of such key components that could not be sacrificed without failing the letter and spirit of Section 106.

In response to a concern that a finding of adverse effect could incorrectly be thought as automatically triggering a requirement to produce an Environmental Impact Statement (EIS), the Council added the last sentence of § 800.8(a)(1) of the final regulation to make it clear that adverse effects on historic properties do not, by themselves, necessarily trigger an EIS requirement. However, they may be of such magnitude or combine with other environmental impacts to warrant preparation of an EIS. This is determined by the Federal agency in accordance with its NEPA procedures and applicable NEPA case law.

Tribal comments showed a concern that sensitive information would be published on the Environmental Impact Statement (EIS), and therefore be available for public distribution. The Council notes that § 800.8(c)(1)(iii) states that tribes must be consulted in the preparation of NEPA documents. The Council believes that the confidentiality concerns of the tribes could be addressed in these consultations. Moreover, § 800.8(c)(1)(ii) states that identification and effects determinations must be consistent with §§ 800.4 and 800.5, and that such sections address confidentiality concerns. Tribes could object to a NEPA coordination that is not consistent with this and other standards.

Certain comments cited a concern that § 800.8 could allow too many inappropriate reasons to prolong or repeat consultation. The Council has limited objections to the NEPA coordination on two bases: (a) That it does not meet the standards listed under subsection (c)(1), or (b) that substantive treatment of effects on historic properties on the NEPA documents are inadequate. The Council will review such objections within 30 days.

Comments from Federal agencies indicated that subsection (c)(5) inappropriately implied that the Agency Official would retain responsibility for measures in a Record of Decision (ROD) or Finding of No Significant Impact (FONSI) when another party may

actually carry those out. The Council therefore agreed to change the language to: ''if the Agency Official fails to ensure that the measures * * * are carried out * * *'' (the language used to state that the Agency Official ''fails to carry out the measure * * *'').

Section 800.9

Many comments found the review procedures set forth in § 800.9(a) of the September 1996 draft to be problematic. Comments found this subsection to be a backdoor, and unauthorized, appeals process that created a lack of finality to the 106 process. Comments also noted that the right to appeal to the Council was too limited, as only certain individuals who had participated in the process could make an appeal under subsection (a). Based on the strong adverse sentiment to this provision, the Council completely redrafted this subsection. The new subsection (a) succinctly and simply states that the Council can render its advisory opinion at any time in the 106 process regarding any compliance matters. Federal agencies are required to consider the Council's advisory opinion in reaching a decision on the matter. With this change, the Council believes it is responding to the concerns expressed in the comments about an elaborate appeals process. The change also addresses the concern that the Council was exceeding its authority as an advisory body, since the final rule acknowledges that the Council will issue advisory opinions.

Subsection (b) was changed in response to a comment which questioned the provision in the September 1996 draft that required the Council chairman to send a foreclosure finding to the head of an agency. The wording implied that the foreclosure decision was that of the Chairman, rather than the Council at large. It was always the intention that the decision was that of the Council at large so as to, among other things, reflect the diversity of the whole Council. The final rule merely deletes the reference to the Chairman.

Several comments sought more direction with regard to intentional adverse effects of applicants in subsection (c). The final rule, like the notice of proposed rulemaking, tracks the language in section 110(k) of the NHPA. Additionally, in response to comments, the Council set forth a procedure describing how it would consult with Federal agencies that make a preliminary determination that circumstances may justify granting assistance to the applicant. The section 110 Guidelines provide substantive guidance on this subject.

Subsection (d) provides for periodic reviews of how participants fulfill their responsibilities under section 106. Some comments questioned the Council's authority for such reviews, even in light of section 203 of the NHPA. The Council maintains the position that sections 202 and 203 of the NHPA clearly provide for the collection of information from Federal agencies regarding the section 106 process and for the Council to make recommendations to Federal agencies on improving compliance. In response to comments, nevertheless, the Council removed the reference to Council ''oversight'' from the final rule in subsection (d)(1).

Subsection (d)(2) of the September 1996 draft was deleted as unnecessary and confusing in that it introduced the concept of ''professional peer review'' without explanation. The Council determined that reference to this term was hot appropriate or beneficial. The final rule's subsection (d)(2) contains the provision on improving the operation of section 106. This subsection remained largely unchanged, except that the last sentence was added to acknowledge the Council's authority under section 202(a)(6) of the NHPA to review Federal agency preservation programs and to make recommendations to improve their effectiveness.

Section 800.10

This section received few comments. One comment questioned the use of the phrase ''directly and adversely'' in subsection (a), finding it implied that indirect effects were hot considered under this subsection. The Council retained the ''directly and adversely'' language of the September 1996 draft because it tracks the statutory language in the NHPA.

Another comment noted that it would be more appropriate to mandate that the National Park Service, instead of the Council, be involved in consultation over National Historic Landmarks. The regulations include a requirement that the Secretary of the Interior receive notice and an invitation to participate in such consultations and, thus, the Council has provided for involvement of the Secretary of the Interior whenever the Secretary wants to enter the consultation. The Council chose not to mandate the Secretary's participation.

The final rule contains a few other minor changes to rephrase headings and wording of subsections.

Section 800.11

The type of documents required to be submitted at various stages in the 106 process remained, for the most part, the same as presented in the September 1996 draft. Subsection (a) on adequacy of documentation and subsection (c) on confidentiality, were changed to respond to comments.

With regard to subsection (a), one comment questioned the use of the term ''factual and logical'' basis in the first sentence. The Council deleted this language as unnecessary. Also in response to a comment, the Council added language requiring the Council or SHPO/THPO to notify the Federal agency with the specific information needs to meet the documentation standards. This should expedite the process and assist the Federal agency in fulfilling its documentation requirements.

The Council had added specific language giving it the authority to resolve disputes over whether documentation standards are met. Some comments disagreed with the language in the September 1996 draft giving the Council or the SHPO/THPO the authority to determine the adequacy of documentation. Comments suggested requiring the Federal agency to consider the Council or SHPO views and supplement the record as the Agency Official determined it as necessary. The Council disagreed with these comments because it viewed the adequacy of documentation as an essential function for which the Council is able to provide its expertise. Council resolution of disputes over documentation would maintain consistency of documentation among Federal agencies. Additionally, the authority of the SHPO/THPO to notify Federal agencies that documentation is insufficient is necessary so that SHPOs/THPOs have the information hat they need to respond to Federal agency determinations. Nevertheless, in light of strong opposition from commenters who were worried that, as written in the September 1996 draft, subsection (a) would cause unending delays in the section 106 process, the Council acceded to eliminating the language suspending relevant time periods until specified information was submitted. In addition, the Council relegated its role to one of ''reviewing,'' as opposed to ''resolving,'' document disputes.

Comments questioned the language under § 800.11(a) suspending the time periods when inadequate documentation is submitted, arguing that such provision would result in long delays. Another comment questioned

the meaning of ''suspended'', querying whether the SHPO/THPO would receive an additional 30 days after receipt of adequate documentation, or merely the remaining days left from when the SHPO/THPO notified the Federal agency that the documentation was inadequate. In order to alleviate concerns of delays in the process, the Council acceded to removing the suspension of time language. Nevertheless, Federal agencies must note that this does not lessen their obligation to meet applicable documentation standards, and that, not meeting such obligations could ultimately result in foreclosure or otherwise open their Section 106 compliance to challenge.

Subsection (c) containing the confidentiality provision, was modified by tracking the statutory language, almost verbatim, from section 304 of the NHPA rather than paraphrasing the main portion of the provision as was done in the September 1996 draft. This was done to more accurately describe the Federal agency responsibilities. At the end of subsection (c)(2), the Council added two sentences describing how it would consult with the Secretary on the withholding and release of information. This was added in response to various comments, particularly those of tribes who are concerned about the release of information of sacred sites. Subsection (c)(3) was added in response to comments made by Federal agencies and others about privacy concerns of applicants. It acknowledges that other laws or agency program requirements may limit access to information.

Minor additions and changes to enhance the clarity of the documentation requirements are made. Additionally, subsections (e) and (f) of the September 1996 draft were consolidated as they contained essentially the same material. In subsections (f) and (g)(4), the Council added ''any substantive revisions or additions to the documentation provided the Council pursuant to § 800.6(a)(1)'' in order to facilitate and expedite the review of information.

Section 800.12

As discussed above, former § 800.12 of the September 1996 draft contained the consultation requirements regarding Indian tribes and Native Hawaiian organizations. The provisions in that past section have been interspersed and incorporated into the relevant sections and subsections of the final rule for ease of reference to those reading the regulations, eliminating the need to flip back and forth between other sections of the regulations and this one. This reorganization was also done in response to tribal concerns that the separate section did not facilitate integration of Indian tribes and Native Hawaiian organizations into the routine process. For the most part, the incorporation of those provisions into the other sections used existing language. Changes that were made in response to comments are noted at the specific section.

Section 800.12 of the final rule contains the provisions on emergency situations, formerly under § 800.13 of the September 1996 draft. The final rule incorporates several changes suggested by the comments. First, the Council deleted the reference to an ''Agency Official'' declaring a disaster or emergency, since it was pointed out that Agency Officials, as defined by the Council's regulations, do not have such authority, nor was it appropriate for the Council to grant them such authority. Second, in subsection (b), language was also added that had erroneously been left out, to acknowledge that the provision extended to other ''immediate threat(s) to life or property.'' Third, the duty to consult with Indian tribes and Native Hawaiian organizations has been incorporated in response to tribal comments holding that this is mandated by the 1992 amendments to the NHPA.

One comment stated that demolition and repair operations should be exempt from section 106 when the following principles are at stake: Protection of lives, compliance with building codes, protection for property, maintenance of public health and safety, restoration of vital community services, or evaluation of post disaster engineering reports. The Council recognized many of these principles but believes it has struck the proper balance between the need to carry out the section 106 process and the need for expediency created by emergency situations. The last sentence of § 800.12 provides an exemption from section 106 compliance for immediate rescue and salvage operations conducted to preserve life or property, since the Council believed that emergency expediency in those situations outweighed section 106 process to such an extend that an exemption was warranted.

Section 800.13

This section, formerly found under § 800.14 of the September 1996 draft, was revised by the Council to simplify its provisions and to respond to various comments. Subsection (a)(1) was added in the final rule to highlight the benefit of planning for subsequent discoveries in Programmatic Agreements. Subsection (a)(2) contains language that was in the September 1996 draft, except that mention of standard treatments containing provisions for subsequent discoveries was deleted as it was deemed inappropriate to include treatment for subsequent discoveries in standard treatments.

Subsection (b) was also changed by adding ''or if construction on an approved undertaking has not commenced,'' as the Council realized that such a circumstance would also provide the opportunity for consultation. Subsection (b)(2) was amended in response to comments that indicated it was not clear, as drafted in the September 1996 draft, that the SHPO/THPO or the Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to the affected property have to agree that the property is of value solely for its scientific, prehistoric, history or archaeological data before the Archaeological and Historic Preservation Act could be used in lieu of Section 106. Subsection (b)(3) was changed minimally to clarify the intent that the SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council have 48 hours in which to respond to a notification of an inadvertent discovery.

Subsection (d) was added as a result of comments made during the tribal consultation meetings and in deference to tribal sovereignty with regard to actions on tribal lands.

Section 800.14

This section was formerly found under § 800.15 of the September 1996 draft. It provides for new options for agencies to pursue in streamlining their section 106 compliance activities and incorporates the practice, under the regulations activities and incorporates the practice, under the regulations to be superseded, of developing Programmatic Agreements to facilitate coordination between Section 106 and an agency's particular program.

Regarding subsection (a), most of the Federal agency and industry commenters believed that the Federal agencies should be the ones determining the procedural consistency of program alternatives with Council regulations. Most SHPOs and Indian tribes believed the Council should make such consistency determinations. In the end, the Council opted to make the consistency determinations. The Council believes it has the internal experience and expertise to make such evaluations. Also, the diversity of its membership ensures that a balanced perspective is brought to final determinations regarding consistency.

Section 211 of the NHPA states that the Council ''is authorized to promulgate such rules and regulations as it deems necessary to govern implementation of section 106 * * * in its entirety.'' Section 110(a)(2) of the NHPA states that the ''(Federal agency historic preservation) *program(s)* shall ensure * * * that the agency's procedures for compliance with section 106 * * * are consistent with regulations issued by the Council * * *'' (emphasis added). It must be understood, among other things and upon closer examination, that section 110 of the NHPA does not specifically provide for Federal agencies to substitute their programs for the Section 106 regulations promulgated by the Council. Through § 800.14(a) of the new regulations, the Council is allowing for such substitution, believing this may help agencies in their section 106 compliance. However, the Council will not allow such substitution if the agency procedures are inconsistent with the Council's 106 regulations. The Council, in its expertise, holds that its regulations correctly implement section 106, and that it would therefore be inimical to its mandate and contrary to the spirit and letter of section 100(a)(2)(E) of the NHPA, for the Council to allow inconsistent procedures to substitute the Council's section 106 regulations.

The last sentence under subsection (a)(4) was added during the OMB review process to allay concerns that 101(d)(5) agreements would be entered into without the knowledge and opportunity to comment of Federal agencies.

Subsection (b) is intended to retain the concept of Programmatic Agreements as in the superseded regulations, but with more clarity regarding required signatures, termination, and public participation. Programmatic Agreements should facilitate and streamline the Section 106 process regarding complex project situations or multiple undertakings.

Subsection (c) sets forth the process for exempting certain programs or categories of undertakings from the section 106 process. This is based on section 214 of the NHPA.

Subsection (f) was added in response to tribal comments that there needed to be specific requirements for Federal agencies to consult with Indian tribes during the preparation of program alternatives. The content follows the policies that have guided tribal consultation throughout the revisions of the regulation.

Section 800.15

This section was formerly under § 800.16 of the September 1996 draft. It is presently reserved for future use. The Council will proceed with the review of tribal applications for substitution of tribal regulations for the Council's section 106 regulations on tribal lands, pursuant to section 101(d)(5) of the Act, on the basis of informal procedures. With regard to State agreements, the Council will keep in effect any currently valid State agreements until revised procedures for State agreements take effect or until the agreement is otherwise terminated.

Section 800.16

Few comments were received on the definitions and no substantial changes were made. There were some comments on the definition of ''undertaking,'' requesting clarification of its scope. That has been done in the Section-by Section analysis (Section VII).

VI. Summary of Major Changes From the Regulations Being Superseded

The revised section 106 regulations will significantly modify the process under the regulations to be superseded, introducing new streamlining while incorporating statutory changes mandated by the 1992 amendments to the NHPA. This section of the preamble highlights the major revisions in the process. Although there are many other refinements and improvements that cumulatively improve the operation of the section 106 process, they are not detailed here.

Major Changes

Greater deference to Federal agency-SHPO[1] *decisionmaking.* The Council will no longer review routine decisions agreed to by the Federal agency and the SHPO/THPO (adverse effect findings and most Memoranda of Agreement), recognizing that the capability of these parties to do effective preservation planning has grown substantially since the process was last revised in 1986.

More focused Council involvement. The Council will focus its attention on those situations where its expertise and national perspective can enhance the consideration of historic preservation issues. Criteria accompanying the regulation specify that the Council may enter the section 106 process when an undertaking has substantial impacts on important historic properties, presents important questions of policy or interpretation, has the potential for presenting compliance problems, or presents issues of concern to Indian tribes or Native Hawaiian organizations.

Better definition of participants' roles. The primary responsibility of the Federal agency for section 106 decisions is emphasized, while the advisory roles of the Council and the SHPO/THPO are clarified. The roles of other participants are more clearly defined, particularly Indian tribes, local governments and applicants, who may participate as ''consulting parties.'' Certain individuals and organizations may also be entitled to be consulting parties, based on the nature of their relation to an undertaking and its effects on historic properties. Others may request to be involved. The exclusive role of the Federal agency to make the ultimate decision on the undertaking is stressed and the advisory roles of the other parties is clearly stated.

Native American roles defined and strengthened. The 1992 NHPA amendments placed major emphasis on the role of Indian tribes and other Native Americans. The revisions incorporate specific provisions for involving tribes when actions occur on tribal lands and for consulting with Indian tribes and Native Hawaiian organizations, as required by the NHPA, throughout the process. The revisions embody the principle that Indian tribes should have the same extent of involvement when actions occur on tribal lands as the SHPO does for actions within the States; this includes the ability to agree to decisions regarding significance of historic properties, effects to them and treatment of those effects, including signing Memoranda of Agreement. Off tribal lands, Federal agencies must consult the appropriate tribe or Native Hawaiian organization. The provisions recognize Federal agency obligations to consider properties to which the tribes attach religious and cultural significance in project planning. Provision is also made for the involvement of the Tribal Historic Preservation Officer in lieu of the SHPO for undertaking on tribal lands when that official has assumed the responsibilities of the SHPO in accordance with section 101(d) (2) of the NHPA.

Role of applicants recognized. The revisions acknowledge the direct interests of applicants for Federal assistance or approval and specify greater opportunities for active participation in the section 106 process as consulting parties. Applicants are permitted to initiate and pursue the steps of the process, while the Federal agency remains responsible for final decisions regarding historic properties.

[1] The revised regulations extend to Tribal Historic Preservation Officers (THPO) the same role on tribal lands as the SHPO has in the section 106 process. Accordingly, this summary of changes refers to ''SHPO/THPO'' when the responsibilities for the SHPO and the THPO (with regard to tribal lands) are the same.

Early compliance encouraged. Provisions have been added to encourage agencies to initiate compliance with the Section 106 process early in project planning and to begin consultation with the SHPO/THPO and others at that early stage. This should promote early agency consideration of historic properties in project planning and prevent late recognition of an agency's legal responsibilities that often cause delay or compliance problems.

Coordination with other reviews advanced. Agencies are encouraged to integrate Section 106 review with that required under the National Environmental Policy Act and related laws. Specific provisions that make identification and evaluation, public participation and documentation requirements more flexible facilitate this and will streamline reviews, allowing agencies to use information and analyses prepared for one law to be used to meet the requirements of another.

Use of NEPA compliance to meet Section 106 requirements authorized. Agencies are authorized to use the preparation of Environmental Impact Statements and Environmental Assessments under the National Environmental Policy Act to meet section 106 needs in lieu of following the specified Council process. This is expected to be a major opportunity for agencies with well-developed NEPA processes to simplify concurrent reviews, reduce costs to applicants and avoid redundant paperwork.

New techniques introduced to deal with marginal or routine cases. Federal agencies may seek exemptions from Section 106 or advisory comments on an entire program. Also, the Council may establish standard methods of treating recurring situations. This will allow agencies to save both time and resources that would otherwise be committed to legally-mandated reviews.

Public participation clarified. Opportunities for public involvement in the section 106 process are simplified and more clearly defined, with encouragement for Federal agencies to use their established public involvement procedures where appropriate. Clarification in this area will reduce controversy over the adequacy of an agency's efforts to involve the public.

Alternate Federal agency procedures flexed. The provisions allowing Federal agencies to substitute their internal procedures for the Council's section 106 regulations no longer require that the agency procedures be formal rules or regulations. This will make it easier for agencies to tailor the section 106 process to their needs. Approval of such substitute procedures is linked to requirements of section 110(a)(2)(E) of the NHPA.

Procedural Streamlining

The following section details changes in the basic Section 106 process. It demonstrates the technical alteration to the process to carry out the changes described previously.

''No effect'' step simplified. To ''no historic properties'' and ''no effect'' determinations of the regulations being superseded are combined into a single ''no historic properties affected'' finding. The separate ''effect'' determination of the regulations being superseded is dropped and the agency moves directly to assessing adverse effects when it appears historic properties may be affected.

Identification and evaluation of historic properties made more flexible. The revised regulation introduces the concepts of phased identification and relating the level of identification to the nature of the undertaking and its likely impacts on historic properties. These concepts are important to effective NEPA coordination and will encourage more cost-effective approaches to survey and identification, as agencies will be able to make preliminary decisions on alternative locations or alignments without having to conduct the more intensive identification efforts necessary to deal with the final design and siting of a project.

Adverse effect criteria and exceptions revamped. The criteria are revised to better define when projects have adverse effects on historic properties. The ''exceptions'' to the criteria concerning rehabilitation of historic properties meeting the Secretary's Standards and transfer of Federal properties with preservation restrictions have been incorporated into the adverse effect criteria of the new regulations and expanded. Previously, much archaeological data recovery qualified for No Adverse Effect treatment when appropriate data recovery was undertaken. Such cases now will be treated as adverse effects (as the destruction of other historic properties), but other changes to the process will speed completion of the section 106 process.

Council review of No Adverse Effect determinations eliminated. The requirement that the Council review all No Adverse Effect determinations is replaced by SHPO/THPO review and concurrence. Consulting parties are authorized to ask the Council to review such a determination if the request is made in a timely manner.

Failure of Federal agency-SHPO/THPO consultation leads to Council involvement. If an agency and the SHPO/THPO failed to reach a solution to deal with adverse effects, the process required the Federal agency to seek the formal comments of the Council. The revised process requires the agency to invite the Council to join the consultation and help the parties reach resolution. Termination and comment would follow only if further consultation was not successful. This should result in more negotiated solutions, which are more efficient and usually provide better results.

Council comment provision reflects 1992 NHPA amendments. Council comments must be considered by the head of the Federal agency receiving them, as required by section 110(1) of NHPA.

Review of agency findings clarified. Recognizing that the Council's views on Federal agency actions to comply with section 106 are only advisory, a new provision allows anyone at anytime to seek the Council's opinion on agency findings and decisions under section 106. There is no obligation to delay agency action while the council conducts this review.

Emergency and post-review discoveries situations revised. Greater emphasis is placed on planning for unanticipated events and more flexible responses are allowed.

Council monitoring of overall Section 106 performance enhanced. The new regulations will shift the emphasis of Council review from individual cases to assessments of the overall quality of a Federal agency's or SHPO/THPO's performance in the section 106 process. The obligation of section 203 of the NHPA for agencies to provide project information to the Council is included. Also, provisions are made for closer Council review of cases where a participant has been found to have shortcomings in complying with section 106.

VII. Description of Meaning and Intent of Specific Sections

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

Subpart A—Purposes and Participants

Section 800.1(b)

This sections makes clear that references in the section 106 regulations are not intended to give any additional authority to implementing guidelines, policies or procedures issued by any other Federal agency. Where such provisions are cited, they are simply to

assist users in finding related guidance, which is non-binding, or requirements of related laws, which may be mandatory depending on the particular law itself.

Section 800.1(c)

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

Section 800.2(a)

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

Section 800.2(a)(1)

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

Section 800.2(a)(2)

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

Section 800.2(a)(3)

While a Federal agency may rely on applicants or contractors to prepare necessary materials and assessments for section 106 purposes, the Agency Official must personally and independently make the findings and determinations required under these regulations. This includes assuming the responsibility for ensuring that work done by others meets applicable Federal requirements.

Section 800.2(a)(4)

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

Section 800.2(b)

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

Section 800.2(c)

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

Section 800.2(c)(1)

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

Section 800.2(c)(2)

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

Section 800.2(c)(3)

This section embodies the statutory requirement for Federal agencies to consult with Indian tribes and Native Hawaiian organizations throughout the section 106 process when they attach religious and cultural significance to historic properties that may be affected by an undertaking. It is intended to promote continuing and effective consultation with those parties throughout the section 106 process.

Such consultation is intended to be conducted in a manner that is fully cognizant of the legal rights of Indian tribes and that is sensitive to their cultural traditions and practices.

Section 800.2(c)(3)(i)

This subsection has two main purposes. First, it emphasizes the importance of involving Indian tribes and Native Hawaiian organizations early and fully at all stages of the section 106 process. Second, Federal agencies should solicit tribal views in a manner that is sensitive to the governmental structures of the tribes, recognizing that confidentiality and communication issues may require Federal agencies to allow more time for the exchange of information. Also, this section states that the Agency Official must make a ''reasonable and good faith effort'' to identify interested tribes and Native Hawaiian organizations. This means that the Agency Official may have to look beyond reservations and tribal lands in the project's vicinity to seek information on tribes that had been historically located in the area, but are no longer there.

Section 800.2(c)(3)(ii)

This subsection was added to make clear that nothing in these regulations can, or is intended to, modify any rights that Indian tribes maintain through treaties, sovereign status, or other legal bases.

Section 800.2(c)(3)(iii)

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

Section 800.2(c)(3)(iv)

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

Section 800.2(c)(3)(v)

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

Section 800.2(c)(3)(vi)

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

Section 800.2(c)(4)

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

Section 800.2(c)(5)

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

Section 800.2(c)(6)

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

Section 800.2(d)(1)

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

Section 800.2(d)(2)

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

Section 800.2(d)(3)

It is intended that Federal agencies have flexibility in how they involve the public, including the use of NEPA and other agency planning processes, as long as opportunities for such public involvement are adequate and

consistent with subpart A of the regulations.

Subpart B—The Section 106 Process

Section 800.3

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

Section 800.3(a)

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

Section 800.3(a)(1)

This section explains that if there is an undertaking, but there is no potential that the undertaking will have an effect on an historic property, then the agency is finished with its section 106 obligations. There is no consultation requirement for this decision.

Section 800.2(a) (2)

This is a reminder to Federal agencies that adherence to the standard 106 process in subpart B is inappropriate where the undertaking is governed by a program alternative established pursuant to § 800.14.

Section 800.3(b)

This section does not impose a mandatory requirement on Federal agencies. It emphasizes the benefit of coordinating compliance with related statutes so as to enhance efficiency and avoid duplication of efforts, but the decision is up to the Agency Official. Agencies are encouraged to use the information gathered for these other processes to meet section 106 needs, but the information must meet the standards in these regulations.

Section 800.3(c)

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

Section 800.3(c) (1)

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

Section 800.3(c) (2)

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

Section 800.3(c) (3)

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

Section 800.3(c) (4)

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

Section 800.3(d)

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

Section 800.3(e)

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

Section 800.3(f)

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

Section 800.3(g)

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

Section 800.4(a)

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

Section 800.4(b)

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

Section 800.4(b)(1)

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

Section 800.4(b)(2)

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

Section 800.4(c)

This section sets out the process for determining the National Register eligibility of properties not previously evaluated for historic significance. It follows closely the regulations to be superseded.

Section 800.4(c)(1)

This section sets out the process for eligibility determinations in much the same way as the regulations to be superseded, but requires Federal agencies to acknowledge the special expertise of Indian tribes and Native Hawaiian organizations when assessing the eligibility of a property to which they attach religious and cultural significance. If either objects to a determination of eligibility, they may seek the Council to have the matter referred to the Keeper. The Council retains discretion on whether or not to submit such referral.

Section 800.4(c)(2)

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

Section 800.4(d)

This section now combines the ''No Historic Properties'' and ''No Effect'' findings of the regulations to be superseded.

Section 800.4(d)(1)

This section describes the closure point in the Section 106 process where no historic properties are found or no effects on historic properties are found. Consulting parties must be specifically notified of the determination, but members of the public need not receive direct notification; the Federal agency must place its documentation in a public file prior to approving the undertaking, and provide access to the information when requested by the public. Once the consulting parties are notified, the SHPO/THPO has 30 days to object to the determination. The Council may also object on its own initiative within the time period. Lack of such objection within the 30 day period means that the agency need not take further steps in the section 106 process.

Section 800.4(d)(2)

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

Section 800.5

This section is similar to the provisions for assessing adverse affects under the regulations to be superseded, but the role of the Council is significantly altered and a role is provided for Indian tribes, Native Hawaiian organizations and other consulting parties.

Section 800.5(a)

This section has been minimally changed except that it provides for Indian tribe and Native Hawaiian organization consultation where properties to which they attach religious and cultural significance are involved. This section also requires the Agency Official to consider the views of consulting parties and the public that have already been provided to the Federal agency.

Section 800.5(a)(1)

This section has important changes from the regulations to be superseded. It combines the effect criteria and adverse effect criteria as defined in the regulation to be superseded. This section has also been modified to codify the practice of the Council in considering both direct and indirect effects in making an adverse effect determination. This section allows for consideration of effects on the qualifying characteristics of a historic property that may not have been part of the property's original eligibility evaluation. The last sentence in this section is intended to amplify the indirect effects concept, similar to the NEPA regulations, which calls for consideration of such effects when they are reasonably foreseeable effects.

Section 800.5(a)(2)(i)

This section contains the minor change of deleting the word ''alteration''. The alteration adverse effect concept is retained in the next subsection.

Section 800.5(a)(2)(ii)

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

Section 800.5(a)(2)(iii)

This subsection, along with § 800.5(a)(2)(I), would encompass recovery of archeological data as an adverse effect, even if conducted in accordance with the Secretary's standards. This change from the regulations to be superseded acknowledges the reality that destruction of a site and recovery of its information and artifacts is adverse. It is intended that by eliminating data recovery as an exception to the adverse effect criteria, Federal agencies will be more inclined to pursue other forms of mitigation, including avoidance and preservation in place, to protect archeological sites. The Council is publishing for comment concurrent with this regulation a proposal to deal with recovery of archeological data as a standard treatment in accordance with § 800.14. It is the Council's intent to retain an expedited format for resolution and reaching agreements where values other than scientific research are not involved.

Section 800.5(a)(2)(iv)

This section was changed to more closely track the National Register criteria regarding the relation of alterations to a property's use or setting to the significance of the property.

Section 800.5(a)(2)(v)

This section was changed to more closely track the language of the National Register criteria as it pertains to the property's integrity.

Section 800.5(a)(2)(vi)

This section was modified to acknowledge that where properties of religious and cultural significance to Indian tribes or Native Hawaiian organizations are involved, neglect and deterioration may be recognized as qualities of those properties and thus may not necessarily constitute an adverse effect.

Section 800.5(a)(2)(vii)

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

Section 800.5(a)(3)

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

Section 800.5(b)

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

Section 800.5(c)

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

Section 800.5(d)

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

Section 800.6

The process for resolving adverse effects has been changed to reflect the altered role of the Council and the consulting parties.

Section 800.6(a)(1)

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

Section 800.6(a)(2)

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

Section 800.6(a)(3)

This section specifies the Agency Official's obligation to provide project documentation to all consulting parties at the beginning of the consultation to resolve adverse effects. Particular note should be made of the reference to the confidentiality provisions.

Section 800.6(a)(4)

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

Section 800.6(a)(5)

Although it is in the interest of the public to have as much information as possible in order to provide meaningful comments, this section acknowledges that information may be withheld in accordance with Section 304 of the NHPA. Particular attention is given to the confidentiality concerns of Indian tribes and Native Hawaiian organizations.

Section 800.6(b)

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

Section 800.6(b)(1)

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

Section 800.6(b)(2)

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

Section 800.6(c)

This section details the provisions relating to Memoranda of Agreement. This document evidences an agency's compliance with section 106 and the agency is obligated to follow its terms. Failure to do so requires the Agency Official to reopen the Section 106 process and bring it to suitable closure as prescribed in the regulations. The reference to section 110(1) of the Act is intended to conform the streamlining provisions of these regulations with current statutory requirements, pending amendment of that section.

Section 800.6(c)(1)

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

Section 800.6(c)(2)

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

Section 800.6(c)(3)

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

Sections 800.6(c)(4)–(9)

These sections set forth specific features of a Memorandum of Agreement and the way it can be terminated or amended.

Section 800.7

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

Section 800.7(a)(1)

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

Section 800.7(a)(2)

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

Section 800.7(a)(3)

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

Section 800.7(a)(4)

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

Section 800.7(b)

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

Section 800.7(c)

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

Section 800.7(c)(4)

This section specifies what it means to ''document the agency head's decision'' as required by section 110(1) when the Council issues its comment to the agency head.

Section 800.8

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

Section 800.8(a)(1)

This section encourage agencies to coordinate NEPA and section 106 compliance early in the planning process. It emphasizes that impacts on historic properties should be considered when an agency makes evaluations of its NEPA obligations, but makes clear that an adverse effect finding does not automatically trigger preparation of an EIS.

Section 800.8(a)(2)

This section encourages consulting parties in the section 106 process to be prepared to consult with the Agency Official early in the NEPA process.

Section 800.8(a)(3)

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

Section 800.8(b)

this section notes that a project, activity or program that falls within a NEPA categorical exclusion may still require section 106 review. An exclusion from NEPA does not necessarily mean that section 106 does not apply.

Section 800.8(c)

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

Section 800.8(c)(1)

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

Section 800.8(c)(2)

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

Section 800.8(c)(3)

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

Section 800.8(c)(4)

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

Section 800.8(c)(5)

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

Section 800.9

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

Section 800.9(a)

This section emphasizes the right of the Council to provide advice at any time in the process on matters related to the section 106 process. Federal agencies should consider the Council's views, but need not adhere to them, unless specifically provided for in the regulation.

Section 800.9(b)

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

Section 800.9(c)

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

Section 800.9(d)

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

Section 800.10

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

Section 800.11

This section sets forth the requirements for documentation at various steps in the section 106 process. It has been amended to make documentation requirements clearer and to promote agency use of documentation prepared for other planning requirements.

Section 800.11(a)

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

Section 800.11(b)

This section was added primarily to allow for the use of documents prepared for NEPA or other agency planning processes to fulfill this provision as long as those documents meet the standards in this section.

Section 800.11(c)

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

Section 800.11(d)–(f)

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

Section 800.12

This section on emergency situations contains some minor changes from the process under the regulations to be superseded, but generally follows the existing approach.

Section 800.12(a)

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

Section 800.12(b)

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

Section 800.12(c)

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

Section 800.12(d)

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

Section 800.13

This section follows closely the process under the regulations to be superseded for dealing with resources discovered after Section 106 review has been completed.

Section 800.13(a)

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

Section 800.13(b)(1)

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

Section 800.13(b)(2)

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

Section 800.13(b)(3)

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

Section 800.13(c)

This section allows an agency to make an expedited field judgment regarding eligibility of properties discover during construction.

Section 800.13(d)

This new section requires an agency to comply with tribal procedures when a discovery is on tribal land and obtain concurrence of the tribe, unless it has previously developed a process under § 800.13(a).

Subpart C—Program Alternatives

Section 800.14

This section lays out a variety of alternative methods for Federal agencies to meet their Section 106 obligations. While some are based on existing techniques in the regulations to be superseded, a number are newly-introduced to allow agencies to tailor the Section 106 process to their needs.

Section 800.14(a)

Alternate procedures are a major streamlining measure that allows tailoring of the Section 106 process to Agency programs and decisionmaking processes. The procedures would substitute in whole or in part for the Council's section 106 regulations. As procedures, they would include formal Agency regulations, but would also include departmental or Agency procedures that do not go through the formal rulemaking process. Procedures must be developed in consultation with various parties as set forth in the

regulations. The public must have an opportunity to comment on Alternate procedures. If the Council determines that they are consistent with its regulations, the alternate procedures may substitute for the Council's regulations. In reviewing alternate procedures for consistency, the Council will not require detailed adherence to every specific step of the process found under the Council's regulations. The Council, however, will look for procedures that afford historic properties consideration equivalent to that afforded by the Council's regulations and that meet the requirements of section 110(a)(2)(E) of the Act. If an Indian tribe has substituted its procedures for the Council's regulations pursuant to section 101(d)(5) of the NHPA, then the Federal agency must follow the tribe's substitute regulations for undertakings on tribal lands.

Section 800.14(b)

This section is intended to retain the concept of Programmatic Agreements as in the regulations to be superseded, but to add more clarity about their use and the processes for creating them. The circumstances under which a Programmatic Agreement is appropriate are specified. The section places Programmatic Agreements into two general categories: Those covering agency programs and those covering complex or multiple undertakings. The section on Agency programs makes clear that the President of NCSHPO must sign a nationwide agreement when NCSHPO has participated in the consultation. If a Programmatic Agreement concerns a particular region, then the signature of the affected SHPSs/THPOs is required. An individual SHPO/THPO can terminate its participation in a regional Programmatic Agreement, but the agreement will remain in effect for the other states in the region. Only NCSHPO can terminate a nationwide Programmatic Agreement on behalf of the individual SHPOs. Language is included to recognize tribal sovereignty while providing flexibility to Federal agencies and tribes when developing Programmatic Agreements. While it does not prohibit the other parties from executing a Programmatic Agreement, the language does limit the effect of the agreement to non-tribal lands unless the tribe executes it. However, the language also authorizes multiple Indian tribes to designate a representative tribe or tribal organization to participate in consultation and sign a Programmatic Agreement on their behalf. Requirements for public involvement and notice are included. The section on complex or multiple undertakings ties back to § 800.6 for the process of creating such programmatic agreements.

Section 800.14(c)

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

Section 800.14(d)

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

Section 800.14(e)

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

Section 800.14(f)

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

Section 800.15. Tribal, State and Local Program Alternatives

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

Section 800.16 Definitions

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

The definition of ''Agency'' was added for ease of reference. It tracks the statutory definition in the NHPA.

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

The definition of ''area of potential effects'' has been clarified by adding the second sentence which acknowledges that the determination of the area potential effects is often subjective and depends on the nature and scale of the undertaking and the associated effects.

The definition of ''comment'' was added to make it clear that the term referred to the formal comments of the Council members.

The definition of ''consultation'' was added to describe the nature and goals of this critical aspect of the section 106 review process.

''Day'' was added to clarify the running of time periods.

''Effect'' was added to the definition section. Even though the ''no effect'' step has been eliminated in the final rule, the concept of an undertaking's effect is still a part of the ''historic properties affected'' determination.

''Foreclosure'' is a term that has always been a part of the section 106 process, but has not been defined in the regulations. The terms was added to the definition section to describe the finding that is made by the Council when an Agency action precludes the Council from its reasonable opportunity to comment on an undertaking.

''Head of the Agency'' was added in light of the 1992 amendments in section 110(1) that require that the head of an

Agency document decisions where a Memorandum of Agreement has not been reached for an undertaking.

''Historic property'' has been expanded to include properties of traditional religious and cultural importance in accordance with section 101(d)(6)(A) of the NHPA as amended in 1992.

''Indian tribe'' has been redefined exactly as in section 301(4) of the statute.

''Native Hawaiian organization'' is defined exactly as in section 301(17) of the statute.

''Tribal Historic Preservation Officer'' is intended to include the tribal official who has formally assumed the SHPO's responsibilities. It also includes, for ease of reference, the designated representative of a tribe that has not assumed SHPO responsibilities when an undertaking occurs on or affects historic properties on its tribal lands; this inclusive interpretation of THPO was added so that it would be clear that whenever an Agency undertaking is on or affects historic properties on tribal lands, the tribe's approval and signature on an agreement is required, unless they specifically waive their rights.

''Tribal lands'' is defined exactly as in section 301(14) of the statute.

''Undertaking'' is defined exactly as in section 301(7) of the statute. The Agency Official is responsible, in accordance with § 800.3(a), for making the determination as to whether a proposed Federal action is an undertaking. As appropriate, an agency should examine the nature of its Federal involvement taking into consideration factors such as the degree of Federal agency control or discretion; the type of Federal involvement or link to the action; and whether or not the action could move forward without Federal involvement. An agency should seek the advice of the Council when uncertain about whether or not its action falls within the definition of an undertaking. The pre-existing regulatory definition of undertaking included new and continuing projects, activities, or programs and any of their elements not previously considered under section 106. It is intended that the new definition includes such aspects of a project, activity, or program as undertakings.

Appendix A. Criteria for Council Involvement in Reviewing Individual Section 106 Cases

This appendix sets forth the criteria that will guide Council decisions to enter certain section 106 cases, as provided in the new regulations. As § 800.2(b)(1) states, the Council will document that the criteria have been met and notify the parties to the section 106 process as process as required. Council involvement in section 106 cases is not automatic once a criterion has been met. The Council retains discretion as to whether or not to enter such a case. Likewise, it is not essential that all criteria be met. The point of the criteria is to ensure that the Council has made a thoughtful decision to enter the section 106 process and to give agencies, SHPOs/THPOs and other section 106 participants a clear understanding of the kind of cases that warrant Council involvement.

VIII. Impact Analysis

The Regulatory Flexibility Act

The Council certifies that the final rule will not have a significant economic impact on a substantial number of small entities. Although some comment on the rule as proposed questioned the validity of such certification, the rule in its proposed and final versions imposes mandatory responsibilities on only Federal agencies. As set forth in section 106 of the NHPA, the duties to take into account the effect of an undertaking on historic resources and to afford the Council a reasonable opportunity to comment on that undertaking are Federal agency duties. Indirect effects on small entities, if any, created in the course of a Federal agency's compliance with section 106 of the NHPA, must be considered and evaluated by that Federal agency.

The Paperwork Reduction Act

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

The National Environmental Policy Act

In accordance with 36 CFR part 805, the Council initiated the NEPA compliance process for the Council's regulations implementing section 106 of the NHPA prior to publication of the draft regulations in the **Federal Register** on September 13, 1996. On August 12, 1997, through a notice of availability on the **Federal Register**, the Council sought public comment on its Environmental Assessment and preliminary Finding of No Significant Impact. The Council has considered such comments, and has confirmed its finding of no significant impact on the human environment. A notice of availability of the Environmental Assessment and Finding of No Significant Impact has been published on the **Federal Register**.

Executive Orders 12866 and 12875

The Council is exempt from compliance with Executive Order 12866 pursuant to implementing guidance issued by the Office of Management and Budget's Office of Information and Regulatory Affairs in a memorandum dated October 12, 1993. The Council also is exempt from the documentation requirements of Executive Order 12875 pursuant to implementing guidance issued by the same OMB office in a memorandum dated January 11, 1994. Although exempt, the Council has adhered to the principles in both orders by involving and consulting with State, local, and tribal entities, members of the public, and industry groups in the development of these regulations and throughout the rulemaking process, as discussed above in the Background section. The regulations to not mandate State, local, or tribal governments to participate in the Section 106 process. Instead, State, local, and tribal governments may decline to participate. State Historic Preservation Officers do advise and assist Federal agencies, as appropriate, as part of their duties under section 101(b)(3)(E) of the NHPA, as a condition of their Federal grant assistance. In addition, in accordance with Executive Order 12875, the regulations include several flexible approaches to consideration of historic properties in Federal agency decision making. The regulations promote flexibility and cost effective compliance by providing for alternate procedures, categorical exemptions, standard treatments, program comments, and programmatic agreements.

The Unfunded Mandates Reform Act of 1995

The final regulations implementing section 106 of the NHPA do not impose annual costs of $100 million or more, will not significantly or uniquely affect small governments, and are not a significant Federal intergovernmental mandate. The Council thus has no obligations under sections 202, 203, 204 and 205 of the Unfunded Mandates Reform Act.

Executive Order 12898

The final regulations implementing section 106 of the NHPA do not cause adverse human health or environmental effects, but, instead, seek to avoid adverse effects on historic properties throughout the United States. The participation and consultation process established by these regulations seeks to ensure public participation—including by minority and low-income populations and communities—by those

whose cultural heritage, or whose interest in historic properties, may be affected by proposed Federal undertakings. The section 106 process is a means of access for minority and low-income populations to participate in Federal decisions or actions that may affect such resources as historically significant neighborhoods, buildings, and traditional cultural properties. The Council considers environmental justice issues in reviewing analysis of alternatives and mitigation options particularly when section 106 compliance is coordinated with NEPA compliance. Guidance and training is being developed to assist public understanding and use of these regulations.

Memorandum Concerning Government-to-Government Relations With Native American Tribal Governments

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

Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The council will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective June 17, 1999.

List of Subjects in 36 CFR Part 800

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

For the reasons discussed in the preamble, the Advisory Council on Historic Preservation amends Title 36, Chapter VIII by revising part 800 to read as follows:

PART 800—PROTECTION OF HISTORIC PROPERTIES

Subpart A—Purposes and Participants

Subpart B—The Section 106 Process

Subpart C—Program Alternatives

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

Subpart A—Purposes and Participants

§ 800.1 Purposes.

(a) *Purposes of the section 106 process.* Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings. The procedures in this part define how Federal agencies meet these statutory responsibilities. The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the Agency Official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.

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

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

§ 800.2 Participants in 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 § 800.2(c) in findings and determinations made during the section 106 process. The Agency Official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes, as applicable, such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act and agency-specific legislation. The Council encourages the Agency Official to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part.

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

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

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

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

(1) *State Historic Preservation Officer.* (i) The State Historic Preservation Officer (SHPO) reflects the interests of the State and its citizens in the preservation of their cultural heritage. In accordance with section 101(b)(3) of the Act, the SHPO advises and assists Federal agencies in carrying out their section 106 responsibilities.

(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) *Tribal Historic Preservation Officer.* (i) The Tribal Historic Preservation Officer (THPO) appointed or designated in accordance with the Act is the official representative of an Indian tribe for the purposes of section 106. If an Indian tribe has 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 the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands.

(ii) If 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. For the purposes of subpart B of this part, such tribal representative shall be included in the term ''THPO.''

(3) *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. Such Indian tribe or Native Hawaiian organization shall be a consulting party.

(i) 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.

(ii) 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 is intended to alter, amend, repeal, interpret or modify tribal sovereignty, any treaty rights, or other rights of an Indian tribe, or to preempt, modify or limit the exercise of any such rights.

(iii) 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.

(iv) 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.

(v) 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.

(vi) 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.

(4) *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.

(5) *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 to initiate consultation with the SHPO/THPO and others, but remains legally responsible for all findings and determinations charged to the Agency Official. The Agency Official shall notify the SHPO/THPO and other consulting parties when an applicant is so authorized.

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

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

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

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

Subpart B—The Section 106 Process

§ 800.3 Initiation of the section 106 process.

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

(1) *No potential to cause effects.* If the undertaking does not have the potential to cause effects on historic properties, 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 the effective date of these regulations, 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 Archaeological Resources Protection Act and agency-specific legislation, such as section 4(f) of the Department of Transportation Act. Where consistent with the procedures in this subpart, the Agency Official may use information developed for other reviews under Federal, State or tribal law to meet the requirements of section 106.

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

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

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

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

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

(d) *Consultation on tribal lands.* Where the Indian tribe has not assumed the responsibilities of the SHPO on tribal lands, consultation with the Indian tribe regarding undertakings occurring on such tribe's lands or effects on such tribal lands shall be in addition

to and on the same basis as consultation with the SHPO. If the SHPO has withdrawn from the process, the Agency Official may complete the section 106 process with the Indian tribe and the Council, as appropriate. An Indian tribe may enter into an agreement with a SHPO or SHPOs specifying the SHPO's participation in the section 106 process for undertakings occurring on or affecting historic properties on tribal lands.

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

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

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

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

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

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

§ 800.4 Identification of historic properties.

(a) *Determine scope of identification efforts.* The Agency Official shall consult with the SHPO/THPO to:

(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 § 800.4(a), 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 §§ 800.4(b)(1) and (c).

(c) *Evaluate historic significance.*—(1) *Apply National Register Criteria.* In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified properties and guided by the Secretary's Standards and Guidelines for Evaluation, the Agency Official shall apply the National Register Criteria (36 CFR part 63) to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility. The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the Agency Official to reevaluate properties previously determined eligible or ineligible. The Agency Official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.

(2) *Determine whether a property is eligible.* If the Agency Official determines any of the National Register

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

(d) *Results of identification and evaluation.*—(1) *No historic properties affected.* If the Agency Official finds that either there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them as defined in § 800.16(i), the Agency Official shall provide documentation of this finding as set forth in § 800.11(d) to the SHPO/THPO. The Agency Official shall notify all consulting parties, including Indian tribes and Native Hawaiian organizations, and make the documentation available for public inspection prior to approving the undertaking. If the SHPO/THPO, or the Council if it has entered the section 106 process, does not object within 30 days of receipt of an adequately documented finding, the Agency Official's responsibilities under section 106 are fulfilled.

(2) *Historic properties affected.* If the Agency Official finds that there are historic properties which may be affected by the undertaking or the SHPO/THPO or the Council objects to the Agency Official's finding under § 800.4(d)(1), the Agency Official shall notify all consulting parties, including Indian tribes or Native Hawaiian organizations, invite their views on the effects and assess adverse effects, if any, in accordance with § 800.5.

§ 800.5 Assessment of adverse effects.

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

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

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

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

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

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

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

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

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

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

(3) *Phased application of criteria.* Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the Agency Official may use a phased process in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to § 800.4(b)(2).

(b) *Finding of no adverse effect.* The Agency Official, in consultation with the SHPO/THPO, may propose a finding of no adverse effect when the undertaking's effects do not meet the criteria of § 800.5(a)(1) or the undertaking is modified or conditions are imposed, such as the subsequent review of plans for rehabilitation by the SHPO/THPO to ensure consistency with the Secretary's Standards for the Treatment of Historic Properties (36 CFR part 68) and applicable guidelines, to avoid adverse effects.

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

(1) *Agreement with finding.* Unless the Council is reviewing the finding pursuant to § 800.5(c)(3), the Agency Official may proceed if the SHPO/THPO agrees with the finding. The Agency Official shall carry out the undertaking in accordance with § 800.5(d)(1). Failure of the SHPO/THPO to respond within 30 days from receipt of the finding shall be considered agreement of the SHPO/THPO with the finding.

(2) *Disagreement with finding.* (i) If the SHPO/THPO or any consulting party disagrees within the 30-day review period, it shall specify the reasons for disagreeing with the finding. The Agency Official shall either consult with the party to resolve the disagreement, or request the Council to review the finding pursuant to § 800.5(c)(3).

(ii) The Agency Official should seek the concurrence of any Indian tribe or Native Hawaiian organization that has made known to the Agency Official that it attaches religious and cultural significance to a historic property subject to the finding. If such Indian tribe or Native Hawaiian organization disagrees with the finding, it may within the 30-day review period specify the reasons for disagreeing with the finding and request the Council to review the finding pursuant to § 800.5(c)(3).

(iii) If the Council on its own initiative so requests within the 30-day review period, the Agency Official shall submit the finding, along with the documentation specified in § 800.11(e), for review pursuant to § 800.5(c)(3). A Council decision to make such a request shall be guided by the criteria in appendix A to this part.

(3) *Council review of findings.* When a finding is submitted to the Council pursuant to § 800.5(c)(2), the Agency Official shall include the documentation specified in § 800.11(e). The Council shall review the finding and notify the

Agency Official of its determination as to whether the adverse effect criteria have been correctly applied within 15 days of receiving the documented finding from the Agency Official. The Council shall specify the basis for its determination. The Agency Official shall proceed in accordance with the Council's determination. If the Council does not respond within 15 days of the receipt of the finding, the Agency Official may assume concurrence with the Agency Official's findings and proceed accordingly.

(d) *Results of assessment.*—(1) *No adverse effect.* The Agency Official shall maintain a record of the finding and provide information on the finding to the public on request, consistent with the confidentiality provisions of § 800.11(c). Implementation of the undertaking in accordance with the finding as documented fulfills the Agency Official's responsibilities under section 106 and this part. If the Agency Official will not conduct the undertaking as proposed in the finding, the Agency Official shall reopen consultation under § 800.5(a).

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

§ 800.6 Resolution of adverse effects.

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

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

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

(A) The Agency Official wants the Council to participate;

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

(C) A Programmatic Agreement under § 800.14(b) will be prepared;

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

(iii) The Council shall advise the Agency Official and all consulting parties whether it will participate within 15 days of receipt of notice or other request. Prior to entering the process, the Council shall provide written notice to the Agency Official and the consulting parties that its decision to participate meets the criteria set forth in appendix A to this part. The Council shall also advise the head of the agency of its decision to enter the process. Consultation with Council participation is conducted in accordance with § 800.6(b)(2). (iv) If the Council does not join the consultation, the Agency Official shall proceed with consultation in accordance with § 800.6(b) (1).

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

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

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

(5) *Restrictions on disclosure of information.* Section 304 of the Act and other authorities may limit the disclosure of information under §§ 800.6(a)(3) and (4). 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 § 800.6(b)(2).

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

(v) If the Agency Official, and the SHPO/THPO fail to agree on the terms of a Memorandum of Agreement, the Agency Official shall request the Council to join the consultation and provide the Council with the documentation set forth in § 800.11(g). If the Council decides to join the consultation, the Agency Official shall proceed in accordance with § 800.6(b)(2). 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. A Memorandum of Agreement executed pursuant to § 800.6(b)(1) that is filed with the Council shall be considered to be an agreement with the Council for the purposes of Section 110(1) of the Act. 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 § 800.6(b)(1).

(ii) The Agency Official, the SHPO/THPO, and the Council are the signatories to a Memorandum of Agreement executed pursuant to § 800.6(b)(2).

(iii) The Agency Official and the Council are signatories to a Memorandum of Agreement executed pursuant to § 800.7(a)(2).

(2) *Invited signatories.* (i) The Agency Official may invite 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.

(ii) The signatories should invite any party that assumes a responsibility under a Memorandum of Agreement to be a signatory.

(iii) The refusal of any party invited to become a signatory to a Memorandum of Agreement pursuant to § 800.6(c)(2)(i) or (ii) 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 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 § 800.6(c)(1) 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 § 800.7(c) 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 § 800.7(c).

(4) If the Council terminates consultation, the Council shall notify the Agency Official, the agency's Federal Preservation Officer and all consulting parties of the termination and comment under § 800.7(c). 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 §§ 800.7(a) (1) or (3) or § 800.8(c)(3), or termination by the Council under § 800.6(b)(1)(v) or § 800.7(a)(4), 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;

(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 Cooordination 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 rules.* 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) and 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 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 § 800.8(c)(1) 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 § 800.8(c)(2)(ii), the Council shall notify the Agency Official either that it agrees with the objection, in which case the Agency Official shall enter into consultation in accordance with § 800.6(b)(2) or seek Council comments in accordance with § 800.7(a), or that it disagrees with the objection, in which case the Agency Official shall continue its compliance with this section. Failure of the Council to respond within the 30 day period shall be considered disagreement with the objection.

(4) *Approval of the undertaking.* If the Agency Official has found during the preparation of the EA, DEIS or EIS that the effects of the undertaking on historic properties are adverse, the Agency Official shall specify in the FONSI or the ROD the proposed measures to avoid, minimize or mitigate such effects and ensure that the approval of the undertaking is conditioned accordingly. The Agency Official's responsibilities under Section 106 and the procedures in this subpart shall then be satisfied when either the proposed measures have been adopted through a binding commitment on the agency, the applicant or other entities, as appropriate, or the Council has commented and received the response to such comments under § 800.7. Where the NEPA process results in a FONSI, the Agency Official must adopt such a binding commitment through a Memorandum of Agreement drafted in compliance with § 800.6(c). Where the NEPA process results in an EIS, the binding commitment does not have to be in the form of a Memorandum of Agreement drafted in compliance with § 800.6(c).

(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 § 800.8(c)(4)) are carried out, the Agency official shall notify the Council and all consulting parties that supplemental environmental documents will be prepared in compliance with NEPA or that the procedures in §§ 800.3 through 800.6 will be followed as necessary.

§ 800.9 Council review of Section 106 compliance.

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

(b) *Agency foreclosure of the Council's opportunity to comment.* Where an Agency Official has failed to

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

(c) *Intentional adverse effects by applicants.*—(1) *Agency responsibility.* Section 110(k) of the Act prohibits a Federal agency from granting a loan, loan guarantee, permit, license or other assistance to an applicant who, with intent to avoid the requirements of section 106, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. Guidance issued by the Secretary pursuant to section 110 of the Act governs its implementation.

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

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

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

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

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

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

(2) *Improving the operation of Section 106.* Based upon any evaluation of the section 106 process, the Council may make recommendations to participants, the heads of Federal agencies, and the Secretary of actions to improve the efficiency and effectiveness of the process. Where the Council determines that an Agency Official or a SHPO/THPO has failed to properly carry out the responsibilities assigned under the procedures in this part, the Council may participate in individual case reviews in a manner and for a period that it determines is necessary to improve performance or correct deficiencies. 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) 0f 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 undertaking, 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. 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 the criteria above, the Secretary, in consultation with such Federal agency head or official, shall determine whom may have access to the information for the purpose 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 Indian tribes and Native Hawaiian organizations, related to the confidentiality concern. The Council shall advise the Secretary and the Federal agency within 30 days of receipt of adequate documentation.

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

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

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

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

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

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

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

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

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

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

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

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

(f) *Memoradum 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 § 800.12(a), 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, § 800.12 (a) and (b) also apply to an imminent threat to public health or safety as a result of a natural disaster or emergency declared by a local government's chief executive officer or legislative body, provided that if the Council or 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 § 800.13(a)(1), the Agency Official shall include in any finding of no adverse effect or Memorandum of Agreement a process to resolve any adverse effects upon such properties. Actions in conformance with the process satisfy the Agency Official's responsibilities under section 106 and this part.

(b) *Discoveries without prior planning.* If historic properties are discovered or unanticipated effects on historic properties found after the Agency Official has completed the section 106 process without establishing a process under § 800.13(a), 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 archaeological data, the Agency Official may comply with the Archaeological and Historic Preservation Act instead of the procedures in this part and provide the Council, the SHPO/THPO, and the 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 actions proposed by the Agency Official 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 and the Agency Official shall take into account their recommendations and carry out appropriate actions. The Agency Official shall provide the SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council a report of the actions when they are completed.

(c) *Eligibility of properties.* The Agency Official, in consultation with the SHPO/THPO, may assume a newly-discovered property to be eligible for the National Register for purposes of Section 106. The Agency Official shall specify the National Register Criteria used to assume the property's eligibility so that information can be used in the resolution of adverse effects.

(d) *Discoveries on tribal lands.* If historic properties are discovered on tribal lands, or there are unanticipated effects on historic properties found on tribal lands, after the Agency Official has completed the section 106 process without establishing a process under § 800.13(a) 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 § 800.14(f), 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) *Consultation.* The consultation shall involve, as appropriate, SHPO/THPOs, the National Conference of State Historic Preservation Officers (NCHSPO), 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 § 800.14(f).

(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 this subsection, 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) *Terms not carried out or termination.* 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.

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

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

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

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

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

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

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the exempted program or category of undertakings has the potential to affect historic properties 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 § 800.14(f).

(5) *Council review of proposed exemptions.* The Council shall review a request for an exemption that is supported by documentation describing the program or category for which the exemption is sought, demonstrating that the criteria of § 800.14(c)(1) have been met, describing the methods used to seek the views of the public, and summarizing any views submitted by the public. Unless it requests further information, the Council shall approve or reject the proposed exemption within 30 days of receipt. 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 § 800.14(c)(1). The Council shall notify the Agency Official 30 days before termination becomes effective.

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

(d) *Standard treatments.*—(1) *Establishment.* The Council, on its own initiative or at the request of another party, may establish standard methods for the treatment of a category of historic properties, a category of undertakings, or a category or 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 interests. 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 § 800.14(f).

(5) *Termination* .The Council may terminate a standard treatment by publication of notice in the **Federal Registger** 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 standard 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 § 800.14(f).

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

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

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

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

(f) *Consultation with Indian tribes and Native Hawaiian organizations when developing program alternatives.* Whenever an Agency Official proposes a program alternative pursuant to § 800.14 (a)–(e), 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.

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

§ 800.15 Tribal, State, and Local Program Alternatives. [Reserved]

§ 800.16 Definitions.

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

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

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

(d) *Area of potential effects* means the geographic area or areas within which an undertaking may directly or indirectly cause changes 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 cause by the undertaking.

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

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

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

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

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

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

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

(l) *Historic property* means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria. 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) *Native Hawaiian organization* means any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians. *Native Hawaiian* means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(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. For the purposes of subpart B of this part, the term also includes the designated representative of an Indian tribe that has not formally assumed the SHPO's responsibilities when an undertaking occurs on or affects historic properties on the tribal lands of the Indian tribe. (See § 800.2(c)(2)).

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

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

Appendix A to Part 800—Criteria For Council Involvement in Reviewing Individual Section 106 Cases

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.

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.

Specific Criteria. The Council is likely to enter the section 106 process at the steps specified in the revised regulations 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 Section 800.9(d)(2).

(4) *Presents issues of concern to Indian tribes or Native Hawaiian organizations.* This may include cases where there have been concerns raised about the identification of, evaluation of or assessment of effects on historic properties to which an Indian tribe or Native Hawaiian organization attaches religious and cultural significance; where an Indian tribe or Native Hawaiian organization has requested Council involvement to assist in the resolution of adverse effects; or where there are questions relating to policy, interpretation or precedent under section 106 or its relation to other authorities, such as the Native American Graves Protection and Repatriation Act.

Dated: May 7, 1999.

John M. Fowler,

Executive Director.

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