4310-10-P

ADVISORY COUNCIL ON HISTORIC PRESERVATION

36 CFR Part 800

RIN 3010-AA06

Protection of Historic Properties

AGENCY: Advisory Council on Historic Preservation.

ACTION: Final rule; revision of current regulations.

SUMMARY: The Advisory Council on Historic Preservation (ACHP) has adopted amendments to the regulations setting forth how Federal agencies take into account the effects of their undertakings on historic properties and afford the ACHP a reasonable opportunity to comment, pursuant to Section 106 of the National Historic Preservation Act (NHPA). Most of the amendments respond to court decisions which held (1) that the ACHP could not require a Federal agency to change its determinations regarding whether its undertakings affected or adversely affected historic properties, and (2) that Section 106 does not apply to undertakings that are merely subject to State or local

regulation administered pursuant to a delegation or approval by a Federal agency. Other amendments clarify an issue regarding the time period for objections to "No Adverse Effect" findings and establish that the ACHP can propose an exemption to the Section 106 process on its own initiative, rather than needing a Federal agency to make such a proposal.

DATES: These amendments are effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: If you have questions about the amendments, please call the Office of Federal Agency Programs at 202-606-8503, or e-mail us at achp@achp.gov. When calling or sending an 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.

SUPPLEMENTARY INFORMATION: The information that follows has been divided into five sections. The first one provides background information introducing the agency and summarizing the history of the rulemaking process. The second section highlights the amendments incorporated into

the final rule. The third section describes, by section and topic, the ACHP's response to public comments on this rulemaking. The fourth 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. Finally, the fifth section includes the text of the actual, final amendments.

I. Background

Section 106 of the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470f, requires Federal agencies to take into account the effects of their undertakings on properties included, or eligible for inclusion, in the National Register of Historic Places ("National Register") and to afford the Advisory Council on Historic Preservation ("ACHP") a reasonable opportunity to comment on such undertakings. The regulations implementing Section 106 are codified at 36 CFR Part 800 (2001) ("Section 106 regulations").

On September 18, 2001, the Federal District Court for the District of Columbia ("district court") upheld the Section 106 regulations against several challenges. Nevertheless, the district court invalidated portions of two subsections of the Section 106 regulations insofar as they allowed the ACHP to reverse a Federal agency's findings of "No Historic Properties Affected" (previous Sec. 800.4(d)(2)) and "No Adverse Effects" (previous Sec. 800.5(c)(3)). See National Mining Ass'n v. Slater, 167 F. Supp. 2d 265 (D.D.C. 2001)(NMA v. Slater); and Id. (D.D.C. Oct. 18, 2001)(order clarifying extent of original order regarding Section 800.4(d)(2) of the Section 106 regulations).

Prior to the district court decision, an objection by the ACHP or the State Historic Preservation Officer / Tribal Historic Preservation Officer (“SHPO/THPO”) to a "No Historic Properties Affected" finding required the Federal agency to proceed to the next step in the process, where it would assess whether the effects were adverse. An ACHP objection to a "No Adverse Effect" finding required the Federal agency to proceed to the next step in the process, where it would attempt to resolve the adverse effects.

On appeal by the National Mining Association, the D.C. Circuit Court of Appeals (“D.C. Circuit”) ruled that Section 106 does not apply to undertakings that are merely subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency, and remanded the case to the district court. National Mining Ass'n v. Fowler, 324 F.3d 752 (D.C. Cir. 2003)(NMA v. Fowler). On September 4, 2003, the district court issued an order declaring Sections 800.3(a) and 800.16(y) invalid to the extent that they applied Section 106 to the mentioned undertakings, and remanding the matter to the ACHP.

On September 25, 2003, through a notice of proposed rulemaking (NPRM)(68 FR 55354-55358), the ACHP proposed amendments to the mentioned subsections of the Section 106 regulations so that they would comport with the mentioned court rulings, while still being consistent with the purpose of helping Federal agencies avoid proceeding with a project under an erroneous determination that the project would not affect or adversely affect historic properties, and still triggering Section 106 compliance responsibilities for Federal agencies when they approve or fund State-delegated programs. A related, proposed amendment would clarify that even if a SHPO/THPO concur in a "No Adverse Effect" finding,

the ACHP and any consulting party still have until the end of the 30 day review period to file an objection. Such objections would require the Federal agency to either resolve the objection or submit the dispute to the ACHP for its non-binding opinion. Finally, the ACHP also took the opportunity in that notice to submit an amendment to clarify that the ACHP could propose an exemption to the Section 106 process on its own initiative, rather than needing a Federal agency to make such a proposal.

After considering the public comments, during its business meeting on May 4, 2004, the ACHP unanimously adopted the final amendments to the Section 106 regulations that appear at the end of this notice of final rule.

II. Highlights of Amendments

ACHP Review of "No Historic Properties Affected" and "No Adverse Effect" Findings

As stated above, the district court held that the asserted power of the ACHP to reverse Federal agency findings of "No Historic Properties Affected" and "No Adverse Effect" exceeded the ACHP's legal authority under the NHPA. Accordingly, the final amendments make it clear

that ACHP opinions on these effect findings are advisory and do not require Federal agencies to reverse their findings.

The final amendments still require a Federal agency that makes an effect finding and receives a timely objection to submit it to the ACHP for a specified review period. Within that period, the ACHP will then be able to give its opinion on the matter to the agency official and, if it believes the issues warrant it, to the head of the agency. The agency official, or the head of the agency, as appropriate, would take into account the opinion and provide the ACHP with a summary of the final decision that contains the rationale for the decision and evidence of consideration of the ACHP's opinion. However, the Federal agency would not be required to abide by the ACHP's opinion on the matter.

The amendments also change the time period for the ACHP to issue its opinion regarding "No Adverse Effect" findings, by allowing the ACHP extend it 15 days. This change is deemed necessary since, among other things, the ACHP opinions may now be addressed to the head of the agency, and would therefore more likely be ultimately formulated by ACHP members, as opposed to such tasks being mostly delegated to the staff. Such formulation of opinions by ACHP members is expected to require more time considering that these ACHP

members are Special Government Employees who reside in different areas of the country and whose primary employment lies outside the ACHP.

In response to public comments, as detailed in the third section of this preamble, the ACHP made several changes to the originally proposed amendments:

(1) When the ACHP decides to send its opinion regarding effect findings to the head of an agency, that decision must be guided by the criteria of appendix A of the Section 106 regulations;

(2) If the ACHP decides to object on its own initiative to an agency finding of effect within the initial 30-day review period open to SHPO/THPOs and consulting parties, the ACHP must present its opinion to the agency at that time, rather than merely objecting and triggering the separate ACHP review period for objection referrals;

(3) The head of an agency that has received an ACHP opinion on an effect finding may delegate the responsibility of preparing the response to that opinion to the Senior Policy Official of his/her agency;

(4) When requesting the ACHP to review effect findings, Federal agencies must notify all consulting parties about

the referral and make the request information available to the public;

(5) Regarding findings of “no adverse effect,” the default period for ACHP review is 15 days. However, the ACHP may extend that time an additional 15 days so long as it notifies the Federal agency prior to the end of the initial 15 day period;

(6) The amendments now clarify that, when an agency and SHPO/THPO disagree regarding a finding of “no historic properties affected,” the Federal agency has the option of either resolving the disagreement or submitting the matter for ACHP review; and

(7) The ACHP will retain a record of agency responses to ACHP opinions on findings of effect, and make such information available to the public.

Clarification of the 30-day Review Period for No Adverse Effect Findings

As stated in the NPRM, questions had arisen under the Section 106 regulations as to whether a Federal agency could proceed with its undertaking immediately after the SHPO/THPO concurred in a finding of "No Adverse Effect." The Section 106 regulations specify a 30-day review period, during which

the SHPO/THPO, the ACHP and other consulting parties can lodge an objection. The result of such an objection is that the Federal agency must submit the finding to the ACHP for review. If the SHPO/THPO concurs, for example, on the fifth day of the 30 day period, the language prior to these final amendments may have given some the erroneous impression that this would cut off the right of other parties to object thereafter within the 30 day period (e.g., on the 15th or 28th day).

The final amendment provides clearer language, consistent with the original intent expressed in the preamble to the previous iteration of the Section 106 regulations ("the SHPO/THPO and any consulting party wishing to disagree to the [no adverse effect] finding must do so within the 30 day review period," 65 FR 77720 (December 12, 2000) (emphasis added)) and in subsequent ACHP guidance on the regulations ("Each consulting party has the right to disagree with the [no adverse effect] finding within that 30-day review period;" www.achp.gov/106q&a.html#800.5). All consulting parties have the full 30 day review period to object to a no adverse effect finding regardless of SHPO/THPO concurrence earlier in that period.

As explained below, a few public comments objected to this amendment. However, the ACHP decided to leave the language regarding this issue as it was proposed in the NPRM.

Authorization of the ACHP to Initiate Section 106 Exemptions

Under the Section 106 regulations prior to these final amendments, in order for the ACHP to begin its process of considering an exemption, the ACHP needed to wait for a Federal agency to propose such an exemption. Under the final amendments, the ACHP will be able to initiate the process for an exemption on its own.

As stated in the NPRM, the ACHP believes it is in an unique position, as overseer of the Section 106 process, to find situations that call for a Section 106 exemption and to propose such exemptions on its own. There may also be certain types of activities or types of resources that are involved in the undertakings of several different Federal agencies that would be good candidates for exemptions when looking at the undertakings of all of these agencies, but that may not be a high enough priority for any single one of those agencies to prompt it to ask for an exemption or to ask for it in a timely fashion. The ACHP will now be able to

step into those situations and propose such exemptions on its own, and then follow the already established process and standards for such exemptions.

As detailed in the third section of this notice, there were several comments on this part of the amendments. However, as explained below, the ACHP decided to not make any changes to this part of the proposed amendments.

ACHP Review of Objections Within the Process for Agency Use of the NEPA Process for Section 106 Purposes

A public comment correctly pointed out that the proposed amendments failed to adjust the process regarding NEPA/106 reviews (under Section 800.8(c)) in accordance with the NMA v. Slater decision. If left unchanged, that process could have been interpreted as allowing the ACHP to overturn agency findings of effect.

Accordingly, the final amendments change that process to comport with the NMA v. Slater decision, in a manner consistent with the final amendments regarding the review of effects under the regular Section 106 process at Sections 800.4(d) and 800.5(c).

Applicability of Section 106 to Undertakings that are Merely Subject to State or Local Regulation Administered Pursuant to a Delegation or Approval by a Federal agency.

As explained above and in the NPRM, the D.C. Circuit held that Section 106 does not apply to undertakings that are merely subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency. Accordingly, the final amendment removes those types of undertakings from the definition of the term "undertaking" on Section 800.16(y).

Formerly, an individual project would trigger Section 106 due to its regulation by a State or local agency (through such actions as permitting) pursuant to federally-delegated programs such as those under the Surface Mining Control and Reclamation Act, 30 U.S.C. 1201 et seq. Under the final amendment, such State or local regulation will not, by itself, trigger Section 106 for those projects.

Nevertheless, it is the opinion of the ACHP that the Federal agency approval and/or funding of such State-delegated programs does require Section 106 compliance by the Federal agency, as such programs are "undertakings" receiving Federal approval and/or Federal funding. Accordingly, Federal agencies need to comply with their

Section 106 responsibilities regarding such programs before an approval and/or funding decision on them. Agencies that are approaching a renewal or periodic assessment of such programs may want to do this at such time.

Due to the inherent difficulties in prospectively foreseeing the effects of such programs on historic properties at the time of the program approval and/or funding, the ACHP believes that Section 106 compliance in those situations should be undertaken pursuant to a program alternative per 36 CFR § 800.14. For example, that section of the regulations provides that "Programmatic Agreements" may be used when "… effects on historic properties cannot be fully determined prior to approval of an undertaking; [or] … when nonfederal parties are delegated major decisionmaking responsibilities …" 36 CFR § 800.14(b)(1). The ACHP stands ready to pursue such alternatives with the relevant Federal agencies.

While there were various comments on this part of the amendments and the explanatory material of the NPRM, the ACHP decided not to change the amendments regarding this issue. See the discussion of those comments, below.

III. Response to Public Comments

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

NMA v. Slater and Sayler Park Case

Several public comments asked the ACHP to mention a case out of a District Court in Ohio. In that case, Sayler Park Village Council v. U.S. Army Corps of Engineers, 2002 WL 32191511 (S.D. Ohio Dec. 30, 2002); 2003 WL 22423202 (S.D. Ohio Jan. 17, 2003) (Sayler Park), the judge specifically disagreed with the NMA v. Slater decision regarding the ACHP's authority to overturn agency effect findings. These public comments also argued that the Sayler Park decision relieved the ACHP from amending the Section 106 regulations.

The Sayler Park case involved a Corps of Engineers (Corps) Clean Water Act permit needed for the construction of a barge loading facility. A group of residents who lived near the proposed facility sued the Corps alleging that it

had issued the permit in violation of Section 106. While the Corps determined that the undertaking would not have an effect on historic properties, the SHPO and others disagreed and argued that the Corps should continue the Section 106 process. The Corps upheld its determination of no effect and, based on the NMA v. Slater decision, decided its Section 106 responsibilities were concluded. It then issued the permit and this lawsuit followed.

The Sayler Park court expressly disagreed with the NMA v. Slater holding that Section 800.4(d)(2) of the Section 106 regulations was substantive and therefore beyond the scope of the ACHP's authority. As explained above, that section required an agency to move to the next step of the Section 106 process if, among other things, the ACHP and/or SHPO/THPO disagreed with its finding that no historic properties would be affected by the undertaking. The court in Sayler Park held that this provision of the regulations was not substantive because, rather than restraining the agency's ability to act, it merely added a layer of consultation ("... no matter the process, the agency never loses final authority to make the substantive determination ...").

The ACHP presented a similar argument to the NMA v. Slater judge. The ACHP continues to believe that neither this provision nor the similar one regarding “no adverse effects” (nor any other provisions of the regulations for that matter) were substantive. None of these provisions imposed an outcome on a Federal agency as to how it would decide whether or not to approve an undertaking. They merely provided a process that assured that the Federal agency took into account the effects of the undertaking on historic properties. They did not impose in any way whatsoever how such consideration would affect the final decision of the Federal agency on the undertaking. They did not provide anyone with a veto power over an undertaking. See 65 Fed. Reg. 77,698, 77,715 (Dec. 12, 2000).

While the ACHP still disagrees with the NMA v. Slater partial invalidation of Sections 800.4(d)(2) and 800.5(c)(3), it nevertheless believes it must proceed with the amendments in this rulemaking. The NMA v. Slater court (the D.C. District Court) has direct jurisdiction over the ACHP and has issued specific orders (1) partially invalidating the provisions that are the main subject of these amendments and (2) remanding these matters to the ACHP for action consistent with its decisions. Moreover, as

opposed to the situation in the Sayler Park cases, the ACHP was a party before the court in the NMA cases. The ACHP is not confronted with conflicting orders from different courts. Under these circumstances, the ACHP did not believe it had the option of ignoring the NMA v. Slater and NMA v. Fowler decisions and orders, despite the ACHP's disagreement with them. It therefore has proceeded with this rulemaking, which now has culminated with the amendments described herein.

Sections 800.4(d) and 800.5(c) - Review of "No Historic Properties Affected" and "No Adverse Effect" Findings

Make the stipulation regarding "no historic properties affected" consistent with that regarding "no adverse effect" objections, and direct an agency and SHPO/THPO to continue to consult when there is disagreement with an agency's determination, as opposed to requiring automatic referral to the ACHP. It was not the purpose of the ACHP to foreclose the opportunity of Federal agencies and SHPO/THPOs to attempt to work out their differences regarding this finding. Therefore, the amendments now explicitly state that, upon disagreement, Federal agencies "shall either

consult with the objecting party to resolve the disagreement, or forward the finding and supporting documentation to the Council" for review. See Section 800.4(d)(1)(ii).

If the option is invoked by the ACHP to require decisions from agency heads in other than very rare instances, the work of Federal agencies could be seriously impeded (particularly those agencies with multi-member agency heads like the FCC). Even if used sparingly, this would delay the deployment of needed service to the public, and could also delay FCC consideration of other important issues of telecommunications policy having no historic preservation implications. If the ACHP concludes that these provisions are necessary and within its statutory authority, we urge the ACHP to invoke the proposed rules sparingly with a view toward requiring a response from agency heads only in cases presenting the most significant questions of law or policy or having such magnitude as to potentially cause the destruction of, or other very significant impact on, historic properties. The ACHP believes it has the legal authority to issue comments on agency effect findings to the heads of agencies. Among other

things, the statutory language of Section 106 specifies that "[t]he head of any such Federal agency shall afford the Advisory Council on Historic Preservation ... a reasonable opportunity to comment with regard to such undertaking." 16 U.S.C. 470f (emphasis added). A more than reasonable interpretation of that statutory language would indicate that the ACHP could provide its opinion on the effects of an undertaking to the head of an agency. Now that such ACHP's opinions on effects are advisory, this could be the ACHP's last reasonable opportunity to comment on the undertaking within the Section 106 process. Nevertheless, in response to this and other similar comments, the ACHP has changed the proposed amendments so that the head of an agency can delegate the duty of responding to the ACHP's opinions on effects to the agency's Senior Policy Official. The Senior Policy Official, as now defined in the Section 106 regulations, is the senior policy level official designated by the head of the agency pursuant to Section 3(e) of Executive Order 13287. In addition, the final amendments provide that ACHP decisions to issue opinions to heads of agencies must be guided by the criteria of appendix A to the regulations.

In consultations where the ACHP has entered the process, there appears to be no good reason to allow the

ACHP to object and appeal to itself. Doing so merely adds unnecessary expense and delay to an already overly burdensome process. ... If the ACHP desires to object to the finding, it should do so and communicate its comments to the agency within the original 30-day review period. The ACHP has changed the proposed amendments in response to this and other similar comments. The amendments regarding effect findings, as originally proposed, could allow the ACHP to object twice to Federal agency findings of effect: once during the initial 30-day period for parties to review the finding, and a second time once the agency finalized its finding and, upon objection, needed to refer the matter to the ACHP for an advisory opinion within a separate review period. This could have allowed the ACHP to object in the initial period and then object again, thereby giving the ACHP two independent opportunities to review and object to the finding. This was not intended. The amendments were edited so that if the ACHP provides a written objection to the agency within the initial 30-day review period, the agency does not need to refer the same matter to the ACHP for the “second” review. However, the ACHP written objection in the initial 30-day period would be subject to the same conditions that would have applied for the “second” referral

(e.g., ACHP discretion to send the opinion to the head of the agency; and requirement that a response come from the agency head or the Senior Policy Official if the matter is sent to the head of the agency).

The ACHP is not required to respond to frivolous or unfounded objections, or in fact to objections of any kind, but as written in these amendments, the full 30-day delay from the filing of such objections is automatic and unavoidable. In order to limit unnecessary objections and minimize wasteful delay, objections that trigger a 30-day review ought to be limited to written objections that assert and substantiate a substantial likelihood of significant adverse effect, consisting of damage or destruction to a highly important historic property. Another proposed idea is to add a process for agencies or applicants to dismiss insufficiently supported objections. The ACHP disagrees. While the ACHP may (and does) disagree with certain SHPO/THPO objections from time to time, it does not believe such objections are frivolous or unfounded. Moreover, with regard to objections to "no adverse effect" findings, the ACHP has changed the proposed amendments so that the default time period for ACHP response is 15 days. An objection that

is frivolous or unfounded would, at worst, only cause a 15 day delay in the process. The documentation that agencies are already required to provide the ACHP would adequately show the seriousness (or lack thereof) of objections. Particularly with regard to the idea of a motion to dismiss process, the ACHP also does not believe that adding such an additional layer of process would achieve much in terms of saving time or providing for predictability. As the comment itself points out, time (the comment suggests ten days) would be needed for the ACHP to consider and dispose of such motions to dismiss, not to mention the time for the agency or applicant to draft and provide the ACHP with the motion itself. In addition, this additional layer of process would provide a further area of potential, time-consuming litigation for those who want to challenge an ACHP's decision to dismiss their objection. Moreover, inserting this motion to dismiss process into the regulations would further clutter what many industry commenting parties deem to be an overly complicated process. Finally, the comment provides no basis for limiting the analysis to "significant" adverse effects or "highly important" historic properties. As explained in the preambles to previous iterations of the Section 106 regulations and case law, the ACHP believes it

has properly defined the “adverse effects” that should be considered in the Section 106 process, and properly defined the scope of “historic properties” to be considered in the process. See NMA v. Slater.

The proposal exceeds the standards explained in the NMA v. Slater case, in that it imposes a further procedural requirement, after the agency has made a determination of effect, which additional requirement is obviously designed to put pressure on the agency to reconsider or reverse its decision. The ACHP disagrees. The amendments do not exceed the standards explained in the NMA v. Slater case. The court partially invalidated Sections 800.4(d)(2) and 800.5(c)(3) insofar as they forced an agency to proceed to the next step of the process when the ACHP objected to such agency’s effect finding, because the court viewed this as the ACHP effectively reversing the agency’s substantive effect findings. The amendments make it clear that the ACHP’s opinions on effect findings are not binding on the agency and that only the agency can reverse its own findings. If the agency disagrees with the ACHP’s opinion as to whether there is an effect or an adverse effect, the agency responds

to the ACHP opinion and is done with the Section 106 process.

The ACHP should be required to keep and report statistics, as a part of its annual report, on the number of times that federal agencies have bypassed the Section 106 process by maintaining initial findings of no effect and no adverse effect despite SHPO/THPO and ACHP objections. This and similar comments reflected the opinion that certain Federal agencies, knowing that the ACHP could no longer "overturn" their findings of effect, would take advantage of the situation and be more willing to make questionable findings of "no historic properties affected" or "no adverse effects." The ACHP has changed the proposed amendments so that they now include a requirement for the ACHP to keep track of how agencies respond to ACHP opinions regarding effects, and make a report of such data available to the public. This will help the ACHP in overseeing the Section 106 process. The ACHP intends to use this information in order to, among other things, bring any recurring problems to the heads of the relevant agencies and suggest ways in which they can improve the effectiveness, coordination, and consistency of their policies and programs with those of the

NHPA. See 16 U.S.C. 470j(a)(6). The ACHP decided that, in order to present a fuller and more accurate picture, the information to be collected must include not only the occasions where an agency proceeds in disagreement with the ACHP, but also those occasions where an agency changes its finding in accordance with the ACHP advice. The ACHP will also keep track of the instances where the ACHP decides to not respond to an agency referral of an objection. Finally, while the ACHP will maintain discretion as to how it makes this information available to the public, its intent is to be flexible in using mechanisms such as its web-site or other means. The ACHP will not require members of the public to file Freedom of Information Act requests in order to get that information.

While there is great value in a process that would allow time for the ACHP to comment to the head of a federal agency where the issue warrants, many of the review requests that the ACHP will receive will not warrant such attention. In the interest of streamlining the compliance process, a 15-day review period for "no adverse effect" determinations is adequate for most of these requests, and an amendment could provide for a 30-day review period in certain

situations. Specific criteria, such as those contained in Appendix A of the current regulations, are needed to provide a threshold between standard staff review and full ACHP involvement. The ACHP received this and other similar comments. In response, the ACHP decided to change the amendments so that when it receives a referral for review of a “no adverse effect” objection, the default time period for such review is 15 days. If the ACHP deems that it needs more time, it can extend the review period an additional 15 days so long as it notifies the agency. This allows simple or weak objections to be dispatched sooner, while also allowing the ACHP staff and/or membership to better manage their workload so that they can dedicate the necessary time to properly review and respond to objections that present more significant and complex issues. The ACHP does not believe that the 15 additional days, when actually invoked by the ACHP, would seriously affect project planning and could be accommodated by agencies in their establishment of the project review and approval schedule. Finally, in response to this and similar comments, the ACHP changed the amendments so that an ACHP decision to send its opinion to the head of an agency must be guided by appendix A of the regulations.

At the very least, agencies should be required to copy SHPOs on the documentation submitted to the ACHP when an objection is referred to the ACHP. Absent this, the SHPOs will have no assurance that their position has been accurately represented to the ACHP or that the documentation provided by the agency is the same as that submitted to the SHPO for review--or, for that matter, that the project has been forwarded to the ACHP. In response to this and other similar comments, the ACHP changed the proposed amendments so that agencies are now required to notify consulting parties (which includes SHPO/THPOs) that a referral has been made to the ACHP and to make the information packet sent to the ACHP available to the public. It is the understanding of the ACHP that many agencies already proceed in this way anyhow.

Provide for Tribes and THPOs to request additional time for review, rather than allowing the federal agency to wait out an absolute cut-off time of thirty (30) days. The ACHP believes that the amendments strike an appropriate balance between the need for an adequate time period for review, and the need for projects decisions to be made in a timely manner and within a predictable time frame. However, the

ACHP strongly encourages Federal agencies to facilitate effective tribal involvement by being receptive to tribal requests for additional time for review.

Strike "assume concurrence with the agency's finding" and replace with "proceed in accordance with the agency official's original finding." No reason for the agency to assume anything about the ACHP's position due to its silence. The ACHP agrees that the terminology regarding “assuming concurrence” may not necessarily reflect the position of the entity that fails to respond within the regulatory time frame. Accordingly, that terminology has been removed. Nevertheless, the legal and procedural effect of a failure to respond within the provided time frame remains exactly the same as before (e.g., “the agency official's responsibilities under section 106 are fulfilled” if neither the ACHP nor the SHPO/THPO object to a no historic properties affected finding within the 30-day review period).

Concerned about the requirement that the agency provide "evidence" that the agency considered the ACHP's opinion. We understand the need of the agency to provide a responsive

reply to the ACHP, however the Department finds this requirement confusing, overly burdensome, and unjustified. The ACHP clarifies that this requirement for providing "evidence" simply means that the agency's written response must explain the agency's rationale for either following or not following the ACHP opinion so that the document reflects the fact that the agency actually considered the ACHP opinion.

Require the agency to prepare additional documentation for the ACHP's review, beyond the existing requirements of 36 CFR § 800.11(d)-(e). This should specifically include responses from the agency to any objections raised by a consulting party or the SHPO/THPO, for both "no historic properties affected" and "no adverse effect" findings. Several comments raised this issue. However, it has been the ACHP's experience that the current documentation requirements at the cited provision of the regulations are sufficient for the ACHP to carry out an informed and adequate review. Moreover, it is the ACHP's experience that in most, if not all, cases of objection referrals to the ACHP, the Federal agencies explain why they believe the

objection is incorrect. This explanation necessarily responds to the objection itself.

If the SHPO/THPO or a consulting party disagrees with the agency's determination regarding effects, require the finding to be certified by the Federal Preservation Officer, and/or another agency official who is a historic preservation professional, meeting the Secretary of the Interior's Professional Qualifications Standards, 62 Fed. Reg. 33,707 (June 20, 1997), prior to sending the finding to the ACHP for review. The ACHP declined to follow the recommendation in this comment. Many Federal agencies have historic preservation professionals in their staff who review and/or develop agency findings in the Section 106 process. In addition, other professionals at the SHPO/THPO offices, and sometimes the ACHP, also review the findings in the course of the normal process. Accordingly, the ACHP did not believe that the delay that could be created by such an additional layer of process would be justified.

Actual comments should be required from the ACHP to help rule on effect disagreements. The ACHP simply does not

have the staff resources that would be needed to respond to every objection referred to it regardless of merit.

Clarification of the 30-Day Review Period for No Adverse Effect Findings

Federal agencies should not have to wait until the end of the 30-day period if the agency obtains the agreement of all the consulting parties within that period. This concept was rejected since there was a concern that it could motivate agencies to allow fewer consulting parties into the process in order to increase the chances of having a shorter review period. The ACHP also wanted to provide those who may have been denied consulting party status or who may not have found out about the undertaking until late, a better opportunity to bring their concerns to the ACHP.

Conferring authority to trigger ACHP review on every consulting party would be counterproductive and inefficient since the mere assertion of a disagreement, regardless of its merit, could result in the elevation of the dispute to the ACHP. This would create delays. The proposed amendments do not change this aspect of the process. Assessing the

merit (or lack thereof) of disagreements would insert uncertainty in the process. Once the ACHP has received a referral of a disagreement, it could dispose of those which it deems to have no merit with little delay.

Section 800.14(c) - Exemptions

Suggest that the ACHP provide a specific mechanism that ensures notification of and input from the affected agency. The ACHP will notify and consult with those agencies affected by any exemption proposed by it.

Authorizing the ACHP to exempt "certain" arbitrary projects from Section 106 weakens the Act. The process for exemptions retains the high standard that has to be met by any program or category of undertakings seeking an exemption. Their potential effects upon historic properties must be “foreseeable and likely to be minimal or not adverse” and the exemption must be consistent with the purposes of the NHPA. See 16 U.S.C. 470v and 36 CFR § 800.14(c)(1).

Since the members of the ACHP are presidential appointees, it would be disingenuous to contend that political partisanship would have no effect on these exemptions. There also seems to be a conflict of interest in the ACHP proposing an exemption, and then deciding on it. "Partisanship" plays no role in these decisions. As stated above, exemptions must meet high, non-partisan standards in order to be adopted. See 16 U.S.C. 470v and 36 CFR § 800.14(c)(1). Moreover, even without the amendments, Federal agencies other than the ACHP could propose exemptions. Those Federal agencies are led by presidential appointees. Finally, under the ACHP's operating procedures, ACHP Federal agency members are not permitted to vote on matters in which their agency has a direct interest not common to the other members.

The exemptions process should be amended to include a procedure for SHPOs/THPOs or other consulting parties to request a determination from ACHP that a specific undertaking that would normally be exempt should be reviewed. The ACHP believes this is unnecessary. The exemptions themselves, as adopted by the ACHP, can contain such a process. Moreover, the exemptions can be drafted so

that they place situations that could present adverse effects beyond their scope. Finally, the regulations allow the ACHP to revoke exemptions. Section 800.14(c)(7). Those who believe an exemption should be revoked can ask the ACHP to do so under the cited section.

If the ACHP is authorized to propose and approve exemptions on its own initiative, where will we turn with our objections to these exemptions? The consultation process regarding exemptions has not changed. Those who object to the exemptions can present such objections to the ACHP. Much like the rulemaking process, the fact that the ACHP has submitted a proposal does not necessarily mean that the ACHP will adopt the proposal without changes or adopt the proposal in the first place. The ACHP will consider objections to exemptions it proposes the same way it will consider those regarding exemptions other agencies propose.

The ACHP fails to make a persuasive case as to why it needs additional authority to search out and adopt exemptions from Section 106. There is no claim that the current regulation has caused any particular problems, or has been found inadequate in some way. If a potential

Section 106 exemption is "not. . . a high enough priority for any single. . . agenc[y] to prompt it to ask for an exemption or to ask for it in a timely fashion," it is not clear why it should be a priority for the ACHP. As opposed to most of the other agencies of the Federal government, the ACHP has a mission focused on historic preservation matters and assisting other agencies regarding such matters. Other agencies have missions that are focused on other matters. It is not surprising, therefore, that their priorities are not focused on historic preservation issues. This does not mean, however, that such issues are unimportant or not deserving of the ACHP's attention. If a program or category of undertakings meet the standards for an exemption, such exemptions should be considered by the ACHP whether or not the relevant agency can focus its energies on the issue. Also, due to its size and flatter management structure, the ACHP can address these issues more promptly. Furthermore, the ACHP believes this amendment appropriately and responsibly promotes the goal of environmental streamlining. Finally, as stated in the NPRM, the ACHP is in an unique position to identify cross-cutting exemptions that could benefit several agencies.

The ACHP should be required to keep and report statistics, as a part of its annual report, on the number and name of project exemptions that it has initiated. The ACHP does not see a reason for such reporting considering the fact that exemptions must be published in the Federal Register before they go into effect. See Section 800.14(c)(8).

This is an unreasonably indefinite provision that short-circuits protection of historic properties encouraged by current regulations requiring Federal agencies to propose exemptions individually rather than in broad classes. The proposed amendments will inevitably result in failures to appreciate unique characteristics of individual properties subsumed in exempted categories or affected by an unacceptably undefined "certain types of activities," and therefore, a significant erosion of preservation standards. The amendments do not alter the scope of possible exemptions (e.g., program or category of agency undertakings). They also do not change the high standards that exemptions must meet. See 16 U.S.C. 470v and 36 CFR § 800.14(c)(1). Finally, they do not change the consultative process through which proposed exemptions are considered.

The rule does not allot a specific time period for the THPOs/SHPOs to comment on the proposed exemptions. THPOs/SHPOs should be given the same period of time to comment on proposed exemptions as the ACHP. The THPOs/SHPOs review and comment period should occur prior to the ACHP review and comment period so that the ACHP may take into account the input of the THPOs/SHPOs in their decision-making. The exemptions process does not specify a time period for THPO/SHPOs to comment because different exemptions, due to their varying complexity and impact, may call for widely different comment periods. The process points to Section 800.14(f), which fleshes out the details of consulting with tribes and specifies that the agency official and the ACHP must take tribal views into account in reaching a final decision.

ACHP Review of Objections Within the Process for Agency Use of the NEPA Process for Section 106 Purposes

36 CFR § 800.8(c)(3) states that 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) ...". This appears to contradict the court decision that the asserted power of the ACHP to reverse Federal agency determinations of effect exceeded the ACHP's legal authority under the Act. This was an oversight. The ACHP agreed that the referred section of the regulations needed to be edited to better comport with the NMA v. Slater decision and therefore added an amendment to incorporate into that section changes similar to those incorporated by the amendments to the review process for effect findings at Sections 800.4(d) and 800.5(c).

Section 800.16(y) - State Permits Under Delegated Programs

It is difficult for us to understand the basis for the proposed rule change given that the rule's definition of "undertaking" was taken verbatim from the 1992 revisions to the NHPA. With regard to licensing, the appellant in the NMA v. Fowler case argued that Section 106, by its own terms, only applied to "Federal ... agenc[ies] having authority to license any undertaking." 16 U.S.C. 470f. Accordingly, it argued that no matter how broadly Congress defined the term undertaking, Section 106 only deals with the subset of

undertakings that actually receive a license from a Federal agency, as opposed to a State agency. The appellants, and the court, saw Section 106 itself as placing a limit on the "undertakings" subject to its provision. The court also believed that the case of Sheridan Kalorama Historical Association v. Christopher, 49 F.3d 750 (D.C. Cir. 1995), barred it from a different interpretation. In that opinion, the court held that "however broadly the Congress or the [ACHP] define 'undertaking,' § 106 applies only to: 1) 'any Federal agency having ... jurisdiction over a proposed Federal or federally assisted undertaking'; and 2) 'any Federal ... agency having authority to license any undertaking.'" Although the ACHP disagrees with the NMA v. Fowler interpretation of the NHPA, the ACHP is bound by the court's decision.

The ACHP should disclose contrary legal interpretations. This comment referred to the case of Indiana Coal Council v. Lujan, 774 F. Supp. 1385 (D.D.C. 1991), vacated in part and appeal dismissed, Nos. 91-5397, 91-5405, 91-5406, 1993 U.S. App. LEXIS 14561, 1993 WL 184022 (D.C. Cir. Apr. 26, 1993), appeal dismissed, No. 91-5398 (D.C. Cir. Dec. 2, 1993). In that case, the court held that

permits issued by State agencies pursuant to a delegated authority from the Office of Surface Mining were undertakings requiring compliance with Section 106. Soon after that decision was issued, Congress amended the NHPA definition of “undertaking” to specifically include “those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.” 16 U.S.C. 470w(7). Some, including the ACHP, argue that Congress did this to codify the ruling in the Indiana Coal Council case. See 138 Cong. Rec. S17681 (Oct. 8, 1992). In fact, the Indiana Coal Council, the National Coal Association, and the American Mining Congress asked the D.C. Circuit to dismiss their appeal of the Indiana Coal Council case based on the 1992 amendment to the NHPA definition of “undertaking.” As a result, the appeal was dismissed and the decision vacated in part by the D.C. Circuit because the 1992 amendments made the case moot.

A new section should be added to the regulations that specifically addresses "State and Local Delegated Programs." The ACHP should provide Federal agencies and the public with clear and unambiguous language concerning these programs and their level of consideration, consistent with the Federal

Court ruling, under Section 106 of the Act. As stated in the NPRM, the ACHP believes that Federal agency approval of, amendments or revisions to, and funding of delegated programs trigger Section 106 review. The ACHP does not believe a new section in the regulations would be required for such programs because it believes the already existing processes in those regulations can be used to adequately cover such Federal agency approvals and/or funding. Specifically, the delegated programs could be covered by Programmatic Agreements under Section 800.14(b) of the regulations. The ACHP looks forward to working with the Department of the Interior, the Environmental Protection Agency, and other agencies in developing such agreements.

The proposed changes to the regulation itself at 36 CFR § 800.16(y) are appropriate and consistent with the D.C. Circuit's opinion in NMA v. Fowler. However, the Preamble discussion of the rule is inappropriate (decision on whether there is an undertaking is up to the agency), improperly characterizes the nature of the Federal government's role in annual funding of State programs (while initial approval may be an undertaking, it is a leap to say each renewal, assessment or funding event will trigger Section 106), and

is inconsistent with the ACHP's official position set forth in its brief before the court (regarding the agency having the final word on whether it has an undertaking). The discussion is not inappropriate since, while procedurally the agency makes the determination as to whether it has an undertaking, the ACHP has the right (and the expertise) to provide its opinion on that issue. Furthermore, the Office of Surface Mining (OSM) has long acknowledged that its approval, amendment, and at least the initial funding of State-delegated programs triggers Section 106 review. See Indiana Coal Council, 774 F.Supp. at 1400 (this portion of the opinion was not vacated by the D.C. Circuit). The ACHP looks forward to working with the affected agencies, historic preservation officers, industries, and other stakeholders in reaching an agreement for handling these programs under Section 106.

Objects to the suggestion that "For existing programs, this [compliance with section 106] could occur during renewal or periodic assessment of such programs." There will be no way to know that the delegation includes adequate and enforceable provisions until after the "renewal or periodic assessment" occurs at some uncertain date years in the

future. Waiting on renewal or periodic reviews in such instances means that untold damage to the Nation's heritage will occur in the intervening years. Improper delegations must immediately be rescinded until such time as the agency official has properly complied with section 106 and 36 CFR Part 800. While the ACHP desires to move quickly and reach adequate agreements on these programs, the ACHP does not have the authority to rescind other agencies' approvals of programs. The idea of pursuing an agreement at the moment of renewal or reassessment (to cover a delegated program as a whole) was mostly a practical recommendation, so that agencies that are nearing such stages would take advantage of such occasions (when they may be preparing to undergo some form of review process anyhow) to work on and resolve this issue.

Concerned with the ACHP's "opinion" that Federal agency approval and/or funding of such delegated programs does require Section 106 compliance by the Federal agency, as such programs are "undertakings" receiving Federal approval and/or Federal funding. This appears as an attempt to accomplish through the back door what the ACHP has been barred by the courts from doing through the front door. The

ACHP is not aware of any court opinion barring its interpretation of such Federal approval and funding decisions as being undertakings subject to Section 106. The D.C. Circuit specifically mentioned this interpretation, without ruling on it, when it quoted the appellant's brief: "For example, although the NMA concedes that '[t]he federal government's approval of a State's overall SMCRA permitting program may arguably be an action subject to Section 106, because the federal government contributes funds to the general administration of state permitting programs and approves those programs,' it contends that individual state mining permits do not fall within that section since 'the federal government does not retain the authority to approve or reject any one mining project application.'" In any event, OSM has long acknowledged, and the U.S. District Court for the District of Columbia has ruled, that OSM approval, amendment, and at least the initial funding of delegated programs triggers Section 106 review. See Indiana Coal Council, 774 F.Supp. at 1400 (this portion of the opinion was not vacated by the D.C. Circuit).

Section 106 reviews should definitely be required for individual permits issued by state agencies under delegation

by federal agencies. Our cities and counties receive large amounts of money wherein they are allowed to issue permits under delegation by federal agencies (e.g., HUD programs). The ACHP wants to clarify that under certain Housing and Urban Development (HUD) programs, such as the Community Development Block Grant (CDBG) program, Federal statute specifically provides that States or local agencies act on behalf of HUD in meeting HUD's Section 106 responsibilities. Those HUD grant programs are not affected by the issue of delegated programs being addressed in these amendments, which pertain only to regulatory and permitting programs.

Rulemaking Process

Urges ACHP to engage in consultation with preservation stakeholders when developing a revised draft of the regulations, rather than drafting them behind closed doors, as was done with the current proposal. The ACHP engaged in the consultation required by the Administrative Procedure Act for rulemaking. It published the proposed amendments on the Federal Register and provided the public with 30 days in which to provide comments. In response to requests, this period was thereafter extended an additional 30 days. As

reflected in this preamble, the ACHP seriously considered all public comments and, in response to those comments, edited the proposed amendments in several ways. Moreover, the ACHP membership, composed by representatives of various stakeholders in the process (including Federal agencies, the National Trust for Historic Preservation, the National Conference of State Historic Preservation Officers, citizen members, a Native Hawaiian organization representative and expert members), fully vetted the proposed amendments and changes to them. In the end, as explained above, the ACHP had to amend the regulations and respond in a timely manner to the court's order. Moreover, it is important to note that this rulemaking involved a fairly limited scope of issues.

Miscellaneous Issues

Several public comments addressed issues beyond the limited scope of this rulemaking. Again, this rulemaking was intended to respond primarily to the issues raised by the NMA v. Slater and NMA v. Fowler decisions regarding the authority of the ACHP to overturn agency effect determinations and the issue of delegated programs. The ACHP decided to respond to the following comments, even though they were not particularly germane to the present

rulemaking. The ACHP may consider some of those issues in future rulemakings.

If the dispute is over eligibility for inclusion on the National Register, the Keeper should be included in the process. Several members of the public made this comment. However, it is unclear what was meant since the Section 106 regulations already provide for referral to the Keeper when an agency and SHPO/THPO disagree regarding the eligibility of a property for listing on the National Register of Historic Places. 36 CFR § 800.4(c)(2). To the extent that the comment advocates that such referral be made when consulting parties other than the SHPO/THPO dispute a determination regarding a property's eligibility, the ACHP disagrees. The practice of agency and SHPO/THPO eligibility determinations has been long establish in practice and in law (see 36 CFR § 63.3), and there is no indication of such an arrangement having presented problems in the Section 106 process.

The ACHP rules contain no significance or materiality limitations, such as those contained in the National Environmental Policy Act that limit most of that statute's

key provisions only to actions that might significantly affect the environment. In contrast, the ACHP Section 106 rules seek to require agencies to examine all effects of any intensity, whether or not the effects are significant. Where there is an alteration of a historic property, any diminishment of any aspect of its historic integrity, however measured and however great or small, can support a finding of adverse effect. While the NEPA statute itself contains the limiting factors of "major" Federal actions and "significant" effects, the NHPA does not. Regardless, the Section 106 regulations allow agencies to weed out at the very start of the process those undertakings that generically would not affect historic properties (Section 800.3(a)), and provides a shortened process for those undertakings that would not affect historic properties within their area of potential effects (Section 800.4(d)).

Opponents of the Section 4(f) review process claimed its protections were unnecessary because Section 106 was in place. Now the opponents of responsible procedure aim to significantly weaken Section 106. Section 4(f) could still be eliminated when the Transportation Act comes before Congress in January. If Section 4(f) is removed and Section

106 severely weakened, there will be no meaningful protection for significant historic resources. Several members of the public repeated this comment verbatim. The ACHP does not believe the amendments in this rulemaking "significantly weaken" the Section 106 process. Moreover, as of the date of this notice, Congress has not taken action on the legislation mentioned in these comments. Various versions of the bill are under consideration by the Congress. Due to the uncertainty of the actual legislation that may or may not be passed by Congress, the ACHP can only speculate on the eventual relationship between Section 106 and Section 4(f). Once Congress and the President have acted on the legislation, the ACHP will be able to assess the situation and determine whether any future regulatory action is needed.

Restrict the ability of agencies to exclude consulting parties in order to silence objections: This could be accomplished, for example, by allowing the SHPO/THPO or the ACHP to invite a consulting party to participate in the Section 106 review if the federal agency has rejected the party's request. Several members of the public endorsed this concept. In light of the limited scope of this rulemaking

and the fact that this issue was not identified in the NPRM, the ACHP does not believe it is appropriate to address this issue in the final rulemaking. The ACHP also notes that the current provision was the subject of extensive comment and negotiation in the previous rulemaking and any alteration of it would require thorough public airing.

Very concerned with the ACHP's rules extending the protections of Section l06 to properties only "potentially eligible" for the National Register of Historic Places. Only those properties actually listed on the National Register or formally determined eligible for such listing by the Keeper should be within the scope of Section 106. This very same issue was raised in the NMA v. Slater case. That court sided with the ACHP’s interpretation of the NHPA that the properties within the scope of Section 106 include those that meet the criteria for listing on the National Register, even though they have not been formally determined eligible by the Keeper and that the process for identifying them in the Section 106 regulations is appropriate. As the ACHP stated in a previous preamble to the Section 106 regulations (which the court specifically cited approvingly in its decision): “Well-established Department of the Interior

regulations regarding formal determinations of eligibility specifically acknowledge the appropriateness of section 106 consideration of properties that Federal agencies and SHPOs determine meet the National Register criteria. See 36 CFR § 63.3. . . . Not only does the statute allow this interpretation, but it is the only interpretation that reflects (1) the reality that not every single acre of land in this country has been surveyed for historic properties, and (2) the NHPA's intent to consider all properties of historic significance. It has been estimated that of the approximately 700 million acres under the jurisdiction or control of Federal agencies, more than 85 percent of these lands have not yet been investigated for historic properties. Even in investigated areas, more than half of identified properties have not been evaluated against the criteria of the National Register of Historic Places. These estimates represent only a part of the historic properties in the United States since the section 106 process affects properties both on Federal and non-Federal land. Finally, the fact that a property has never been considered by the Keeper neither diminishes its importance nor signifies that it lacks the characteristics that would qualify it for the National Register." 65 Fed. Reg. 77705.

IV. Impact Analysis

The Regulatory Flexibility Act

The ACHP certifies that the amendments will not have a significant economic impact on a substantial number of small entities. The amendments in their proposed version only impose mandatory responsibilities on 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 ACHP 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 amendments do not impose reporting or record-keeping requirements or the collection of information as defined in the Paperwork Reduction Act.

The National Environmental Policy Act

It is the determination of the ACHP that this action is not a major Federal action significantly affecting the environment. Regarding the National Environmental Policy Act

(NEPA) documents for the rule that is being amended, as a whole, please refer to our Notice of Availability of Environmental Assessment and Finding of No Significant Impact at 65 FR 76983 (December 8, 2000). A supplemental Environmental Assessment and Finding of No Significant Impact are not deemed necessary because (1) these amendments do not present substantial changes in the rule that are relevant to environmental concerns; (2) most of the amendments are a direct result of a court order; and (3) there are no significant new circumstances or information relevant to environmental concerns and bearing on the rule or its impacts.

Executive Orders 12866 and 12875

The ACHP is exempt from compliance with Executive Order 12866 pursuant to implementing guidance issued by the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs in a memorandum dated October 12, 1993. The ACHP also is exempt from the documentation requirements of Executive Order 12875 pursuant to implementing guidance issued by the same OMB office in a memorandum dated January 11, 1994.

The Unfunded Mandates Reform Act

The amendments 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 ACHP thus has no obligations under sections 202, 203, 204 and 205 of the Unfunded Mandates Reform Act.

Executive Order 12898

The amendments 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 the Section 106 process 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 ACHP considers environmental justice issues in reviewing analysis of alternatives and mitigation options, particularly when Section 106 compliance is coordinated with NEPA compliance.

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 [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

V. Text of Amendments

List of Subjects in 36 CFR part 800

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

For the reasons stated in the preamble, the Advisory Council on Historic Preservation amends 36 CFR part 800 as set forth below:

PART 800 - PROTECTION OF HISTORIC PROPERTIES

1. The authority citation for part 800 continues to read as follows:

Authority: 16 U.S.C. 470s

2. Amend § 800.4 by revising paragraph (d) to read as follows:

§ 800.4 Identification of historic properties.

* * * * *

(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.

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

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

(iii) During the SHPO/THPO 30 day review period, the Council may object to the finding and provide its opinion regarding the finding to the agency

official and, if the Council determines the issue warrants it, the head of the agency. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The agency shall then proceed according to paragraphs (d)(1)(iv)(B) and (d)(1)(iv)(C) of this section.

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

(B) The person to whom the Council addresses its opinion (the agency official or the head

of the agency) shall take into account the Council's opinion before the agency reaches a final decision on the finding.

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

responsibilities under section 106 are fulfilled.

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

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

3. Amend § 800.5 by revising paragraphs (c)(1), (2) and (3) to read as follows:

§ 800.5 Assessment of adverse effects.

* * * * *

(c) * * *

(1) Agreement with, or no objection to, finding. Unless the Council is reviewing the finding pursuant to paragraph(c)(3) of this section, the agency official

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

(2) Disagreement with finding.

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

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

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

(3) Council review of findings.

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

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

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

(C) The Council shall retain a record of agency responses to Council opinions on their findings of no adverse effects. The Council

shall make this information available to the public.

* * * * *

4. Amend § 800.8 by revising paragraph (c)(3) to read as follows:

§ 800.8 Coordination with the National Environmental Policy Act.

* * * * *

(c) * * *

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

(i) If the Council agrees with the objection:

(A) The Council shall provide the agency official and, if the Council determines the issue warrants it, the head of the agency with the Council's opinion regarding the objection. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this

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

agency official shall continue its compliance with this section.

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

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

* * * * *

5. Amend § 800.14 by revising paragraph (c) to read as follows:

§ 800.14 Federal agency program alternatives.

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(c) Exempted categories.

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

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

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

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

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

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

(4) Consultation with Indian tribes and Native Hawaiian organizations. If the exempted program or category of

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

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

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

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

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

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6. Amend § 800.16 by revising paragraph (y) and adding paragraph (z) to read as follows:

§ 800.16 Definitions.

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

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

Dated: June 30, 2004

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John M. Fowler,

Executive Director.