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United States Army Corps of Engineers, Regulatory Program Concept Paper for Alternate Procedures for the Consideration of Historic Properties

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Section 1.0: Policy

(a) *Purpose.* Section 106 of the National Historic Preservation Act (NHPA) requires Federal agencies to take into account the effects of their undertakings on historic properties and to afford the Advisory Council on Historic Preservation (Council) a reasonable opportunity to comment on such undertakings. The section 106 process strives to balance historic preservation concerns with the needs of Federal undertakings through meaningful consultation between the Army Corps of Engineers (Corps), consulting parties, and the general public. The purpose of these Alternate Procedures is to provide for efficient, consistent, and comprehensive Corps Regulatory compliance with the goals and mandates of section 106, in the context of the Corps Regulatory Program. This Alternate Procedure complies fully with the National Historic Preservation Act (NHPA) and is consistent with the Corps Regulatory Program's mission. This Alternate Procedure clarifies definitions, timelines, processes, and other Regulatory Program requirements, including undertaking, scope of analysis, area of potential effects, and consultation with American Indian and Alaska Native governments, and Native Hawaiian organizations. This Alternate Procedure applies to all Department of the Army permit authorizations pursuant to Section 9 and 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended.

(b) *National Historic Preservation Act.* It is the policy of the Corps Regulatory Program to work effectively with Tribal governments, landowners, resource agencies, historic preservation organizations, stakeholders, applicants, and the public to comply with the NHPA and other applicable laws and regulations, Executive Orders, Presidential Memoranda, and policy guidance documents, and to efficiently process permit applications so that development projects can proceed for the good of the Nation's economic health and national security.

(c) *Relation to other provisions of the NHPA.* Section 106 is related to other provisions of the NHPA designed to further the national policy on historic preservation. References to those related provisions are included in these procedures to identify circumstances where actions may be affected by the independent obligations of those other provisions.

(d) *The Corps Regulatory Program.* Section 404 of the Clean Water Act (CWA) authorizes the Corps to issue permits for the discharge of dredged or fill material into waters of the United States, including certain wetlands. Section 10 of the Rivers and Harbors Appropriations Act of 1899 (RHA) authorizes the Corps to issue permits for the construction or modification of structures in navigable waters, or the accomplishment of

any other work affecting the course, location, condition, or physical capacity of navigable waters. Section 9 of the RHA authorizes the Corps to approve plans for dams or dikes that would span a navigable waterway. Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended, authorizes the Corps to permit the ocean disposal of dredged material. The objective of the Regulatory Program is to provide objective and timely decisions whenever a member of the public, Federal agency, Tribal government, or state or local government submits an application to conduct activities under any of these statutes.

(e) *Corps permitting process.* These procedures are intended to ensure the full consideration of historic properties during the processing and evaluation of standard permit applications (including Letters of Permission), and requests for general permit verifications (including nationwide, regional, and programmatic general permits). In accordance with applicable laws, Executive Orders, and regulations, the Corps will consult with State Historic Preservation Officers (SHPO), Tribal Historic Preservation Officers (THPO), Indian tribes, Native Hawaiian organizations (NHO), other consulting parties, the public, and where applicable, the Council during the permit process and prior to making a decision whether to grant a permit authorization.

(f) *Corps Regulatory authority.* Regulations for processing Department of the Army (DA) permit applications under both authorities are found at 33 CFR 320-331.

(g) *Public Interest.* Under its authorities, the Corps regulates activities affecting waters of the United States on private property, trust lands, or land under the management and jurisdiction of other governmental entities. The RHA and CWA envision that economic development activities would occur; hence, these statutes and their implementing regulations establish a process for the Corps to evaluate project proposals, and authorize those where impacts to aquatic resources are not contrary to the overall public interest, or in the case of general permits, where impacts to aquatic resources are no more than minimal, with mitigation. In addition to the requirements of the NHPA, all historic properties are subject to consideration under NEPA (33 CFR part 325, Appendix B) and the Corps' public interest review requirements contained in 33 CFR 320.4. Therefore, effects to historic properties and other historic resources will also be considered by the District Engineer (DE) when making permit decisions.

(h) *National Historic Landmarks (NHL).* The DE will take into account the effects, if any, of proposed undertakings on historic properties both within and beyond the waters of the United States. Pursuant to section 110(f) of the NHPA and 36 CFR 800.10 (Special Requirements for Protecting National Historic Landmarks), the DE, where the undertaking that is the subject of a permit action may directly and adversely affect any National Historic Landmark, shall, to the maximum extent possible, condition any issued permit as may be necessary to minimize harm to such landmark.

(i) *Undertaking.* The DE determines whether a potential project, activity, or program meets the definition of an undertaking, as provided for in 36 CFR 800.16. If it does not meet the definition of an undertaking, the historic preservation review process is complete and the administrative record should be documented accordingly.

(j) *Scope of analysis.* The DE is responsible for making final determinations regarding the boundaries of the Area of Potential Effects (APE); however, in cases of Standard Individual Permits or for General Permits that involve impacts to significant historic resources, such as NHLs, the DE shall seek the views of the SHPO/THPO or their staff before establishing the APE.

(i) Within the context of the Corps Regulatory Program, the APE is the geographic area within which the proposed undertaking has the potential to affect historic properties. Effects may be direct or indirect. The APE is influenced by the scope, scale and nature of the undertaking and may be different for different kinds of effects. In light of the Corps Regulatory Program's mission requirements, the APE includes jurisdictional waters of the United States and associated upland areas or buffers as determined by the DE. Other areas may be incorporated into the APE if it is determined that sufficient federal control and responsibility exists.

(ii) Generally, the establishment of the APE will follow the scope of analysis as defined in 33 CFR Part 325, Appendix B- NEPA Implementation Procedures for the Regulatory Program.

(k) *Procedural review.* Should, at any time during the permit review process, a dispute arise between the Corps and the SHPO/THPO, the Council, or the applicant concerning the application of these procedures, the DE shall consult with in-house cultural resources/Tribal liaison staff to address the matter. The DE, or any of the consulting parties, may request additional review, through Corps Headquarters as described in Section 13.0 of these procedures. All parties will be kept informed of these proceedings.

(l) *Relationship to the National Environmental Policy Act (NEPA) process.* The NEPA process is not a substitute for the Section 106 process; however, the ACHP's regulations, which implement Section 106, encourage Federal Agencies to coordinate section 106 reviews with NEPA reviews.

(m) *Lead Federal agency.* The Corps is the lead Federal agency for actions that require authorization under Section 404 of the CWA and Section 10 of the RHA where there is no other federal involvement because the Corps permit or verification will be the sole Federal decision. However, if more than one Federal agency has jurisdiction or authority over an undertaking, the DE may choose to support another Federal agency as the lead Federal agency or serve as a cooperating agency, to achieve efficient permit evaluation, minimize redundancy, and provide effective lines of coordination and consultation. Hence, Corps regulatory staff may use lead Federal agency processes, procedures, and work products, including NEPA work, and the results of consultation with tribal governments, when evaluating permit applications and making permit decisions. The DE will, as required by law and regulation, make independent permit

decisions by integrating processes for the benefit of the Regulatory Program and achieving Tribal consultation and historic preservation goals. The DE, as appropriate, may accept documentation for Federal or Federally-assisted projects from a lead Federal agency, to comply with the requirements of the NHPA within the context of the Regulatory Program.

(n) *Consultation with American Indian and Alaska Native Governments (Indian tribes), and Naïve Hawaiian organizations (NHOs).* If an undertaking has the potential to affect historic properties to which Federally-recognized Indian tribal governments and NHOs attach religious and cultural significance, the DE will consult, as appropriate. Public notices alone are insufficient means to initiate and accomplish consultation. An effective consultation process requires active communication with Indian tribes and NHOs, considering their interests during the decision-making process, in recognition of their sovereign status. Most work is usually accomplished at the staff level; however, in cases where policy agreements such as local consultation procedures are being developed, consultation must be carried out at the government-to-government (DE-Tribal government head) level.

(o) *Documentation.* The DE will ensure that a determination, finding, MOA, or PA made under these procedures is supported by documentation to enable interested parties to understand the basis for the action. Such documentation shall be provided to the Council, SHPOs, THPOs, Indian tribes, and NHOs, to the extent permitted by law.

(p) *Use of subject matter experts.* The DE will, as appropriate, consult with qualified agency cultural resources staff, tribal liaisons, and other points of contact, when implementing these procedures. The DE should identify staff in districts, divisions, labs, centers of expertise, and headquarters offices, and use them as needed.

(q) *Use of applicants and consultants.* Upon request, the DE may recommend, with Corps Regulatory oversight, permit applicants or their authorized representatives to coordinate with the SHPO/THPO and other consulting parties. The DE will notify the SHPO/THPO when a permit applicant or group of permit applicants has been authorized to coordinate. In such circumstances, the DE remains responsible for all findings and determinations made pursuant to consultation under section 106 of the NHPA, as well as government-to-government relationships with Indian tribes. The DE may also recommend that an applicant contract with a qualified consultant when carrying out identification efforts necessary to make an effect determination. The DE may provide a list of qualified consultants to the applicant, but may not recommend one consultant in particular.

(r) *Avoidance and minimization.* By regulation and policy, permit applicants must first consider avoidance and minimization of impacts to aquatic resources, including wetlands, before compensating for unavoidable impacts. This same philosophy is applied when considering historic properties. Corps staff will work with applicants and consulting parties to avoid and minimize effects to historic properties first, before authorizing activities requiring mitigation (e.g., data recovery, recording). At any time

during permit processing, the DE may consult with applicants, SHPO/THPOs, Indian tribes and NHOs, and other consulting parties to discuss and consider possible alternatives or measures to avoid or minimize the potential adverse effects of a proposed undertaking on historic properties.

(s) *District Implementation Protocols.* The DE is encouraged to develop District Implementation Protocols with their SHPO/THPOs and/or Tribal officials to streamline implementation of these procedures and provide for expedited reviews and/or additional exempt activities. District Implementation Protocols may be used for the same type of undertakings in more than one case or across district boundaries. When the DE uses a District Implementation Protocol, the DE may develop and execute the agreement without need for Council participation in consultation or Council's signature.

(t) *Permit withdrawal.* The DE has the authority to withdraw a permit application if an applicant fails to provide information necessary to complete the 106 process.

(u) *Permit denial.* The DE may deny any permit action when it is determined, through the evaluation process, that impacts to National Register eligible or listed historic properties including traditional cultural properties cannot be avoided, minimized, or adequately mitigated.

(v) *Permit modification or revocation.* The DE has the authority to modify or revoke an existing permit should historic properties addressed in a permit condition, PA, or MOA, be affected after-the-fact. Failure to mitigate adverse effects may result in fines.

2.0: *Methods for Complying with the NHPA.*

(a) *Standard Individual Permits.* Each Corps district complying with section 106 of the NHPA will, in general, utilize the existing Council regulations, found at 36 CFR 800, for all undertakings that are required to be processed as Individual Standard Permits except where noted in these Alternate Procedures.

(b) *General Permits.* Each Corps district complying with section 106 of the NHPA, will apply these Alternate Procedures when processing requests for General Permits (including nationwide, regional and programmatic general permits).

(c) *Letters of Permission.* Each Corps district complying with section 106 of the NHPA, will apply these Alternate Procedures when processing requests for Letters of Permission.

(d) *District-specific procedures.* Unless otherwise indicated, and with the exception of Standard Individual Permit actions which are required to adhere to the procedures set forth in 36 CFR 800, each district is encouraged to consult with the SHPO/THPO, Indian tribes, and NHOs to develop regional operating procedures, to streamline the section 106 process and to more efficiently process requests for General Permit verifications and Letters of Permission. District-specific programs are intended to afford effective

protection to historic properties while providing permit applicants with objective and timely decisions. No district-specific program or procedure may supersede or nullify the procedures found at 36 CFR 800 or these Alternate Procedures.

2.1: Authority.

These procedures are promulgated pursuant to section 110(a)(2)(E) of the NHPA (16 U.S.C 470h-2) which directs Federal agencies to develop procedures for implementing section 106 of the NHPA, and 36 CFR 800.14(a) which authorizes Federal agencies, in consultation with the Council, to develop alternate procedures to implement the section 106 process, that, after Council concurrence, substitute, or in the case of these procedures, supplement, the regulations set forth in 36 CFR 800. The Council retains final authority to determine whether the Corps alternate procedures, in the context of the Corps Regulatory Program, are consistent with 36 CFR 800.

2.2: Scope of these Alternate Procedures.

These procedures, in combination with the Council's implementing regulations found at 36 CFR 800, apply to all requests for Department of the Army Permits. These procedures does not apply to the Corps of Engineers Civil Works water resources programs, projects, or activities except for the Regulatory Program.

2.3: Definitions.

In addition to the definitions found at 36 CFR 800.16, (a)-(z), the following definitions are included for clarification in consonance with the regulations with the Corps Regulatory Program mission:

(a) *Certified local government* means a local government certified in accordance with section 101(c)(1) of the NHPA.

(b) *District Engineer (DE)* means the Federal agency official for the purposes of implementing section 106, in the context of the Corps Regulatory Program, or the DE's designee.

(c) *Federal trust responsibility* means the unique legal relationship between the Federal government and Federally recognized tribes arising from the Constitution, treaties, statutes, Supreme Court cases, and Executive Orders in which an Indian tribe ceded land to the United States government in exchange for protection of reservation lands, trust resources, off-reservation treaty rights, properties of traditional religious and/or cultural importance to Indian tribes (e.g. sacred sites and properties of religious and cultural importance) when such lands and properties may be affected by a permit authorized by a Department of the Army.

(d) *Keeper of the National Register (Keeper)* means the Department of the Interior official who manages listings in the National Register of Historic Places and who resolves disputes on a property's eligibility.

(e) *Office of the Assistant Secretary of the Army for Civil Works (OASA (CW))* means the Federal preservation officer, or Principal Deputy to the Assistant Secretary of the Army for Civil Works.

(f) *Programmatic Agreement* means, for the purposes of the Regulatory Program's implementation of section 106, a document that records the terms and conditions agreed upon to resolve the potential adverse effects of a complex permit action, including a Regional General Permit or a Nationwide Permit, if necessary, or complex permitting situations.

(g) *Special Condition* means an enforceable stipulation included in a DA permit that can be incorporated into a permit authorization to resolve effects that may occur as a result of an authorized undertaking.

(h) *Tribal Consultation*, in this context, means a process established and agreed upon by Corps Regulatory offices and an Indian tribe or tribes, or Native Hawaiian organization, through their respective governmental structures for the purposes of compliance with section 106.

2.4: *Participants.*

(a) *United States Army Corps of Engineers (Corps).*

(1) The Corps Agency Official with jurisdiction over an undertaking assumes legal responsibility for section 106 compliance either through implementing 36 CFR 800 when processing Standard Individual Permits, or through the application of these Alternate Procedures when processing requests for verification under a General Permit authorization. For the purposes of the Corps Regulatory Program, the Agency Official with authority to grant a permit authorization is the District Engineer (DE) or an official representative designated by the DE. The DE shall ensure that professional standards, in accordance with the Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation are met in the conduct of identification, evaluation, assessment of effects, and treatment of historic properties.

(i) The Deputy Assistant to the Secretary of the Army for Civil Works (ASA (CW)) is the Federal Preservation Officer (FPO) responsible for policy, program direction, and oversight of the Corps responsibilities under the NHPA.

(b) *Advisory Council on Historic Preservation (Council).*

(1) The Council issues regulations to implement section 106 of the NHPA; provides guidance and advice on the application of its regulations, 36 CFR 800; oversees the operation of the section 106 process; enters into agreements with Federally recognized Indian tribes under section 101(d)(5) of the NHPA; and approves Federal agency procedures for substitution and/or supplementation of the Council's regulations.

Consulting parties, and the public, may at any time seek advice, guidance, and assistance from the Council on the application of these procedures.

(2) In the context of the Corps Regulatory Program, the Council may elect to become a consulting party if so requested. The Council may also review specific permit actions for compliance with these procedures and, may, in certain circumstances be asked to provide advice in support of dispute resolutions regarding effects to historic properties, the establishment of the APE, and other section 106 matters.

(c) *State Historic Preservation Officer (SHPO)*.

(1) The SHPO administers the national preservation program at the State level and is responsible for conducting comprehensive statewide surveys of historic properties and for maintaining inventories of these properties. Under section 101(b)(3)(E) of the NHPA, SHPOs are directly responsible for advising and assisting Federal agencies, such as the Corps, in carrying out their historic preservation responsibilities. SHPOs may request historic properties investigations when there is a reasonable likelihood for a proposed activity to affect a historic property, with adequate justification. SHPOs may request that a Corps permit applicant conduct a historic properties survey on privately owned property with adequate justification that clearly identifies the need for further cultural resources investigations.

(2) The SHPO possesses expertise regarding historic properties within the State. The SHPO may provide assistance to the DE or Corps Regulatory field staff in the identification and effect assessment of historic properties.

(3) When participating as a consulting party, the SHPO shall be invited to sign any MOA or PA developed to mitigate for an adverse effect.

(d) *Federally recognized Indian tribes and Native Hawaiian organizations (NHO)*.

(1) Section 101(d)(6)(B) of the NHPA requires the Corps to consult with any Federally recognized Indian tribe and NHO that attaches traditional and cultural importance to historic properties that may be affected by a proposed undertaking. For Federally recognized Indian tribes, this consultation may take place for historic properties located both on and off Tribal lands.

(2) If a proposed undertaking may affect historic properties to which Indian tribes or NHOs attach religious and cultural significance, the DE will consult with the Indian tribe(s) or NHO(s) in an appropriate manner. The Public Notice distributed in accordance with the procedures set forth in 33 CFR 325.3 is not an appropriate means to notify an Indian tribe or NHO of a permit action, nor to initiate consultation, unless otherwise specified and agreed upon by an Indian tribe or NHO.

(3) When an Indian tribe has assumed the functions of the SHPO on Tribal lands, the THPO is the official representative for the purposes of section 106. If an Indian tribe has not assumed the responsibilities of the SHPO on Tribal lands, the DE will consult with a representative designated by the Indian tribe or NHO, in addition to consulting with the SHPO.

(4) Relationships should be established and maintained directly between the DE and the head of a Tribal government, as well as between Regulatory and Tribal staff members. The DE and staff are encouraged to meet face-to-face with the heads of Tribal governments and staff as a part of the consultation process. The DE and/or the head of a Tribal Government or THPO will typically designate technical staff to attend consultation meetings, track issues, and suggest potential solutions or outcomes.

(5) The DE initiates government-to-government relations with Federally-recognized Indian tribes by means of formal written communication to the heads of Tribal governments when consultative deliberations result in formal policy decisions or statements. Due to a Tribe's sovereign status, these documents may be signed only by the DE (or the Deputy DE) and the head of the Tribal government. A Tribal head or a DE may request government-to-government consultation over and above staff-level consultation when either expresses the need for a face-to-face meeting to resolve an issue related to a permit decision. Any final decision that has been the subject of government-to-government consultation will be formally transmitted from the DE to the head of the Tribal government, and vice versa. Once consultation is complete, the DE remains the final decision authority.

(6) When participating as consulting parties, Federally-recognized Indian tribes and NHOs shall be invited to sign any MOA or PA developed to mitigate against an adverse effect.

(7) Further guidance for consultation with American Indians and Alaska Natives (Federally recognized Tribes) may be found in the Corps' 1998 Policy Guidance Letter 57 and the 1998 Department of Defense American Indian and Alaska Native Policy.

(e) *Tribal Historic Preservation Officer (THPO)*.

(1) Where the Secretary of the Interior has authorized a Federally recognized Indian tribe to carry out some or all of the SHPO responsibilities on Tribal land pursuant to section 101(d)(2) of the NHPA, the THPO acts as a consulting party in the same manner as a SHPO would. The THPO acts as a consulting party when:

(i) A proposed undertaking would occur on or affect historic properties on Tribal lands; or,

(ii) A proposed undertaking may affect a historic property of traditional religious and cultural importance to the Tribe both on and off Tribal lands, and the THPO is the Tribes' designated representative for consultation.

(2) When participating as a consulting party, the THPO shall be invited to sign any MOA or PA developed to mitigate against an adverse effect.

(f) *The Applicant for a DA Permit (Applicant)*.

(1) Applicants for DA permits are active participants in the consultation process and shall be afforded an opportunity to respond to issues raised regarding potential impacts to historic properties located on privately owned lands. To the extent allowable by law, applicants shall be advised if historic properties are known to exist on the property being considered for a permit authorization, or if it is believed that historic properties are likely to be present on said property and/or would be affected by the proposed undertaking.

(2) Applicants are generally financially responsible for causing to conduct any historic properties investigations on the property under consideration for a permit that may be deemed necessary in order to determine potential effects. Applicants are required to hire qualified cultural resource management specialists, as specified by the Secretary of the Interior's Standards and Guidelines, to conduct any historic properties investigations that may be necessary in order to assess effects. Such investigations should be coordinated with the Corps prior to being conducted. The results of any investigations conducted as a result of a contract survey will be coordinated and approved by the DE prior to permit authorization, unless otherwise specified in a permit authorization.

(3) The applicant shall be included as a signatory on any MOA or PA developed to mitigate for an adverse effect.

(g) *The public.*

(1) The DE shall seek and consider the views of the public regarding historic properties that may be affected as a result of a permitted undertaking.

(2) As a general rule, project-specific verifications for nationwide, regional, and programmatic general permits are not required to be coordinated via Public Notice, and the DE is not responsible for consulting with the general public. However, when significant impacts to historic properties are encountered, public input may be necessary in order to make a fully-informed permit decision. In such cases, the DE is encouraged to seek the views of the public.

(3) The Nationwide Permit Program is subject to re-issuance at a minimum of every five years. Re-issuance of the Nationwide Permit Program is subject to public review and comment.

3.0: *Permit Evaluation.*

3.1: *Pre-application Meetings.*

This section applies to all types of DA Permits.

(a) *Early consideration of historic properties.* If during a pre-application meeting, for any type of DA permit, the DE believes that a historic property may be affected by a proposed undertaking, the prospective applicant will be informed that prior to authorizing said activity, the Corps must comply with the NHPA. The DE also will inform prospective permit applicants that the Corps will consider any effects on historic properties in accordance with these Alternate Procedures or 36 CFR 800, when evaluating a proposed undertaking.

(b) *Early engagement by applicants with Corps Regulatory.* As a general rule, prospective applicants are encouraged to engage early and often with the Corps, during the planning phase of a proposed undertaking; however, pre-application meetings with the Corps is not required to obtain a permit. During pre-application meetings with prospective permit applicants the DE will encourage the consideration of possible effects to historic properties at the earliest practical time in their planning process. Such pre-application meetings should, if appropriate, involve consideration of alternatives that avoid and minimize the undertaking's adverse effects on historic properties.

(c) *NEPA process.* During the pre-application phase, the Corps may decide to use the integrated approach to conducting its Section 106 process, at which time it would provide advance notification to the SHPO/THPO and the Council.

3.2: Programmatic Review

(a) *Establish undertaking.* Upon receipt of a permit application for

Standard Individual Permit or a General Permit (including pre-construction notifications for Nationwide Permits) verification request, the Corps will determine whether a proposed action is an undertaking, as defined in 36 CFR 800.16 and as further clarified in part 1.0(j) of these procedures.

(b) *Determine process.* If it is determined that a proposed activity meets the definition of an undertaking, the Corps will establish a process by which the undertaking will be evaluated for permitting. If it is further determined that a proposed undertaking must be processed as a Standard Individual Permit (IP) as specified in 33 CFR 325, the Corps must follow the procedures set forth in 36 CFR 800 in order to fulfill its section 106 responsibilities. If it is determined that a proposed undertaking qualifies for procedural review and verification under a General Permit (including nationwide, regional or programmatic general permits), or authorization under a Letter of Permission, the procedures outlined below apply.

(c) *Establish APE.* The DE will define the APE within which historic properties will be considered. The DE shall seek the views of the SHPO/THPOs or their staff before establishing the APE for projects that involve impacts to unique resources, such as NHLs. If a dispute regarding the APE arises between the DE and the SHPO/THPO or Indian tribe, the DE will request additional Corps Headquarters and Council review as provided for in section 13.0 of these procedures.

(d) *Initial effect determination.* If it is determined that an activity qualifies for processing as a General Permit, the DE must establish whether it is a type of undertaking that has the potential to cause effects on historic properties.

(1) *Determination of “no potential to cause effects.”* In certain instances, the nature, scope, location, and magnitude of the work and/or structures to be permitted may be such that it is reasonable to presume that there is no potential that a historic property exists or may be affected. Three such situations are:

(i) Undertakings in areas that have been extensively modified by previous work. In such areas, historic properties that may have at one time existed within the APE may be presumed to have been lost unless specific information indicates the presence of such a property. An example would be maintenance dredging of a previously constructed canal.

(ii) Undertakings in areas which have been created in modern times. Some recently created areas, such as dredged material disposal islands, have had no human habitation. In such cases, it may be presumed that there is no potential for the existence of historic properties unless specific information indicates the presence of such properties.

(iii) Certain types of work or structures that are of such limited nature and scope that there is little likelihood of impinging upon a historic property even if such properties were to be present within the APE. An example would be placement of a buoy or other aid to navigation.

(2) In addition, certain categories of activities have been identified as having minimal and not adverse effects on historic properties based on the nature and overall scope of the activity. These types of activities are provided in Appendix A and reflect suggested exemptions from additional 106 consideration. While these activities are generally not expected to result in adverse effects on historic properties, districts are encouraged to

initially coordinate with the SHPO/THPO, Indian tribes and NHOs to identify areas within their district's boundaries that are likely to yield historic properties. Activities proposed in these areas would not be exempt from section 106 review, even if such activities are exempt in other areas.

(3) Following review and documentation, a determination of "no potential to cause effects" the Corps has no further obligations under section 106 or these procedures, except in the case of an inadvertent discovery.

(e) *If a "no potential to cause effects" determination cannot be made for a General Permit.* The DE will coordinate/consult any other effects determinations in accordance with the remaining parts of these procedures. Other effect determinations include no adverse effect and adverse effect.

(f) *Determine if project needs further review.* Districts may develop a local agreement with the SHPO/THPO, Indian tribe(s), and NHOs which identifies coordination procedures, and may include a list of certain categories of activities which have little to no risk of impacting historic properties and do not need further review.

(g) *Identify historic properties within the APE.* The DE shall identify historic properties within the APE, in consultation with the SHPO/THPO, Indian tribes, and NHOs. The DE may obtain information from the SHPO/THPO, Indian tribes, NHOs, and other appropriate sources, such as district files and records, the latest published version of the National Register, and other lists of properties determined eligible, to determine if there are any historic properties that may be affected by the proposed undertaking. A historic evaluation investigation (see section 3.3, Investigations) of the APE may be necessary if adequate information is not available.

3.3: *Investigations.*

This section may apply to all types of DA permits.

(a) *Identification efforts.* The DE shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include, but are not limited to, background research, consultation, oral history interviews, sample field investigations, and field surveys, to identify historic properties within the APE that may be affected as a result of a proposed undertaking. The DE will take into account past planning, research and studies, the magnitude 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 APE. The DE will also take into account any confidentiality concerns raised by Indian tribes or NHOs during the identification process.

(b) *Need for investigations.* When initial review, additional submissions by the applicant, SHPO/THPO, tribal comments, or responses to the public notice indicate the known existence or reasonable potential existence of historic properties, including properties to which Indian tribes attach religious and cultural significance, that may be

eligible for inclusion in the National Register, within the APE, the DE shall examine the pertinent evidence to determine the need for further investigations. Comments or information of a general nature will not be considered as sufficient evidence to warrant an investigation. The evidence must set forth specific reasons for the need to further investigate within the APE and may consist of:

(1) *Properties of traditional religious and cultural importance.* Information concerning known historic properties, including properties of traditional religious and cultural importance, that may be eligible for inclusion in the National Register; and

(2) *Information concerning known sensitive areas.* Information concerning areas that are likely to yield properties eligible for inclusion in the National Register, particularly where such sensitive area determinations are based upon data collected from other, similar areas within the general vicinity.

(3) Orally transmitted information concerning the presence of historic properties, including information regarding properties of traditional religious and cultural importance is also acceptable.

(c) *Investigations in the APE.* If the DE's review indicates that there are historic properties in the APE, or that the likelihood exists for historic properties to be located within the APE, the DE should conduct, or cause to be conducted, an investigation. The investigation shall be conducted in accordance with the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation, under the supervision of an individual who meets the professional qualification standards set forth in those standards and guidelines. Adherence to the SHPOs/THPOs guidelines for identification is recommended to expedite the review process. The DE can require the applicant to furnish information necessary to determine whether the property meets the eligibility criteria.

(d) *Additional investigations.* In addition to any investigations conducted in accordance with paragraphs (b) and (c), the DE may conduct or cause to be conducted additional investigations which the DE determines are essential to reach the public interest decision. The Corps will notify the SHPO/THPO or Tribal official if any evidence is found which indicates the presence of properties that may be eligible for inclusion in the National Register.

(e) *Types of investigation.* As determined by the DE, investigations may consist of any of the following: further consultations with the SHPO/THPO, the State Archeologist, local governments, Indian tribes, NHOs, local historical and archeological societies, university archeologists, and others with knowledge and expertise in the identification of historical, archeological, cultural and scientific resources; field examinations; and archeological testing. In most cases, the DE will require, in accordance with 33 CFR 325.1(e), that the investigation be conducted by a third party contract at the applicant's expense.

(f) *Identification responsibilities.* The Corps' responsibility to identify properties, in consultation with the SHPO/THPO and/or Tribal official, that may be eligible for inclusion in the National Register, and to make eligibility determinations for properties

that may be eligible for inclusion in the National Register, is limited to resources located within the APE.

(g) *Phased identification efforts.* Where an undertaking under consideration consists of a corridor or large land area, or where access to properties is restricted, the DE may use a phased process to conduct investigations within the APE. The DE may also defer final identification and evaluation of historic properties if it is specifically provided for in an MOA, a PA, or the final decision document for a permit action. Once effects are identified, the DE may also choose to condition the permit for phased compliance, in consultation with the SHPO/THPO. This process should establish the likely presence of historic properties within the APE for each land area or inaccessible area through background research, consultation, and an appropriate level of field investigation, taking into account the magnitude of the undertaking and its likely effects, the APE, and the views of the SHPO/THPO and any other consulting parties. As specific aspects or locations of an undertaking are refined or access is gained, the DE will proceed with the identification and evaluation of historic properties within the appropriate area(s) of potential effects.

(1) For nationwide permits that are not exempt from further review (see Appendix A), final verification of the nationwide cannot be made until the section 106 process is complete. If investigations of the APE are necessary in order to determine if a proposed undertaking will affect historic properties, the nationwide permit verification must be suspended until such determination is made and adequately coordinated and documented.

(2) Special conditions may be added to a nationwide permit verification, or regional or programmatic general permit in order to mitigate an adverse effect.

(h) *Coordination of Investigations.* Investigations should be conducted at the direction of the Corps and should be fully coordinated to ensure the scope and level of effort is appropriate. Any results of investigations should also be coordinated with the Corps.

4.0: *Eligibility Determinations and National Register Criteria.*

This section should be used when evaluating Letters of Permission, and nationwide, regional and programmatic general permits. For Individual Standard Permits, the procedures found at 36 CFR 800 will be followed in order to fulfill section 106 responsibilities.

(a) *Apply National Register criteria.* When determining whether a property may be eligible for inclusion in the National Register the DE will consult with the SHPO/THPO and any Indian tribe or NHO that attaches religious and cultural significance to the property in question. The DE will apply the National Register criteria found at 36 CFR 60.4 to make eligibility determinations. The DE will provide the SHPO/THPO and Indian tribes or NHOs 30 days from the date of initial receipt to respond to eligibility determinations.

(b) *Determine whether a property is eligible.* If the DE determines any National Register criteria are met, and the SHPO/THPO agree within the 30 day review period, the

property shall be considered eligible for the National Register for section 106 purposes. If the DE determines the criteria are not met and the SHPO/THPO agrees within the 30 day review period, the property shall be considered not eligible and the section 106 process is considered to be complete. If the DE and the SHPO/THPO do not agree within the timeframe described above, or if the Council so requests, the DE shall obtain a determination of eligibility from the Secretary of the Interior pursuant to 36 CFR part 63. If an Indian tribe or NHO that attaches religious and cultural significance to a property off tribal lands does not agree, then the Indian tribe or NHO may ask the Council to request the DE to obtain an eligibility determination from the Secretary of the Interior.

5.0: *Assessing Effects*

This section should be used when evaluating Letters of Permission, and nationwide, regional and programmatic general permits. For Individual Standard Permits, the procedures found at 36 CFR 800 will be followed in order to fulfill section 106 responsibilities.

(a) *Apply criteria of effect.* The DE is responsible for evaluating the effects the undertaking will have on historic properties included in, or determined eligible for inclusion in, the National Register, after soliciting views from consulting parties, including the SHPO/THPO and Tribal official. Effects may be direct or indirect.

(b) *No historic properties affected.* If the DE finds that there are no historic properties present, or there are historic properties present but it is determined that the undertaking will have no effect on those historic properties, the DE will provide documentation of this finding to the SHPO/THPO, as well as any other consulting parties.

(1) *No objection to DE's finding.* If the SHPO/THPO, Indian tribe, NHO, or the Council, only if the Council has entered into the section 106 process, does not object to the finding within 15 days from the date of notification, or does not respond, the consultation process ends and the DE may proceed with the permit decision.

(2) *Objection to DE's finding.* If the SHPO/THPO, Indian tribe, or NHO objects with the DE's adequately documented No Historic Properties Affected ("no effect") determination within the 15-day review period, the DE may further consult with the SHPO/THPO, Indian tribe, or NHO to resolve the disagreement at the local level, or request an opinion from the Council.

(i) If warranted, the Council may decide to provide its written opinion to the head of the agency.

(ii) Upon receipt of a request for an opinion, the Council has 15 days to provide the DE or the head of the agency with their opinion. If no response is received within 15 days, the section 106 process is considered to be complete.

(3) The person to whom the Council addresses its opinion shall take into account the Council's opinion prior to arriving at a final permit decision.

(i) The person to whom the Council addressed its opinion shall prepare a summary of the decision that contains the rationale and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties.

(ii) The head of the agency may delegate duties specified under this paragraph to the **senior policy official (FPO)**. If the DE's initial finding will be revised, the DE shall proceed in accordance with the revised finding.

(iii) If the DE's decision is to affirm the initial finding of no historic properties affected, once the summary of the decision has been transmitted to the Council, the SHPO/THPO, and consulting parties, the section 106 process is considered to be complete.

(c) *No adverse effect.*

(1) *No adverse effect determination through data recovery.* This determination applies when the historic property is of value only for its potential contribution to archeological, historical, or architectural research, and when such value can be substantially preserved through the conduct of appropriate research, and such research is conducted in accordance with applicable professional standards and guidelines; or when the undertaking is limited to the rehabilitation of buildings and structures and is conducted in a manner that preserves the historical and architectural value of affected historic properties through conformance with the Secretary of the Interior's Standards for the Treatment of Historic Properties (36 CFR part 68) and other applicable guidelines, to avoid adverse effects.

(2) *DE determination of no adverse effect.* If the DE, based on coordination with the SHPO/THPO and other consulting parties, determines that an effect is not adverse, the DE will provide documentation of this finding to the SHPO/THPO, as well as other consulting parties. The SHPO/THPO and consulting parties will have 15 days to respond to a notice of determination.

(i) *No objection to DE's finding:* Unless the Council is reviewing the "no adverse effect" determination pursuant to paragraph (c)(3) of this section, the DE may proceed after the close of the 15-day review period if the SHPO/THPO has agreed with the determination of no adverse effect or has not provided a response, and no consulting party has objected.

(ii) *Disagreement:*

(a) If the SHPO/THPO or any consulting party notifies the DE in writing within the 15-day review period objecting to the determination and specifies the reasons for the disagreement in the notification, the DE will either consult with the party to resolve the disagreement, or request an opinion from the Council pursuant to paragraph (c)(3) of this section.

(b) If an Indian tribe or NHO that has made known to the DE that it attaches religious and cultural significance to a historic property subject to the finding disagrees with the finding, it may, within the 15-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)(3) of this section.

(c) If there are disagreements with the district engineer's "no adverse effect" findings, the DE may either continue consultation to resolve the disagreement at the local level, or request an opinion from the Council.

(3) *Council Review of Findings.* If the DE requests an opinion from the Council the finding and supporting documentation will be forwarded to the Council and the DE will request that the Council review the finding pursuant to paragraphs (i) and (ii), below.

The DE will notify the other consulting parties and make the documentation available to the public to the extent allowable by law.

(i) The Council has up to 15 days from the date of notification to review the determination and provide either the DE or, if warranted, the head of the agency with its opinion regarding the finding. If the Council does not respond within the 15-day review period, the DE may consider the section 106 process complete.

(ii) The DE or, if the head of the agency has been involved in the process, will take into account the Council's opinion before reaching a final decision on the permit. The DE must document the rationale and evidence of consideration of the Council's opinion in the administrative record for the permit action. If the Council provides its opinion to the head of the agency, the Headquarters Regulatory and the district will assist the head of the agency in preparing the required documentation for the final decision. The Headquarters Regulatory will endeavor to provide guidance, if necessary, to the DE within 15 days receipt of the Council's opinion. If the DE's initial finding will be revised, the DE will proceed in accordance with the revised finding. If the DE's (or the head of the agency's) final decision is to affirm initial finding of "no historic properties affected" or "no adverse effect", once the summary decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the Corps responsibilities under section 106 are fulfilled.

(d) *Adverse Effect.*

(1) *DE consultation to determine adverse effect.* In consultation with the SHPO/THPO, any Indian tribe or NHO that attaches religious and cultural significance to identified historic properties, the DE shall apply the criteria of adverse effect to historic properties within the APE. The DE shall consider any views concerning such effects which have been provided by consulting parties and the public. If an adverse effect is found, the DE will consult further to resolve the adverse effect pursuant to Section 10(b), Resolution of Adverse Effects.

(2) *Criteria of adverse effect.* An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register.

(3) *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 of the Interior'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; and

(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.

(e) *Special conditions.* If special conditions must be placed on the permit in order to reach a "no adverse effect" determination, provided that the SHPO/THPO and other consulting parties agree that to condition the permit would result in a "no adverse effect", the special condition must be enforceable, directly related to the section 106 work to be undertaken, and justified in the administrative record for the permit action.

5.1: *DE Decision*

(a) *Decision criteria and mitigation.* At any time during permit processing, preferably, at the earliest stages, the DE may coordinate with the consulting parties to discuss and consider possible alternatives or measures to avoid or minimize the adverse effects of a proposed undertaking on historic properties. The DE will add permit conditions to a nationwide permit verification or to a regional or programmatic general permit to avoid or minimize effects on historic properties which he determines are necessary in accordance with 33 CFR 325.4. In reaching a determination, the DE will consider the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation.

(b) *Resolution of adverse effects.*

(1) *DE agreement on resolution of Adverse Effects.* If the consultation results in a mutual agreement between DE and the SHPO/THPO, permit applicant, other consulting parties, and the Council (if the Council is a consulting party) regarding the resolution of adverse effects to historic properties, then the DE may formalize that agreement through either an MOA, PA, or permit conditions determined to be necessary in accordance with 33 CFR 325.4. If an MOA will be used to resolve adverse effects, the MOA will be signed by the DE, the SHPO/THPO, the Council (if the Council was involved in the resolution of adverse effects), the permit applicant, and invited signatories, such as Indian tribes and NHOs. The signatures of tribal representatives are required when MOAs address activities on tribal lands. If a special condition is used to resolve adverse effects, it must be reviewed and agreed upon by the SHPO/THPO and the Council (if the Council is a consulting party).

(3) *DE disagreement on resolution of Adverse Effects.* If the DE and SHPO/THPO cannot agree upon the terms of an MOA or special condition, the DE will request the participation of the Council in the consultation. The Council shall respond to this request within 15 days, but may request a time extension from the DE. When a copy of an MOA or special condition is sent to the Council, the DE will include the documentation listed in section 11.0 of these procedures.

(4) *DE use of MOA as a permit condition.* The terms of an MOA must be incorporated as permit conditions, to ensure compliance with the NHPA. A copy of the MOA will be sent to each consulting party. If the DE intends to use conditions in the

permit to address the treatment of historic properties instead of executing an MOA or a PA, the DE should notify the SHPO/THPO and the Council (if the Council is a consulting party) and provide them with a copy of the proposed condition prior to finalizing the permit decision.

(c) Failure to Resolve Effects

(1) *Termination of Consultation.* After consulting to resolve adverse effects, the DE, the SHPO/THPO, or the Council may determine that further consultation will not be productive and may choose to terminate consultation. Any party that terminates consultation will notify the other consulting parties, and provide, in writing, the reasons for terminating consultation.

(i) *DE termination.* If the DE terminates consultation, the ASA (CW) will request the Council's comments, and notify the consulting parties of that request. The Council will provide comments on the undertaking as described in paragraph (f) of this section. Upon receipt of the Council's comments, the ASA (CW) will take into account those comments when making a decision on the undertaking's effects on historic properties. Documentation for this decision will be made in writing by the ASA (CW), and will include the rationale for the decision and evidence that the Council's comments were considered. The documentation will be provided to the Council before a final decision on the undertaking is made. The documentation will be made part of the administrative record for the nationwide pre-construction notification, or regional or programmatic general permit verification request.

(ii) *SHPO termination.* If a SHPO terminates consultation, the DE and the Council may execute an MOA, PA, or agree to use permit conditions to resolve adverse effects without the SHPO's involvement.

(iii) *THPO termination.* If a THPO terminates consultation regarding an undertaking occurring on, or affecting, historic properties on its tribal lands, the DE should request the Council to comment on the undertaking as described in paragraph (f) of this section.

(iv) *Council termination.* If the Council terminates consultation, the Council will notify the DE, the Corps of Engineer's Federal Preservation Officer (FPO), and all consulting parties of the termination. The Council will provide comments on the undertaking in accordance with paragraph (f) of this section. The Council may consult with the Corps of Engineer's FPO before terminating consultation to resolve issues concerning the undertaking and its effects on historic properties.

(v) *Termination by applicant.* If the DE, SHPO/THPO and the Council agree on a process to resolve adverse effects, but the applicant does not, the DE has the option of denying the permit.

(d) *Comments without termination.* The Council may determine that it is appropriate to provide additional advisory comments upon an undertaking for which a MOA or PA will be executed, or if a special permit condition will be utilized to resolve adverse effects.

(e) *Comments with termination.* If consultation is terminated by any of the above parties, the Council will provide opportunities for the DE and all consulting parties to

submit comments concerning the undertaking to the Council. If requested by the Council, the DE will provide additional information, arrange an on-site inspection, and provide additional opportunity for public participation.

(1) *Council comments.* The Council will provide its comments to the ASA (CW) within 30 days of receipt of the request for the Council's comments. Copies of the Council comments will be provided to the DE, the applicant, the Corps of Engineer's FPO, and all consulting parties. If the Council does not provide its comments to the ASA (CW) within 30 days of receipt of the request for review, the DE may proceed with processing the permit application.

(2) *ASA (CW) review of Council comments.* The ASA (CW) shall take into account the Council's comments in reaching a final decision on the undertaking. Section 110(I) of the NHPA directs that the Federal Preservation Officers shall document this decision and may not delegate his or her responsibilities pursuant to section 106. Documentation of the Federal Preservation Officer's decision shall include:

(i) 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) A copy of the summary to all consulting parties; and

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

6.0: *Compliance and Enforcement.*

This section applies to all types of Department of the Army Permits.

(a) *Impacts to Historic properties.* Routine compliance and enforcement reviews under 33 CFR 326.4(a) will ensure conditions for historic properties have been met, and that no impacts to historic properties or tribal resources have occurred as a result of the permit action.

(1) *Violation of permit condition for historic properties.* The applicant, SHPO or THPO should be contacted under 33 CFR 326.3(c) when violation of a permit condition has occurred or a previously unidentified historic property has been impacted.

(2) *Resolution of violation.* If the DE determines that corrective measures are available, in consultation with the SHPO or THPO, the DE shall proceed with the remaining sections of these procedures to address the effected historic property.

6.1 *Historic Properties Discovered During Construction.*

This section applies to all types of Department of the Army Permits.

(a) *Discovery of previously unknown historic properties.* If, after a permit has been issued, the DE finds or is notified that the APE contains a previously unknown property that may be eligible for inclusion in the National Register which is reasonably expected to be affected by the undertaking, the DE will immediately notify the SHPO/THPO and any Indian tribe or NHO that attaches religious and cultural significance to the property. The DE will first seek the permittee's voluntary avoidance of construction activities that could affect the property. If the permittee fails to avoid the

property, the DE will determine if it is necessary to revoke or suspend the permit to protect the property until the section 106 consultation process is complete. Based on the circumstances of the discovery, equity to all parties, and considerations of the public interest, the DE may modify, suspend or revoke the permit in accordance with 33 CFR 325.7.

(b) *Resolution of adverse effects.* If the DE, the SHPO/THPO, permit applicant, and any Indian tribe or NHO that attaches religious and cultural significance to the property are unable to reach an agreement pursuant to paragraph [11], the DE will determine what actions may be taken to resolve adverse effects. The DE may modify, suspend or revoke the permit in accordance with 33 CFR 325.7 (or 33 CFR 330.4(e) and 330.5(d) for activities authorized by nationwide permits), after considering the circumstances of the discovery, equity to all parties, and the public interest. In addition, the DE will notify the SHPO/THPO, any Indian tribe or NHO that attaches religious and cultural significance to the affected property, and the Council within 48 hours of discovery, or at the soonest possible time. The notification will include the DE's assessment of the National Register eligibility of the property and proposed actions to resolve adverse effects. The SHPO/THPO, Indian tribe or Native Hawaiian organization, and the Council shall respond within 48 hours of the notification. The DE will take into account their recommendations, and then carry out the appropriate actions. The DE will provide the SHPO/THPO, Indian tribe or Native Hawaiian organization, and the Council a report of the actions taken when they are completed.

(c) *Use of memorandum of agreement, programmatic agreement, or special permit conditions.* If the DE determines that historic properties are likely to be discovered within the APE during construction, the MOA, PA, or permit conditions should include a process to resolve any adverse effects to such properties. This process may include monitoring during construction and appropriate reporting and treatment of historic properties if they are encountered. Actions taken in accordance with the process in the MOA, PA, or permit conditions will satisfy the DE's responsibilities under section 106 of the NHPA and these procedures.

7.0: *Emergency Procedures.*

This section applies to all types of Department of the Army Permits.

(a) *Definition of emergency.* Division engineers are authorized to approve special processing procedures in emergency situations. An "emergency" is a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process an application under standard procedures.

(1) When an emergency undertaking is essential and requires immediate response, or for a disaster or emergency declared by the President, a tribal government, or the Governor of a State, or if there is an imminent threat to life, property, human health, or human safety, the DE will explain the circumstances and recommend special procedures

to the division engineer who will instruct the DE as to further processing of the application.

(b) *Notification.* Even in an emergency situation, reasonable efforts will be made to receive comments from interested Federal state, and local agencies and the affected public. Also, notice of any special procedures authorized and their rationale is to be appropriately published as soon as practicable. These procedures apply to undertakings that are implemented either 45 days in advance of an imminent emergency or disaster situation or within 45 days after the emergency or disaster has been declared. DEs are encouraged to develop specific local procedures with THPOs and SHPOs.

8.0: *Intentional Adverse Effects by Permit Applicants.*

This section applies to all types of Department of the Army Permits.

(a) *General requirements.* The DE shall not issue a permit to an applicant who, with the intent to avoid the requirements of section 106 of the NHPA, has intentionally significantly adversely affected a historic property related to the undertaking, unless the DE determines, after consultation with the Council that the circumstances of the undertaking warrant issuance of the permit.

(b) *Evaluation requirements.* For an undertaking where the DE determines that circumstances may warrant the issuance of the permit, the DE will notify the Council. This notification will include sufficient documentation to explain the circumstances of the adverse effects to historic properties, the degree of damage to the integrity of the historic property, and why permit issuance is warranted. The documentation will include the views of the applicant, the SHPO/THPO, the Indian tribe if the undertaking occurs on or affects historic properties on tribal lands, Indian tribes or NHOs that attach religious or cultural significance to the historic property, and other parties known to be interested in the undertaking. The Council has 30 days from the date of the notification and documentation to provide its advisory opinion to the DE, or the DE may proceed with the permit decision.

(c) *DE decision.* If, after considering the Council's advisory opinion, the DE decides to issue the permit, the DE will notify the Council, SHPO/THPO, consulting parties and other interested parties prior to issuing the permit to the applicant.

9.0: *Conditioning Department of the Army Permits to Resolve Adverse Effects.*

This section applies to all types of Department of the Army Permits.

(a) *Use of Programmatic Agreements.* To resolve adverse effects that may result from complex project situations or multiple undertakings, the DE, the SHPO/THPO, Council, and other Federal agencies may negotiate PAs. Such PAs may be used when effects on historic properties are similar and repetitive, involve more than one state, or are regional in scope. PAs may also be used when effects on historic properties cannot be fully determined prior to the approval of an undertaking.

(1) *Consulting parties.* Consulting parties for PAs will include, as appropriate SHPOs/THPOs, the National Conference of State Historic Preservation Officers (NCSHPO), Indian tribes, NHOs, other Federal agencies, the permit applicant, and members of the public likely to be interested in the PA.

(2) *Tribal Consultation.* Whenever a DE proposes a PA pursuant this section, the DE shall ensure that development of the PA includes appropriate consultation with affected Indian tribes and consultation with affected NHOs. If any undertaking covered by a proposed PA has the potential to affect historic properties on tribal lands, the DE shall identify and consult with the Indian tribes having jurisdiction over such lands. If a proposed PA has the potential to affect historic properties of religious and cultural significance to an Indian tribe or an NHO that are located off tribal lands, the DE shall identify those Indian tribes and NHOs that might attach religious and cultural significance to such properties and consult with them. Consultation may occur at the staff level but the signatories must be the DE and the head of the Tribal government, thus fulfilling the requirement for government-to-government consultation.

(3) *Consultation process.* The consultation process for programmatic agreements will follow the steps in these procedures. If the consulting parties fail to reach agreement on a PA, the DE will conduct section 106 consultation on a case-by-case basis, as appropriate.

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

(1) Requests for comment without an MOA. Documentation shall include:

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

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

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

(iv) Any substantive revisions or additions to the documentation previously provided to the Council.

(c) *District Implementation Protocols.* The DE is encouraged to develop District Implementation Protocols with their SHPO/THPOs and/or Tribal officials to streamline implementation of these procedures and provide for expedited reviews and/or additional exempt activities. Prototype District Implementation Protocols may be used for the same type of undertakings in more than one case or across district boundaries. When the DE uses a prototype District Implementation Protocol, the DE may develop and execute the agreement without need for Council participation in consultation or Council's signature.

(d) *Special Conditions.* If special conditions must be placed on the permit in order to reach a "no adverse effect" determination, provided that the SHPO/THPO and other consulting parties agree that to condition the permit would result in a "no adverse effect",

the special condition must be enforceable, directly related to the section 106 work to be undertaken, and justified in the administrative record for the permit action.

10.0: *Treatment of Human Remains.*

This section applies to all types of Department of the Army Permits.

(a) *Authority.* If human remains and associated funerary objects are encountered during work under a Corps permit, the Corps should defer to the SHPO/THPO and state unmarked burial laws concerning proper notification, treatment, and disposition. In cases of contested tribal claims or controversial actions triggered by the discovery of human remains, the ACHP should be notified.

(1) *Use of NAGPRA mirror process.* As lead Federal agency, the Corps may mirror the general NAGPRA process to determine proper treatment and disposition of human remains. The goals of NAGPRA may be met this way while understanding the law does not apply to private land.

(2) *Use of state statutes to resolve treatment of human remains.* In states that lack specific legislation to address the discovery of unmarked burials, deference to the results of consultation between the SHPO, THPO, and recognized tribes should be given in cases of claims of human remains.

(3) *Competing claims for human remains.* In the case of competing tribal claims, the Corps may require the applicant to undertake additional research, additional work, or provide additional information necessary to resolve the claim. In consultation with the applicant, consulting parties, SHPOs, THPOs, tribes and recognized tribes, the DE will issue a final decision.

(b) *Treatment.* Proper treatment of information, disposition of human remains is important. Public notices will not generally discuss the presence of human remains unless the SHPO and the tribe agree with the language in advance. Photographs of human remains should never be used in public documents or released under FOIA requests. The Corps should instruct the applicant to work closely with the SHPO, THPO, and tribes to correctly treat human remains at all times, including encouraging proper curation for remains that are not repatriated.

11.0: *Documentation Standards.*

This section applies to all types of Department of the Army Permits.

(a) *Adequacy of documentation.* The DE shall ensure that a determination, finding, or agreement under these procedures and 36 CFR 800 is supported by sufficient documentation to enable any reviewing parties to understand its basis. The DE shall provide such documentation to the extent permitted by law. When the DE is conducting phased identification or evaluation under 36 CFR 800.?, 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

DE and specify the information needed to meet the standard. At the request of the DE or any of the consulting parties, the Council shall review any disputes over whether documentation standards are met and provide its views to the DE and the consulting parties.

(b) *Format.* The DE 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.

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

(i) A description of the undertaking, specifying the Federal involvement, the APE, including photographs, maps, drawings, as necessary;

(ii) A description of the steps taken to identify historic properties.

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

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

(i) A description of the undertaking, specifying the project review area, including photographs, maps, and drawings, as necessary;

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

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

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

(v) 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

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

12.0: *Notifications*

(a) *Standard Permits with a Public Notice.* For Corps permits requiring a Public Notice, the public notice procedures at 33 CFR Part 325 will generally satisfy the requirement for public involvement and notification, provided identified consulting parties receive copies of public notices. The public notice should be sent to the SHPO/THPO, Indian tribes that may have land or ethnographic claims in the area of the proposed undertaking, NHOs, certified local governments, and other consulting parties, as well as other interested parties (see 33 CFR 325.3(d)). In the case of large or controversial projects, the public notice should be provided to the Council. When using the integrated NEPA-Section 106 approach for Corps permits requiring a Public Notice, the public notice procedures at 33 CFR 325 will generally satisfy the requirement for public involvement and notification, provided it contains sufficient information relative to potential historic properties, and is provided to all consulting parties.

(1) *Public Notice contents.* The DE's current knowledge of the presence or absence of historic properties and the effects of the proposed undertaking upon such properties, if present within the APE, should be included in the public notice for standard permits. The public notice must generally describe the undertaking's effects on historic properties and the knowledge of the types of historic properties, properties of religious and cultural importance, or tribal resources potentially affected. In order to protect sensitive

information, public notices will not contain maps of locations of historic properties of any type. A review of listed properties in the National Register of Historic Places is generally inadequate to accurately convey negative information for areas with no previous work, or in areas that have the potential to contain historic properties or tribal resources which may yet be identified. Appropriate sources of information to obtain information on historic properties include, but are not limited to: SHPO/THPO, Indian tribes, NHOs, the internet, and contacts with local historical societies, museums, and universities.

Coordinated determinations of effect with SHPO/THPO should be stated if known at the time the public notice is issued. Consultation with Indian tribes and NHOs is not satisfied by the public notice alone. DE's should consult with their resident and non-resident (removed) tribes or NHOs to agree upon a means by which notification of and subsequent consultation on a proposed undertaking should be accomplished.

(2) *Authority to withhold from disclosure.* Locational and sensitive information related to historic properties is excluded from the Freedom of Information Act (Section 304 of the NHPA and Section 9 of Archeological Resources Protection Act). If the DE, SHPO, or THPO, in consultation with the Secretary of the Interior, determines that the disclosure of information to the public relating to the location or character of sensitive historic resources may create a risk of harm, theft, or destruction to such resources or to the area or place where such resources are located, the DE will not include such information in the public notice nor otherwise make it available to the public. The DE will furnish such information to the SHPO/THPO and the Council (if the Council is a consulting party) by separate notice. Sensitive information from Indian tribes and NHOs concerning properties of religious and cultural importance, other historic properties, sacred sites, and Tribal trust resources may be transmitted orally to the DE. If the Indian tribe or Native Hawaiian organization requests that such information be held in confidence, that information will not be recorded or transmitted to other parties.

(5) *Alternative means of notification.* Public notices alone are insufficient means to initiate and accomplish consultation

(b) *Letters of Permission.* The processing of a Letter of Permission application should proceed as outlined in section 3.2, Initial Corps Review. If known, the applicant should provide information on potential impacts to historic properties within the APE or tribal concerns in the application. The DE should consult additional sources of information as specified under section 3.2(g) with respect to the presence/absence of historic properties and tribal concerns within the APE. If, in reviewing the application, the DE identifies potential impacts or the presence of historic properties that may be affected as a result of the proposed undertaking, the Corps should notify the SHPO/THPO, in writing, as well as Indian tribes, and other consulting parties as required by these procedures.

(c) *General Permits.*

(1) *Programmatic Review.* *By statute and regulation, general permits must be evaluated and they either expire or are reissued every five years. Whenever GPs are being evaluated for reissuance, the corps will consult with all interested Federal agencies using rulemaking procedure, and with the ACHP, tribes/NHOs, and the public to identify those activities which are expected to have no more than minimal effects, or no effects, and make a determination as to whether or not further section 106 review shall be*

required. Those general permits for which no further section 106 review is required shall be disclosed to the agencies, tribes, and public. This determination can be re-evaluated at any time at the discretion of the XXX and modified, if necessary. Similarly, the Corps will disclose to the agencies, tribes, and public, those general permits for which further case-by-case section 106 review will be required as described in XXX of this Alternate Procedure.

(2) *General Permits with Pre-Construction Notification Requirements.* When a permit applicant notifies the Corps of a proposed undertaking in accordance with the Pre-construction Notification Procedures found at 33 CFR 330.1(e) or notification requirements associated with other types of General Permits, the Corps will follow the initial review process as defined in Section 4 of these procedures.

(i) If the DE determines that the proposed activity is not an undertaking, and has no potential to cause effects on historic properties, the administrative record should be supplemented to document a basis for this determination and the section 106 process is complete.

(ii) If, during the initial review the DE determines that a proposed undertaking may affect a historic property, the Corps should immediately inform the applicant that the verification will be suspended pending completion of the section 106 process following the procedures set forth in 33 CFR 330.5. In the case of a Nationwide Permit, the DE may suspend the verification on any determination other than “no potential to cause effects” pending the results of further investigations necessary to establish whether a proposed undertaking has the potential to affect a historic property. For the purposes of these procedures, the section 106 process is considered to be complete once the DE has determined, through consultation with the SHPO/THPO, Indian tribes, NHOs, and other consulting parties, that an undertaking will not adversely affect a historic property. A “no historic properties affected” determination may be achieved through permit conditions, an MOA, or a PA. The SHPO/THPO will have 15 days to review the documentation and offer concurrence/non-concurrence with the effect determination. For any of the cases described in this sub-part, the verification cannot be granted and is considered suspended until the 106 process is complete.

(iii) Similarly, if the Corps determines that further investigations of the APE are warranted in order to make a “no historic properties affected” determination”, the Corps should follow the procedures set forth in Section X, Investigations, of these procedures. If investigations reveal that the proposed undertaking will have an effect on a historic property, the Corps will proceed with consultation as described in these procedures. If the results of an investigation indicate that no historic properties are present in the APE, or if it is determined that the proposed undertaking will not have an effect on historic properties even if present within the APE, this determination should be provided to the SHPO/THPO and other consulting parties along with documentation supporting the determination. The SHPO/THPO will have 15 days to review the documentation and offer concurrence/non-concurrence with the effect determination. For any of the cases described in this sub-part, the verification cannot be granted and is considered suspended until the 106 process is complete.

(iv) The DE may assert discretionary authority on Nationwide Permit verifications involving historic properties as provided under 33 CFR 330.4(e).

(2) *General Permits without Pre-construction Notification Requirements.* Under certain circumstances, activities are exempt from pre-construction notification to the Corps (see 33 CFR 330). As a condition of the Nationwide Permit, no activity which may affect properties listed or properties eligible for listing in the National Register of Historic Places, is authorized until the DE has complied with the provisions of these procedures. If a prospective permittee is aware of the presence of historic properties within the APE that may be effected as a result of a proposed undertaking, regardless of whether pre-construction notification is required, the prospective permittee should notify the Corps of the potential to impact historic properties. Such notification initiates the pre-construction notification process as described at 33 CFR 330. The Corps should follow the procedures for consulting with the SHPO/THPO, and other consulting parties as described in section X of these procedures. Failure on behalf of an applicant to notify the Corps as proscribed in this part constitutes a violation of the Nationwide Permit and falls under Compliance Actions (33 CFR 326).

13.0 *Procedural Review.*

This section applies to all types of Department of the Army Permits.

(a) *Additional review.* If a dispute arises between the Corps and the SHPO/THPO, an Indian tribe, NHO, the Council, or the applicant concerning the APE, the definition of undertaking, or any other jurisdictional or procedural matter, the DE shall consult with in-house cultural resources/Tribal liaison staff to resolve the issue.

(b) *Dispute resolution.* If the issue cannot be resolved at the district level between the DE and the SHPO/THPO, Indian tribe, NHO, the Council or the applicant, the DE may request additional review, through Corps Headquarters. Corps Regulatory Headquarters will coordinate with subject matter experts and/or in-house expertise and will request review on behalf of the ACHP to resolve the dispute.

(1) If elevating the dispute to the Corps Regulatory Headquarters, the DE shall furnish all documentation and pertinent information to the Corps Regulatory Headquarters. The Corps Regulatory Headquarters will coordinate the issue with the Council. In cooperation, the Corps Regulatory Headquarters and the Council will endeavor to provide the DE with a response no later than 30 days from receiving the request for dispute resolution for Individual Standard permits and 15 days for nationwide, regional, and programmatic general permits.

(2) The Corps Regulatory Headquarters and the Council will provide a written response to the DE. The DE retains ultimate decision authority.