

**PROGRAMMATIC AGREEMENT
AMONG
THE UNITED STATES DEPARTMENT OF ENERGY, THE TEXAS HISTORICAL COMMISSION,
THE TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS, AND THE TEXAS
COMPTROLLER OF PUBLIC ACCOUNTS
REGARDING THE USE OF INTERSTATE AGREEMENTS
FOR SECTION 106 REVIEW OF EECBG, SEP AND WAP UNDERTAKINGS**

WHEREAS, the United States Department of Energy (DOE) administers the following financial assistance programs: *the Energy Efficiency and Conservation Block Grant Program* under the Energy Independence and Securities Act of 2007 (EECBG); *the State Energy Plan* under the Energy Policy and Conservation Act of 1975 and the State Energy Efficiency Programs Improvement Act of 1990 (SEP); and *the Weatherization Assistance Program (WAP)* for Low-income Persons under Title IV of the Energy Conservation and Production Act, the Energy Policy Act of 2005, the Energy Independence and Security Act of 2007, and the American Recovery and Reinvestment Act of 2009 (ARRA); collectively referred to as the "Programs";

WHEREAS, the projects funded by the Programs are undertakings subject to review under Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f (NHPA), and its implementing regulations at 36 CFR part 800, and include rehabilitation, energy efficiency retrofits, renewables, and weatherization (Undertakings);

WHEREAS, on February 5, 2010, the Advisory Council on Historic Preservation (ACHP) designated a Prototype Programmatic Agreement regarding the Undertakings (Prototype PA) that, under its Stipulation III, authorizes the Section 106 review of these Undertakings in accordance with State interagency agreements;

WHEREAS, DOE has executed financial assistance agreements with the Texas Department of Housing and Community Affairs (TDHCA) to provide TDHCA with ARRA funds for the WAP;

WHEREAS, DOE has executed financial assistance agreements with the Texas Comptroller of Public Accounts (CPA) to provide CPA with ARRA funds for the EECBG and the SEP;

WHEREAS, DOE has executed financial assistance agreements directly with city and county governments in Texas (Direct Recipients) to provide ARRA funds for the EECBG;

WHEREAS, the Texas Historical Commission (THC), acting as the Texas State Historic Preservation Officer (SHPO), was in negotiation with TDHCA for the WAP and with CPA for the EECBG and SEP prior to February 5, 2010;

WHEREAS, THC executed the Interagency Agreement Between the TDHCA and the SHPO Regarding Historical Properties Affected by the Use of DOE WAP Funds dated February 10, 2010 (Interagency Agreement) and thereafter executed the Memorandum of Understanding Between the CPA and THC Regarding EECBG and SEP Undertakings dated March 9, 2010 (MOU), which collectively apply to the rehabilitation, energy efficiency retrofits, renewable, and weatherization Undertakings under the WAP, EECBG and the SEP and provide a historic preservation review process that is similar to that provided by the other terms of the Prototype PA; and

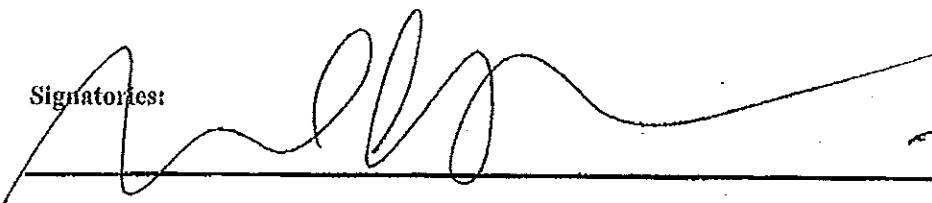
WHEREAS, DOE, does not object to the use of the Interagency Agreement and the MOU to fulfill the requirements of Section 106 for the referenced Undertakings in the State of Texas.

NOW, THEREFORE, DOE, TDHCA, CPA, and the SHPO agree that the Programs shall be administered in accordance with the following stipulations to satisfy DOE's Section 106 responsibilities for all Individual Undertakings of the Programs in the State of Texas;

DOE, TDHCA, CPA, and the SHPO shall ensure that the following stipulations are carried out:

1. The TDHCA and SHPO will review Undertakings in accordance with the terms of the Interagency Agreement (attached as Appendix A to this Programmatic Agreement).
2. The CPA and SHPO will review Undertakings in accordance with the terms of the MOU (attached as Appendix B to this Programmatic Agreement).
3. DOE will make the terms of this Programmatic Agreement applicable to its Direct Recipients. Direct Recipients may review Undertakings in accordance with the review process stated in the MOU, substituting their role for that of CPA or Subrecipients of CPA grants; further, Direct Recipients may use either Attachment A of the MOU or Appendix A of the Interagency Agreement to identify Undertakings exempt from SHPO review.
4. TDHCA and CPA will ensure that the terms of this Programmatic Agreement are applicable to their Subrecipients.
5. This Programmatic Agreement will be in effect for a period of three years from the date of its execution.
6. DOE will send a copy of this Programmatic Agreement to the ACHP upon execution.

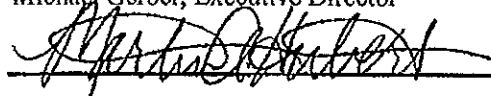
Signatories:



TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS
Michael Gerber, Executive Director

Date

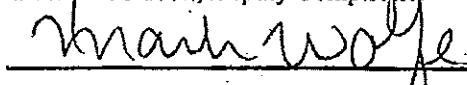
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TEXAS COMPTROLLER OF PUBLIC ACCOUNTS
Martin A. Hubert, Deputy Comptroller

Date

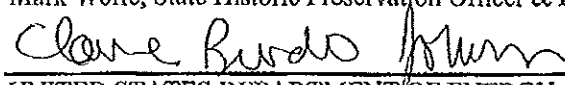
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TEXAS STATE HISTORIC PRESERVATION OFFICER
Mark Wolfe, State Historic Preservation Officer & Executive Director, Texas Historical Commission

Date

3/29/10



UNITED STATES DEPARTMENT OF ENERGY
OFFICE OF ENERGY EFFICIENCY AND RENEWABLE ENERGY
OFFICE OF WEATHERIZATION AND INTERGOVERNMENTAL PROGRAMS

Date

4/1/10

Appendix A
INTERAGENCY AGREEMENT
BETWEEN
THE TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS AND
THE TEXAS STATE HISTORIC PRESERVATION OFFICER
REGARDING HISTORICAL PROPERTIES AFFECTED BY USE OF
DEPARTMENT OF ENERGY WEATHERIZATION ASSISTANCE PROGRAM FUNDS
February 10, 2010
(See following 12 pages)

**INTERAGENCY AGREEMENT
BETWEEN
THE TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS AND
THE TEXAS STATE HISTORIC PRESERVATION OFFICER
REGARDING HISTORICAL PROPERTIES AFFECTED BY USE OF
DEPARTMENT OF ENERGY WEATHERIZATION ASSISTANCE PROGRAM FUNDS
February 10, 2010**

By and among the Texas Department of Housing and Community Affairs (TDHCA) and the Texas Historical Commission, acting as the Texas State Historic Preservation Officer (SHPO), regarding properties affected by use of the United States Department of Energy (DOE) *Weatherization Assistance Program* (WAP, herein called the Program), with funds from the American Recovery and Reinvestment Act of 2009 (ARRA), herein called the Agreement.

WHEREAS, the projects funded by the Program are undertakings subject to review under Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. 470f and its implementing regulations at 36 CFR Part 800;

WHEREAS, by memorandum dated August 28, 2009 (attached as Appendix B), DOE delegated certain tasks necessary for compliance with Section 106 of the NHPA to recipients of funding from the Program, including TDHCA, and authorized recipients to initiate Section 106 consultation in accordance with 36 CFR 800.2(c)(4);

WHEREAS, TDCHA has awarded WAP grant funds to Subrecipients responsible for weatherization at individual properties;

WHEREAS, TDHCA has determined that projects funded by this Program may have an effect on properties included in or eligible for inclusion in the National Register of Historic Places (National Register) and has consulted with the SHPO pursuant to the requirements of the NHPA;

WHEREAS, the unprecedented levels of funding available to the Program, due in large measure to ARRA, has created a large volume of projects requiring expedited historic preservation reviews to ensure the timely obligation of funds that create new jobs and improve local and state economies;

WHEREAS, the SHPO is experiencing unprecedented numbers of requests for historic preservation review of undertakings funded by all Federal Agencies, including projects funded by this Program;

WHEREAS, TDHCA is receiving financial assistance from DOE to carry out the Program;

WHEREAS, TDHCA and SHPO agree that TDHCA will provide SHPO with additional staff and funding in order to cover the time and costs of providing technical assistance and an expedited review of TDHCA's undertakings;

NOW, THEREFORE, TDHCA and SHPO agree that the Program will be administered in accordance with the following stipulations to satisfy the Section 106 responsibilities for all individual undertakings of the Program.

STIPULATIONS

TDHCA and the SHPO shall ensure that the following stipulations are carried out:

I. APPLICABILITY OF AGREEMENT

The review process established by this Agreement will be completed prior to TDHCA approval of any Subrecipient altering any property eligible for assistance under the Program.

II. STAFFING AND PAYMENT FOR SHPO SERVICES

In consideration for providing technical assistance to TDHCA and its WAP Subrecipients and for treating TDHCA's review requests in an expedited manner, TDHCA shall provide staffing and payment for SHPO services. Beginning within thirty (30) days of execution of this Agreement and extending for a period of two (2) years, TDHCA shall fund a staff person to serve as a dedicated reviewer for the Program. The staff person shall be considered an employee of TDHCA but will office with the SHPO. Hiring shall be performed jointly by TDHCA and SHPO, and the staff person shall meet the Secretary of the Interior's Professional Qualification Standards in the area of Architectural History or Historic Architecture, or have equivalent education and experience. His or her salary shall not exceed \$50,000 per year. TDHCA shall also pay SHPO \$48,000 in equal monthly installments of \$2,000 for travel and overhead expenditures associated with the staff person for the Program.

III. EXEMPTIONS FROM SECTION 106 REVIEW

TDHCA and its Subrecipients shall not submit undertakings listed in Appendix A to the SHPO for review. The SHPO has concluded that these work items do not meet the definition of undertaking since they do not have the potential to cause effects on historic properties per 36 CFR 800.3(a) and thus no historic properties will be affected per 36 CFR 800.4(d), or they have limited potential to affect historic properties per 36 CFR 800.5 and will have no adverse effect upon historic properties if carried out as described. TDHCA and its Subrecipients are not required to consult further with the SHPO for work in this category. TDHCA and its Subrecipients are responsible for ensuring that work is carried out as described in Appendix A and for documenting their compliance.

IV. REVIEW PROCEDURES FOR NON-EXEMPT UNDERTAKINGS

TDHCA Subrecipients shall submit all undertakings not covered by Appendix A to the SHPO for review as they do have the potential to cause adverse effects on historic properties. Review procedures shall follow 36 CFR 800.4-6 and standard SHPO procedures, as further clarified or modified by the terms of this Agreement.

A. Identification and Evaluation of Historic Properties:

- i. The Area of Potential Effect for weatherization projects consists solely of the property being weatherized.
- ii. Subrecipient shall submit documentation of each property requiring review, to include at minimum the address (including city and county), known or estimated date of construction, street map with the property location shown, and current, clear overall photographs of the property. Subrecipient may reference the Texas Historic Sites Atlas at <http://atlas.thc.state.tx.us> to determine if the property already has historical designations. The submittal should indicate whether the property is listed in the National Register, if known, and/or determine whether it is eligible for listing in the National Register. If an eligibility determination is provided, SHPO shall concur or not concur with the determination, or if not provided, SHPO shall determine whether the property meets National Register criteria.
- iii. If the property is determined not eligible for the National Register, and thus there are no historic properties affected by the undertaking per 36 CFR 800.4(d)(1), the Section 106 review process is complete and no further coordination with the SHPO shall be required for the property.
- iv. Disputes regarding determinations of eligibility shall be forwarded to DOE, through TDHCA, for review and referral to the Keeper of the National Register in accordance with 36 CFR 800.4(c)(4).

B. Treatment of Historic Properties

- i. For properties determined eligible for the National Register, Subrecipient shall submit documentation of any proposed weatherization activities that do not fall within the exclusions of Appendix A. Documentation shall include a scope of work, plans and specifications, or other detailed description of the project. Additional photographs of areas in which work is to be performed should be included. Subrecipient should make a determination as to whether the project would have an adverse effect on the historic property per 36 CFR 800.5. If an effect determination is provided, SHPO shall concur or not concur with the determination, or if not provided, SHPO shall determine whether the work meets the criteria of adverse effect.
- ii. When the subrecipient and SHPO concur that a project is designed and planned in accordance with the Secretary of the Interior's *Standards for the Treatment of Historic Properties* (36 CFR Part 68, herein called the Standards), the project shall be considered to have no adverse effect, and no further coordination with the SHPO shall be required for the property.
- iii. The subrecipient and SHPO will make best efforts to expedite reviews through a finding of "no adverse effect with conditions" when the scope of work can be modified to ensure adherence with the Standards. If the undertaking cannot meet the Standards or otherwise would result in an adverse effect to historic properties, the Subrecipient shall proceed with further consultation.

C. Resolution of Adverse Effects

The Subrecipient shall consult with the SHPO, TDHCA, and the public, as appropriate, to resolve adverse effects per 36 CFR 800.6. TDHCA shall notify and invite DOE to participate in consultation per the terms of the memorandum attached as Appendix B.

V. TDHCA RESPONSIBILITIES

- A. TDHCA will require Subrecipients to retain access to pre- and post-documentation of the weatherization work completed, including the work write-ups and photographs, as part of its permanent project records. For projects determined to be exempt from SHPO review per Stipulation III, Subrecipient shall compile an annual report per Stipulation VIII. Subrecipient shall provide SHPO access to project documentation upon request per Stipulation IX.
- B. TDHCA will monitor every Subrecipient for compliance with this Agreement.
- C. TDHCA or its Subrecipients are responsible for involving consulting parties and the public in Section 106 consultation, as appropriate, per 36 CFR 800.2 and any applicable guidance from DOE.

VI. SHPO RESPONSIBILITIES

- A. SHPO is permitted thirty (30) calendar days upon receipt to review and comment on documentation submitted pursuant to Stipulation IV. If SHPO does not provide comments within thirty (30) calendar days, it may be assumed that SHPO accepts the documentation to meet the reporting requirements of this Agreement and concurs with the determinations made in the submittal.
- B. An expedited process of seven (7) calendar days will be in effect so long as the staffing and funding noted under Section II is provided, and the documentation required in Stipulation IV is electronically submitted directly to the dedicated reviewer for the Program.
- C. SHPO will provide technical assistance and training on the requirements of Section 106 and application of the Secretary of Interior's *Standards for the Treatment of Historic Properties* to TDHCA and its Subrecipients.

VII. DISCOVERIES AND UNFORESEEN EFFECTS

If, during the implementation of these programs, a previously unidentified property that may be eligible for inclusion in the National Register is encountered, or is affected in an unanticipated manner, the Subrecipient responsible for the weatherization will assume its responsibilities pursuant to 36 CFR 800.13, and will notify TDHCA of the unanticipated discovery.

VIII. REPORTING

During each year this Agreement is in effect, Subrecipients shall forward to the SHPO by December 31st an annual report of all completed projects that were exempted from review

under Stipulation III of this Agreement. The projects should be listed by the property address including city and county, and should include the construction date of the property and the type of project.

IX. MONITORING

SHPO may monitor any activities carried out pursuant to this Agreement. TDHCA Subrecipients will cooperate with SHPO in carrying out these monitoring and review responsibilities.

X. DISPUTE RESOLUTION

If TDHCA, TDHCA Subrecipients, and SHPO are unable to resolve any disagreement arising under the provisions of this Agreement, the Subrecipient will, unless the dispute relates to the National Register eligibility of any property, forward full documentation regarding the project and the basis for the dispute to DOE, who will initiate consultation with the Advisory Council on Historic Preservation (Council) in accordance with 36 CFR 800.9.

XI. AMENDMENTS

Any party to this Agreement may request that it be amended, whereupon the parties will consult with each other. No amendment to this Agreement will become effective without the written concurrence of all the parties.

XII. TERMINATION

- A. Any party to this Agreement may terminate the Agreement by providing thirty (30) days written notice to the other parties, provided that the parties consult during the period prior to the termination to seek agreement on amendments or other actions that would avoid termination.
- B. In the event of termination, TDHCA will require Subrecipients to ensure compliance with 36 CFR 800.4-6 with respect to individual undertakings covered by this Agreement.
- C. This Agreement applies only to ARRA-funded WAP projects and will expire three (3) years from the date on which it becomes effective, unless such programs are extended, in which case this Agreement may be extended as necessary by letter agreement signed by all parties.

XIII. FAILURE TO COMPLY WITH TERMS OF AGREEMENT

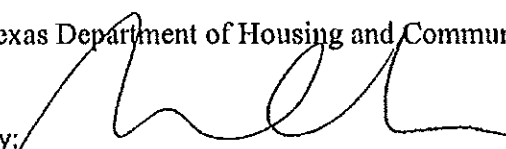
In the event that the terms of this Agreement cannot be carried out by the Subrecipient, no action will be taken or sanction of any action or any irreversible commitment by Subrecipient that would result in an adverse effect to historic properties or would foreclose the Council's consideration of modifications or alternatives to the undertaking.

XIV. LIABILITY LIMITATIONS

In the event that the terms of this Agreement are not carried out by the Subrecipient as indicated in the work plans submitted to TDHCA, the Subrecipient will assume all responsibility for the weatherization project as indicated in the Grant Agreement between TDHCA and Subrecipient.

APPROVED:

Texas Department of Housing and Community Affairs (TDHCA)

By:  Date: 2/12/10
Michael Gerber, Executive Director

Texas Historical Commission acting as Texas State Historic Preservation Officer (SHPO)

By:  Date: 2/12/10
Mark Wolfe, State Historic Preservation Officer

APPENDIX A: WAP UNDERTAKINGS EXEMPT FROM SHPO REVIEW

Projects affecting only properties less than forty-five (45) years old at the time the work takes place shall not require SHPO review, provided the property has not been previously determined eligible under National Register Criteria Consideration G for exceptional significance (36 CFR 60.4). In addition, the following project types affecting properties forty-five (45) years old or older shall not require SHPO review:

A. Interiors:

- 1) Projects limited to interior spaces where the work will not be visible from the exterior of the building; no structural alterations are made; no demolition of walls, ceilings or floors occurs; no drop ceilings are added; and no walls are leveled with furring or moved.
- 2) Repairing or upgrading electrical or plumbing systems in a manner that does not affect the exterior of the building.
- 3) Replacing existing appliances, repairing or replacing water heaters, and installing compact fluorescent light bulbs.
- 4) Installing fire, smoke or carbon monoxide detectors.
- 5) Installing mechanical equipment in a manner that does not affect the exterior of the building.
- 6) Repairing, upgrading or replacing existing mechanical equipment, provided that any new equipment is installed in the location of existing equipment and no physical alterations to the building are required.
- 7) Conducting weatherization or energy conservation activities including insulating attics, ceilings, floors, crawl spaces, foundations, exterior walls, water heaters, and ductwork, provided repairs are made by a qualified contractor using current best practices and methods that are consistent with the preservation techniques in *Preservation Brief #3: Conserving Energy in Historical Buildings*. Spray-foam insulation is not included in this exemption. For exterior blown-in wall insulation, holes shall not be drilled through exterior siding or decorative plasterwork on the interior, and should result in no permanent visible alteration to the structure.

B. Roofing:

- 1) Limited in-kind replacement of existing roofing material.
- 2) Installing reflective roof coatings, with materials that closely match the historic materials and form, or with materials that restore the original feature based on historic evidence, and in a manner that does not alter the roofline; or installing reflective roof coatings on flat or low-slope roofs where not visible from the public right-of-way.
- 3) Installing continuous ridge vents covered with ridge shingles or boards, or roof jacks/vents, bath and kitchen fan vents, gable vents, soffit and frieze board vents, and combustion appliance flues, if not located on a primary roof elevation or visible from the public right-of-way.

C. Exterior Painting:

- 1) Painting exterior surfaces unless the property is subject to local landmark ordinance provision, provided destructive surface preparation treatments, including but not limited to water-blasting, sandblasting and chemical removal, are not used.
- 2) Conducting Lead-based Paint Abatement or "Management in Place" activities carried out by a qualified contractor using current best practices and methods that are consistent with the preservation techniques in *Preservation Brief #37: Appropriate Methods for Reducing Lead-Paint Hazards in Historic Housing*.

D. Masonry:

- 1) Power-washing exterior masonry performed by a qualified contractor at no more than 500-psi with mild detergent, using current best practices and methods that are consistent with the preservation techniques in *Preservation Brief #1, The Cleaning and Waterproof Coating of Masonry Buildings*.
- 2) Limited repairs to masonry, including repointing, and rebuilding chimneys if the joints are done by hand and the mortar matches the original composition and color, and installing chimney flue liners, provided repairs are made by a qualified contractor using current best practices and methods that are consistent with the preservation techniques in *Preservation Brief #2: Re-pointing Mortar Joints in Historic Brick Buildings*.

E. Windows and Doors:

- 1) Repairing or replacing caulking, weather-stripping, and other air infiltration control measures on windows and doors, and installing thresholds, in a manner that does not harm or obscure historic windows or trim.
- 2) Installing interior storm windows or doors, or exterior storm or wood screen doors, in a manner that does not harm or obscure historic windows or trim.
- 3) Removable film on windows (if the film is transparent), solar screens, or window louvers, in a manner that does not harm or obscure historic windows or trim.

F. Foundations:

- 1) Underpinning and ventilating crawl spaces, provided the underpinning materials are set at least 2 inches behind the outer face of piers or foundations on the front façade.
- 2) Installing foundation vents, if painted or finished to match the existing foundation material.

G. Other Exterior:

- 1) Repair of minor roof and wall leaks prior to insulating attics or walls, provided repairs are in-kind and match the existing surface.

H. Site Work:

- 1) Repairing or replacing driveways, parking areas, and walkways, in a manner that does not disturb historic landscape materials or features.
- 2) Repairing or replacing sewer lines, water lines, and drain connections in a manner that does not disturb historic exterior building or landscape materials or features, and where all construction occurs within existing trenches.

APPENDIX B: AUGUST 28, 2009, DELEGATION MEMORANDUM
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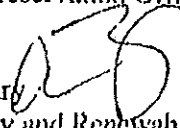


Department of Energy
Washington, DC 20585

August 28, 2009

MEMORANDUM

TO: State Historic Preservation Officers
Tribal Historic Preservation Officers

FROM: Catherine R. Zoi 
Assistant Secretary
Energy Efficiency and Renewable Energy

SUBJECT: Memorandum from EERE Regarding Delegation of Authority for Section 106 Review of Undertakings, Assisted by the U. S. Department of Energy, Office of Energy Efficiency and Renewable Energy

The Department of Energy (DOE), through the Office of Energy Efficiency and Renewable Energy (EERE), provides financial assistance to states, U.S. territories, units of local government, and Indian Tribes through the Energy Efficiency and Conservation Block Grant (EECBG) Program, Weatherization Assistance Program (Weatherization), and State Energy Program (SEP). Attached hereto is a one-page summary of the three programs. Additional program information is available at the following links: <http://www.eecbg.energy.gov/>; <http://apps1.eere.energy.gov/wip/weatherization.cfm>; http://apps1.eere.energy.gov/state_energy_program/.

Through this memorandum, DOE intends to formalize the role of the States and DOE's award recipients (Applicants) to assist DOE in carrying out its Section 106 compliance responsibilities. In order to streamline DOE's compliance with Section 106 and its implementing regulations, "Protection of Historic Properties" (36 CFR Part 800), EERE is authorizing its Applicants under the EECBG, Weatherization, and SEP programs to initiate consultation pursuant to 36 CFR § 800.2(c) (4). Effective immediately, EERE Applicants and their authorized representatives may consult with the State Historic Preservation Officers (SHPOs) and Tribal Historic Preservation Officers (THPOs) to initiate the review process established under 36 CFR Part 800 and to carry out some of its steps. Specifically, EERE Applicants are authorized to gather information to identify and evaluate historic properties, and to work with consulting parties to assess effects. EERE retains responsibility to document its findings and determinations in order to appropriately conclude Section 106 review.

EERE also remains responsible for initiating government-to-government consultation with federally recognized Indian Tribes. EERE's responsibility to consult on a government-to-government basis with Indian Tribes as sovereign nations is established through specific authorities and is explicitly recognized in 36 CFR Part 800. Accordingly, EERE may not delegate this responsibility to a non-federal party without



the agreement of the Tribe to do so. Where no such agreement exists, EERE will initiate tribal consultation.

Authorized Applicants must notify EERE whenever:

- Either the EERE Applicant or the SHPO/THPO believes that the Criteria of Adverse Effect pursuant to 36 CFR § 800.5, apply to the proposal under consideration by EERE;
- There is a disagreement between an Applicant, or its authorized representative, and the SHPO/THPO about the scope of the area of potential effects, identification and evaluation of historic properties and/or the assessment of effects;
- There is an objection from a consulting party or the public regarding their involvement in the review process established by 36 CFR Part 800, Section 106 findings and determinations, or implementation of agreed upon measures; or
- There is the potential for a foreclosure situation or anticipatory demolition as defined under 36 CFR § 800.9(b) and 36 CFR § 800.9(c), respectively.

EERE will participate in the consultation when such circumstances arise.

EERE expects its Applicants that are so authorized, to involve consulting parties in Section 106 findings and determinations and to carry out the exchange of documentation and information in a respectful, consistent and predictable manner. Technical assistance is available to Applicants from EERE regarding the coordination of Section 106 reviews, if needed.

If you have any questions, please contact Dr. F. G. (Skip) Gosling, DOE Federal Preservation Officer/Chief Historian, Office of History and Heritage Resources, (202) 586-5241 or skip.gosling@hq.doe.gov or Steven P. Blazek, NEPA Compliance Officer, (303) 275-4723 or steve.blazek@go.doc.gov.

Appendix B
MEMORANDUM OF UNDERSTANDING
BETWEEN
THE COMPTROLLER OF PUBLIC ACCOUNTS
AND
THE TEXAS HISTORICAL COMMISSION
REGARDING EECBG AND SEP UNDERTAKINGS
March 9, 2010
(See following 15 pages)

**STATE OF TEXAS
MEMORANDUM OF UNDERSTANDING
BETWEEN
THE COMPTROLLER OF PUBLIC ACCOUNTS
AND
THE TEXAS HISTORICAL COMMISSION
REGARDING EECBG AND SEP UNDERTAKINGS
March 9, 2010**

Contract No: _____

This Memorandum of Understanding (referred to hereinafter as "MOU" or "Agreement") is entered into by and between the Comptroller of Public Accounts (CPA) and the Texas Historical Commission (THC), acting as the Texas State Historic Preservation Officer (SHPO), as parties pursuant to the authority granted and in compliance with the provisions of "The Interagency Cooperation Act," TEX. GOV'T CODE ANN. § 771.001, et. seq.

I. Recitals

Whereas, the American Recovery & Reinvestment Act of 2009 (ARRA), Public Law (PL) 111-5, was enacted in 2009 to provide for the stimulation of the economy, creation of jobs, and assist the states in their recovery during the current national economic crisis; and

Whereas, the CPA has received a series of grant funds via the United States Department of Energy (DOE) to provide for implementation of ARRA, including the Energy Efficiency & Conservation Block Grants (EECBG) for local governments statewide and the State Energy Plan (SEP); and

Whereas, the projects funded by these programs are undertakings subject to review under Section 106 of the National Historic Preservation Act of 1966 (NHPA), 16 USC 470f and its implementing regulations at 36 CFR Part 800, and include rehabilitation, energy efficiency retrofits, renewables, and weatherization; and

Whereas, by memorandum dated August 28, 2009 (Attachment B), DOE delegated certain tasks necessary for compliance with Section 106 of the NHPA to recipients of funding, including CPA, and authorized recipients to initiate Section 106 consultation in accordance with 36 CFR 800.2(c)(4); and

Whereas, CPA has awarded EECBG and SEP grants to subrecipients responsible for work at individual properties; and

Whereas, the foregoing grant subrecipients, as a condition of receipt of grant funds from the CPA, are required to comply with the provisions of the NHPA and applicable state law, including the Antiquities Code of Texas (Title 9, Chapter 191 of the Texas Natural

Resource Code) and the Recorded Texas Historic Landmark and courthouse protection provisions of the Texas Government Code (Chapter 442: Texas Historical Commission, Sections 442.006 and 442.008), and related provisions, including obtaining documentation before altering or implementing changes to certain historic structures and buildings; and

Whereas, DOE has determined that projects funded by these programs may have an effect on properties included in or eligible for inclusion in the National Register of Historic Places (National Register) and has consulted with THC as SHPO pursuant to the requirements of the NHPA; and

Whereas, CPA and THC wish to memorialize the agreed upon procedures, roles and responsibilities of CPA and THC applicable to subrecipients to ensure full compliance with all required laws and regulations relative to historic structures and buildings; and

Whereas, this MOU is a zero-dollar Agreement and no costs, expenses, or reimbursements of any kind shall be incurred by the undersigned parties in the course of performing this MOU, including implementation of procedures and activities under the terms of this Agreement; and

Now, Therefore, in consideration of all the foregoing, CPA and THC hereby agree as follows:

II. Parties

CPA:

Texas Comptroller of Public Accounts
c/o Mr. Martin A. Hubert, Deputy Comptroller
111 E. 17th St., Suite 104
Austin, Texas 78774
(512) 463-4002

THC:

Texas Historical Commission
c/o Mr. Mark Wolfe, State Historic Preservation Officer
P.O. Box 12276
108 W. 16th St.
Austin, Texas 78701
(512) 463-6100

III. Statement of Services to be Performed

A. Responsibilities of CPA

The responsibilities of CPA under this Agreement include all of the following:

1. CPA shall advise subrecipients of the grant funds to submit applications for consultation to the THC, for the purpose of assisting THC in the identification of subrecipient projects that require further analysis, review, and consideration of grant activities that may impact historic structures or buildings; and
2. For the purposes of this MOU or Agreement, historic structures or buildings subject to further review and consultation are those structures or buildings at least forty-five (45) years of age or older from date of construction completion, that are listed in or eligible for listing in the National Register of Historic Places, that are located in a National Register listed or eligible historic district, or that are in a locally designated historic district, or are designated as State Archeological Landmarks under the Antiquities Code of Texas, and all current and former county courthouses protected by Chapter 442.008 of the Texas Government Code. Ground-disturbing activity, regardless of the age of structures on the property, will require consultation with the THC in most cases; and
3. CPA shall communicate to any subrecipient with a project listed as an undertaking in Category B of Attachment A of this MOU, or for any project not listed in Category A thereof, that the subrecipient must obtain clearance from the THC before the subrecipient may commence construction of such project. Attachment A is incorporated by reference into this MOU; and
4. For any project listed in Category A of Attachment A, CPA may notify the subrecipient that the project may proceed through construction without prior review by THC; and
5. CPA shall be responsible primarily for program management and oversight throughout the term of this Agreement and any amendments or extensions; and
6. CPA's subrecipients are responsible for involving consulting parties and the public in Section 106 consultation, as appropriate, per 36 CFR 800.2 and any applicable guidance from DOE. At the request of a subrecipient or THC, CPA may serve as the contact with DOE to facilitate the resolution of any disputes involving this agreement that may arise between the subrecipient and THC; and
7. CPA agrees to designate a contact person to be available to THC for day-to-day communications and status reporting.

B. Responsibilities of THC

The responsibilities of THC under this Agreement include all of the following:

1. Upon receipt of applications for consultation and review, THC shall conduct the reviews according to normal process and procedure as stipulated at 36 CFR 800.4-6 and applicable state law, and further clarified or modified by the terms of this Agreement:
 - a. Identification and Evaluation of Historic Properties:

- i. The Area of Potential Effects (APE) for most projects shall consist solely of the building receiving the energy efficiency upgrades and retrofits. THC will work with the subrecipient to define an appropriate APE for projects involving new construction or ground disturbance.
 - ii. Subrecipient shall submit documentation of each property requiring review to THC at the mailing address above. Documentation should include at minimum the address (including city and county), known or estimated date of construction, street map with the property location shown, and current, clear overall photographs of the property. Subrecipient may reference the Texas Historic Sites Atlas at <http://atlas.thc.state.tx.us> to determine if the property already has historical designations. The submittal should indicate whether the property is listed in the National Register, if known, and/or determine whether it is eligible for listing in the National Register. THC shall respond no later than thirty (30) days after a subrecipient has properly submitted a property for review. If an eligibility determination is provided, THC shall concur or not concur with the determination, or if not provided, THC shall determine whether the property meets National Register criteria.
 - iii. If the property is determined not eligible for the National Register, and thus there are no historic properties affected by the undertaking per 36 CFR 800.4(d)(1), the Section 106 review process is complete and no further coordination with THC shall be required for the property.
 - iv. Disputes regarding determinations of eligibility shall be forwarded to DOE for review and referral to the Keeper of the National Register in accordance with 36 CFR 800.4(c)(2).
- b. Treatment of Historic Properties:
- i. For each property listed or determined eligible for listing in the National Register, subrecipient shall submit documentation to THC for any proposed activities that do not fall within the exclusions of Category A of Attachment A. Documentation shall include a scope of work, plans and specifications, or other detailed description of the project. Additional photographs of areas in which work is to be performed should be included. Subrecipient should make a determination as to whether the project would have an adverse effect on the historic property per 36 CFR 800.5. THC will review the description of proposed work for its effect to the NR eligible property. No later than thirty (30) days after THC receives all necessary information for its review, THC will notify the subrecipient of its determination. If an effect determination is provided, THC shall concur or not concur with the determination, or if not provided, THC shall determine whether the work meets the criteria of adverse effect. THC may also provide comments pursuant to applicable state laws regarding historic buildings. For

buildings designated as State Archeological Landmarks under the Antiquities Code of Texas, THC may require that the subrecipient submit an antiquities permit application for any work beyond the scope of routine maintenance.

- ii. When the subrecipient and THC concur that a project is designed and planned in accordance with the Secretary of the Interior's *Standards for the Treatment of Historic Properties* (36 CFR Part 68, herein called the Standards), the project shall be considered to have no adverse effect, and no further coordination with THC shall be required for the property for purposes of Section 106 review.
- iii. The subrecipient and THC will make best efforts to expedite reviews through a finding of "no adverse effect with conditions" when the scope of work can be modified to ensure adherence with the Standards. If the undertaking cannot meet the Standards or otherwise would result in an adverse effect to historic properties, the subrecipient shall proceed with further consultation.

c. Resolution of Adverse Effects:

The subrecipient shall consult with THC and the public, as appropriate, to resolve adverse effects per 36 CFR 800.6. If requested by either a subrecipient or THC, CPA may become involved in consultation. The subrecipient shall notify and invite DOE to participate in consultation per the terms of the memorandum included as Attachment B.

2. THC may change the exemptions provided in Category A of Attachment A at any time provided however, that THC shall provide notice of the changes to CPA with the opportunity to review and comment prior to implementing any such changes; and
3. THC shall provide all other reasonably-related services to the foregoing, as and when requested by CPA; and
4. Other than as specifically provided by this Agreement, THC has no authority to act on behalf of CPA. The person or persons performing this Agreement do not represent CPA. The person or persons performing this Agreement may not represent to the public that he or she acts on behalf of CPA. THC agrees that its employees, agents, personnel, and contractors do not represent CPA under the terms of this Agreement. This prohibition includes, but is not limited to, press releases and public presentations to the public or taxpayers; and
5. THC agrees to designate a contact person to be available to CPA for day-to-day communications and status reporting.

IV. Zero-Dollar Agreement

This is a zero-dollar (\$0.00) MOU Agreement and no costs, expenses, or reimbursements of any kind shall be made under this MOU. CPA shall not incur any costs or make payment to or reimburse any party for any purpose under the terms of this MOU.

V. Discoveries and Unforeseen Effects

If, during the implementation a project, a previously unidentified property that may be eligible for inclusion in the National Register is encountered, or is affected in an unanticipated manner, the subrecipient responsible for the project will assume its responsibilities pursuant to 36 CFR 800.13, and will notify THC of the unanticipated discovery.

VI. Monitoring and Reporting

Upon completion of review of applications for assistance under the EECBG and SEP programs, CPA shall forward to THC a report of all projects exempted from review under Category A of Attachment A. The list shall identify the name of the local governmental entity and the general type of project. Upon the written request of THC for selected projects, CPA shall provide information that identifies the property address of the project, including city and county, and the date of the construction of the building for which the project is being constructed, to the extent the information is available from the application.

THC may monitor any activities carried out pursuant to this agreement. Subrecipients shall cooperate with THC in carrying out these monitoring and review responsibilities.

VII. Term of Agreement; Termination; Amendments

This Agreement is effective as of the date it is signed by CPA, after having first been signed by THC, and shall terminate on August 31, 2012 unless otherwise terminated, amended or extended as set forth herein. The parties to this Agreement may extend or renew the Agreement for an additional period or terms upon mutual agreement and execution of an amendment as provided below.

If CPA, subrecipients, and THC are unable to resolve any disagreement arising under the provisions of this Agreement, CPA, subrecipients and THC will, unless the dispute relates to the National Register eligibility of any property, coordinate to forward full documentation regarding the project and the basis for the dispute to DOE, who will initiate consultation with the Advisory Council on Historic Preservation (Council) in accordance with 36 CFR 800.9.

CPA and THC shall have the right to terminate this Agreement for cause or for convenience upon thirty (30) days' written notice to the other party. Upon termination of this Agreement for any reason, CPA and THC shall have no further liability or obligation whatsoever under this Agreement. In the event of termination, CPA shall require subrecipients to ensure compliance with 36 CFR 800.4-6 and applicable state laws with respect to individual undertakings.

This Agreement may be renewed, extended, or amended or modified upon mutual agreement of CPA and THC by entering into a written amendment or amendments signed by the parties.

VIII. Indemnity

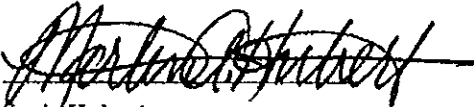
Both parties to this MOU agree that neither shall indemnify the other under the terms of this Agreement.

IX. Authorized Signatories

The following individuals are authorized to bind the respective parties to this memorandum of understanding and cooperation agreement.

CPA:

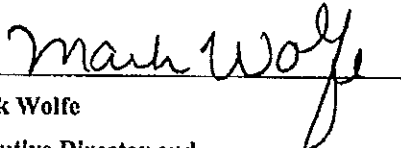
Texas Comptroller of Public Accounts

By: 
Martin A. Hubert
Deputy Comptroller

Date: 3/10/10

THC:

Texas Historical Commission

By: 
Mark Wolfe
Executive Director and
State Historic Preservation Officer

Date: 3/10/10

Attachment A
CONSULTATION LIST
FOR ENERGY EFFICIENCY AND CONSERVATION BLOCK GRANTS &
THE STATE ENERGY PLAN PROGRAMS

The work items and undertakings listed herein qualify for assistance from the U.S. Department of Energy's (DOE) Energy Efficiency and Conservation Block Grants (EECBG) or the State Energy Plan (SEP) implemented by the Texas State Energy Conservation Office (SECO) of the Comptroller of Public Accounts (CPA). By memorandum dated August 28, 2009 (Attachment B), the DOE has delegated limited authority for compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (Section 106), to CPA and SECO or its subrecipients for purposes of the EECBG program. This document, known as the Consultation List, shall assist the parties in carrying out the reviews and consultation between CPA or its subrecipients and the Texas Historical Commission (THC), acting as the Texas State Historic Preservation Officer (SHPO), for Section 106 compliance.

TERMS OF USE

Any work item in the EECBG or SEP program that is not addressed in this list shall be subject to THC consultation under Category B. This Consultation List applies only to projects funded through the EECBG or SEP programs as part of the DOE's Energy Efficiency and Renewable Energy Program (EERE), part of the American Recovery and Reinvestment Act (ARRA) and set to expire in 2012. The terms of this Consultation List shall then terminate unless otherwise agreed to by the THC and CPA. This Consultation List is for the exclusive use of CPA and the EECBG and SEP programs and shall not apply to any other federally-funded program. CPA is advised to document all points of its decision-making in order to demonstrate proper compliance with Section 106.

The following categories apply to any structure or building that is forty-five (45) years of age or older, that is listed in or eligible for listing in the National Register of Historic Places, that is located in a National Register listed or eligible historic district, or that is in a locally designated historic district. Please note that consultation with THC will be required for all State Archeological Landmarks designated under the Antiquities Code of Texas and all current and former county courthouses protected by Chapter 442.008 of the Texas Government Code. Ground-disturbing activity, regardless of the age of structures on the property, will also require consultation with THC in most cases.

Category A No SHPO Consultation Required:

THC as SHPO has concluded that the following work items do not meet the definition of undertaking since they do not have the potential to cause effects on historic properties per 36 CFR § 800.3(a) and thus *no historic properties will be affected* per 36 CFR § 800.4(d), or they have limited potential to affect historic properties per 36 CFR § 800.5 and will have *no adverse effect* upon historic properties if carried out as described. CPA and subrecipients are not required to consult further with THC for work in this category.

CPA and its delegated entities are responsible for ensuring that work is carried out as described and for documenting their compliance.

Building energy audits and retrofits:

- Energy audits and feasibility studies.

Heating, ventilation, and air conditioning (HVAC):

- Routine maintenance or retrofits to existing mechanical equipment, provided there is no physical impact on the building;
- Replacement of existing mechanical equipment or installation of supplemental equipment, provided that exterior equipment is installed within the same footprint on the same pad, and interior equipment is installed within an existing mechanical closet;
- Upgrading existing facility and infrastructure-related pumps and motors, including those for HVAC systems, to variable-speed or premium efficiency standards;
- Sealing, restoring, or insulating HVAC ducts, provided that the ducts are not visible in occupied spaces of the building and access to the ducts does not require demolition of walls or ceilings in occupied spaces of the building; and
- Adding or replacing existing building controls systems including HVAC control systems and the replacement of building-wide pneumatic controls with digital controls, thermostats, dampers, and other individual sensors like smoke detectors or carbon monoxide detectors (wired or non-wired).

Roofing:

- Installation of new roofing, including white roofs or cool roofs, on a flat-roofed building with a parapet, such that the roofing material is not visible from any public right-of-way.

Windows and doors:

- Weatherstripping around windows and doors; and
- Caulking around windows and doors, provided that the color of the sealant matches adjacent materials.

Lighting and appliances:

- Installation of compact fluorescent or LED bulbs in existing fixtures;
- Replacement of fluorescent bulbs, ballasts, and/or wiring in existing fixtures;
- Replacement of existing fluorescent fixtures with new fixtures, provided that the fixtures are not original to the building;
- Installation of motion/occupancy sensors for lighting control;
- Replacement of existing lighting in street lighting fixtures with high efficiency lighting; and
- Replacement of existing appliances with "EnergyStar"™ appliances.

Insulation:

- Attic insulation with proper ventilation, provided that insulation is fiberglass batt or loose fill only;
- Under-floor insulation in basements or crawl spaces, provided that insulation is fiberglass batt or loose fill only, and ventilation of crawl spaces;
- Exterior blown-in wall insulation where holes are not drilled through exterior wall material or decorative plasterwork on the interior, and result in no permanent visible alteration to the structure;
- Water heater tank and pipe insulation; and
- Radiant barriers in unoccupied attic spaces.

Water conservation:

- Water conservation measures, such as installation of low-flow faucets, toilets, showerheads, urinals, or distribution device controls, provided that plumbing fixtures to be replaced are not original to the building;
- Upgrading existing facility and infrastructure-related pumps and motors, including those water/wastewater facilities, to variable-speed or premium efficiency standards;
- Hot water tank replacement that does not require a visible new supply or venting; and
- Repairing plumbing systems in a manner that does not affect the interior or exterior of the building.

Electrical:

- Repairing or upgrading electrical systems in a manner that does not affect the interior or exterior of the building.

Ground-disturbing activity and site work:

- Repairing or replacing in-kind existing driveways, parking areas, and walkways with materials of similar appearance; and
- Excavating to gain access to existing underground utilities to repair or replace them, in a manner that does not disturb historic exterior building or landscape materials or features, and where all construction occurs within existing trenches.

Category B SHPO Consultation Required:

The following undertakings may affect historic properties per 36 CFR § 800.5 and will always require Section 106 review if they involve a structure that is forty-five (45) years of age or older, under the terms of Stipulation III (B) of this Agreement. Any work item or undertaking in the BECBG or SEP program that is not described in Category A or Category B of this Consultation List will also require THC review. **In addition, consultation with THC will be required for all State Archeological Landmarks designated under the Antiquities Code of Texas, all current and former county courthouses protected by Chapter 442.008 of the Texas Government Code, and most ground-disturbing activity, regardless of the age of structures on the property.**

Building energy audits and retrofits:

- Implementation of any energy audit recommendations that do not fall within the types of work described in Category A.

Heating, ventilation, and air conditioning (HVAC):

- Construction of new district heating and cooling systems;
- Construction of new combined heat and power systems, if construction requires ground disturbance;
- Installation of geothermal heating systems; and
- Installation of biomass thermal systems.

Roofing:

- Replacement of visible roofing materials; and
- Installation of green or sod roofs.

Windows and doors:

- Installation of window treatments such as awnings, solar deflection screens, double pane insulation, or solar film or glazing;
- Installation of storm windows or doors; and
- Replacement of windows or doors.

Lighting and appliances:

- Replacement of non-fluorescent light fixtures, or replacement of fluorescent light fixtures that are original to the building.

Insulation:

- Use of spray foam insulation products;
- Wall insulation that does not comply with the conditions described in Category A; and
- Roof insulation during roof replacement, especially exterior rigid insulation.

Water conservation:

- Replacement of original plumbing fixtures.

Renewable energy technologies:

- Solar photovoltaic systems;
- Solar hot water systems; and
- Wind turbines.

Ground disturbing activity:

- New construction or additions; and
- Trenching for utilities where work does not occur in an existing trench.

Attachment B
AUGUST 28, 2009, DELEGATION MEMORANDUM
(next page)

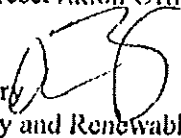


Department of Energy
Washington, DC 20585

August 28, 2009

MEMORANDUM

TO: State Historic Preservation Officers
Tribal Historic Preservation Officers

FROM: Catherine R. Zoi 
Assistant Secretary
Energy Efficiency and Renewable Energy

SUBJECT: Memorandum from EERE Regarding Delegation of Authority for Section 106 Review of Undertakings, Assisted by the U. S. Department of Energy, Office of Energy Efficiency and Renewable Energy

The Department of Energy (DOE), through the Office of Energy Efficiency and Renewable Energy (EERE), provides financial assistance to states, U.S. territories, units of local government, and Indian Tribes through the Energy Efficiency and Conservation Block Grant (EECBG) Program, Weatherization Assistance Program (Weatherization), and State Energy Program (SEP). Attached hereto is a one-page summary of the three programs. Additional program information is available at the following links: <http://www.eecbg.energy.gov/>; <http://apps1.eere.energy.gov/wip/weatherization.ctm>; http://apps1.eere.energy.gov/state_energy_program/.

Through this memorandum, DOE intends to formalize the role of the States and DOE's award recipients (Applicants) to assist DOE in carrying out its Section 106 compliance responsibilities. In order to streamline DOE's compliance with Section 106 and its implementing regulations, "Protection of Historic Properties" (36 CFR Part 800), EERE is authorizing its Applicants under the EECBG, Weatherization, and SEP programs to initiate consultation pursuant to 36 CFR § 800.2(c) (4). Effective immediately, EERE Applicants and their authorized representatives may consult with the State Historic Preservation Officers (SHPOs) and Tribal Historic Preservation Officers (THPOs) to initiate the review process established under 36 CFR Part 800 and to carry out some of its steps. Specifically, EERE Applicants are authorized to gather information to identify and evaluate historic properties, and to work with consulting parties to assess effects. EERE retains responsibility to document its findings and determinations in order to appropriately conclude Section 106 review.

EERE also remains responsible for initiating government-to-government consultation with federally recognized Indian Tribes. EERE's responsibility to consult on a government-to-government basis with Indian Tribes as sovereign nations is established through specific authorities and is explicitly recognized in 36 CFR Part 800. Accordingly, EERE may not delegate this responsibility to a non-federal party without



the agreement of the Tribe to do so. Where no such agreement exists, EERE will initiate tribal consultation.

Authorized Applicants must notify EERE whenever:

- Either the EERE Applicant or the SHPO/THPO believes that the Criteria of Adverse Effect pursuant to 36 CFR § 800.5, apply to the proposal under consideration by EERE;
- There is a disagreement between an Applicant, or its authorized representative, and the SHPO/THPO about the scope of the area of potential effects, identification and evaluation of historic properties and/or the assessment of effects;
- There is an objection from a consulting party or the public regarding their involvement in the review process established by 36 CFR Part 800, Section 106 findings and determinations, or implementation of agreed upon measures; or
- There is the potential for a foreclosure situation or anticipatory demolition as defined under 36 CFR § 800.9(b) and 36 CFR § 800.9(c), respectively.

EERE will participate in the consultation when such circumstances arise.

EERE expects its Applicants that are so authorized, to involve consulting parties in Section 106 findings and determinations and to carry out the exchange of documentation and information in a respectful, consistent and predictable manner. Technical assistance is available to Applicants from EERE regarding the coordination of Section 106 reviews, if needed.

If you have any questions, please contact Dr. F. G. (Skip) Gosling, DOE Federal Preservation Officer/Chief Historian, Office of History and Heritage Resources, (202) 586-5241 or skip.gosling@hq.doe.gov or Steven P. Blazek, NEPA Compliance Officer, (303) 275-4723 or steve.blazek@go.doe.gov.