

MEMORANDUM

DATE: June 2014

FROM: Mark Wolfe, Texas State Historic Preservation Officer, Texas Historical Commission

TO: State and local officials receiving HUD funding or assistance

SUBJECT: Guidelines for consulting with the Texas State Historic Preservation Officer (SHPO) to meet requirements of 24 CFR § 58.5(a) and Section 106 of the National Historic Preservation Act

The Texas State Historic Preservation Officer (SHPO) and the U.S. Department of Housing and Urban Development (HUD) are working together to improve the Section 106 consultation process as it relates to projects funded in whole or in part with HUD funds. Section 106 of the National Historic Preservation Act (16 USC § 470f) requires federal agencies to take into account the effects of their undertakings on historic properties and afford the Advisory Council on Historic Preservation (Council) a reasonable opportunity to comment on those undertakings. The regulations issued by the Council at 36 CFR 800 provide guidelines for consultation with the SHPO, Council, and others. This memorandum explains the responsibilities of HUD grantees preparing environmental reviews under 24 CFR Part 58, “Environmental Review Procedures for Entities Assuming HUD Environmental Responsibilities.” These regulations cover responsibilities for complying with Section 106 of the National Historic Preservation Act.

Both the SHPO and HUD look forward to working with you under the attached consultation guidelines. A number of helpful websites are also available for more information.

Advisory Council on Historic Preservation: www.achp.gov

Texas Historical Commission: www.thc.state.tx.us

Historic Preservation section of the HUD Environmental Review website: www.onecpd.info/environmental-review/historic-preservation

National Park Service/National Register of Historic Places: www.nps.gov

National Preservation Institute (offers Section 106 training programs): www.npi.org

National Trust for Historic Preservation: www.preservationnation.org

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Guidelines for Consulting with the Texas State Historic Preservation Officer to Meet Requirements of 24 CFR § 58.5(a)

Role of the Federal Agency and Responsible Entities: Understanding Your Responsibilities under Federal Law

The National Historic Preservation Act (NHPA) of 1966, as amended, (16 USC 470 et seq.) requires all federal agencies to take into account the effects of their undertakings on historic properties that are included in, or eligible for inclusion in, the National Register of Historic Places **prior** to approval of the expenditure, obligation of any federal funds, or the issuance of any federal license or federal permit.

Under the Council's regulations, 36 CFR Part 800, each federal agency or their federally delegated authority is responsible for:

1. Determining if there is an undertaking (36 CFR § 800.3);
2. Determining the project's area of potential effects, or APE (36 CFR § 800.4(a));
3. Identifying historic properties within the project's APE, if such properties exist (36 CFR § 800.4);
4. Assessing the effect(s) that the project may have on any historic properties in the APE (36 CFR § 800.5);
and
5. Resolving any adverse effects to historic properties by seeking measures to avoid, minimize, or mitigate the effect (36 CFR § 800.6).

Federal agencies or those entities assuming the legal authority and responsibilities for compliance are **required** to consult with the SHPO during this identification and evaluation process. Federal agencies are encouraged to integrate the Section 106 process into agency planning at its earliest stages.

ASSUMPTION OF RESPONSIBILITY BY THE LOCAL COMMUNITY FROM HUD

Under the Housing and Community Development Act (42 USC 5301), units of general local government that are recipients of federal funds from HUD or have land use jurisdiction over HUD-assisted projects assume legal responsibility for compliance with all applicable federal environmental laws, including Section 106 of the NHPA. 24 CFR § 58.10 states that “the responsible entity must assume the environmental responsibilities for projects under programs cited in § 58.1(b). In doing so, the responsible entity must comply with the provisions of NEPA [National Environmental Policy Act] and the CEQ [Council on Environmental Quality] regulations contained in 40 CFR parts 1500 through 1508, including the requirements set forth in this part.” Section 58.5(a) clarifies that the responsible entity also must assume responsibility for compliance with the NHPA and 36 CFR Part 800 regulations.

Responsible Entities serve as the federal authority, in lieu of HUD, for Section 106 review and bear full financial and legal responsibility for undertakings under Section 106. Responsible Entities that are authorized to serve in this capacity include elected governments of town, city, county, state, and tribal governments. These governments may be political subdivisions of the state, have taxing authority, and exercise land use planning. In this document, references to the federal agency or agency official should be interpreted to mean a Responsible Entity. Quasi-governmental agencies, non-profits, and for-profit entities cannot function as Responsible Entities and do not have authority to enter into Section 106 processes. Responsible Entities should ensure that they contact the SHPO and interested parties directly when they invite parties to enter into Section 106 consultation. This responsibility should never be delegated to third parties, including contractors.

For some types of HUD grant programs, in particular housing programs and programs that did not receive statutory authority to prepare reviews under Part 58, HUD remains responsible for environmental review. These programs are governed by separate environmental regulations, 24 CFR Part 50, Protection and Enhancement of

Environmental Quality, and in Texas, HUD and the SHPO have entered into a Programmatic Agreement to address these programs. These programs are not covered in this memorandum.

PROACTIVE PROJECT PLANNING AND SECTION 106

The Section 106 review process is intended to be a planning tool, providing full consideration of appropriate treatments for historic properties. An early project review permits modifications to a project while they are still relatively easy to make and, therefore, reduces the potential for conflict and delay. Additionally, if the review is initiated early in the planning stages of a project, a broad range of alternatives can be considered. It is imperative that federal agencies or Responsible Entities seek to avoid adverse effects to historic properties, and planning is critical to this goal. It may be possible to include preservation activities as eligible project costs. The Texas SHPO strongly encourages communities to be proactive in their efforts to conduct surveys and to identify and evaluate their historic resources. Time spent evaluating these resources now will streamline the Section 106 review process in the future.

COMPLIANCE WITH SECTION 106 AND NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

Both NEPA and the Section 106 review processes are intended as analytical tools so that environmental issues, concerning both the natural and built environments, receive reasonable and fair consideration. These review processes are performed in the project planning stage, when adverse impacts to the environment can still be avoided or more easily mitigated. Therefore, your compliance with these federal laws is essential to a timely execution of projects at the state and local level.

It should be understood that Section 106 and NEPA are **not** the same – they are two separate laws. Unless the NEPA process is formally substituted for Section 106 review, the information submitted for a NEPA review will not suffice for a Section 106 review. Generally, you should plan to complete your responsibilities under Section 106 **first** and then address historic properties in your NEPA compliance. Extensive guidance on coordination of the Section 106 and NEPA processes, or substitution of NEPA procedures for Section 106, is in *NEPA and NHPA: A Handbook for Integrating NEPA and Section 106*, available at http://www.achp.gov/docs/NEPA_NHPA_Section_106_Handbook_Mar2013.pdf.

INVOLVING CONSULTING PARTIES IN THE SECTION 106 REVIEW PROCESS

The Section 106 regulations state that federal agencies or Responsible Entities must actively consult with specific individuals and organizations throughout the Section 106 review process. Consulting parties are defined as: “individuals and organizations with a demonstrated interest in the undertaking due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking’s effect on historic properties” (36 CFR § 800.2(c)). Mandatory consulting parties include: the SHPO; Tribal Historic Preservation Officers (THPO) if applicable; federally recognized tribes if applicable; local units of government if the project may affect historic properties within their jurisdiction; and applicants for federal funds, licenses, or permits. Other individuals and organizations may request to be consulting parties, but that decision is ultimately up to the federal agency. The federal agency or Responsible Entity, at an early stage of the Section 106 process, is required to consult with the SHPO to identify those individuals and organizations that should be invited to become consulting parties.

In Texas, communities may have multiple commissions and organizations with a vested interest in historic preservation. Each county in Texas is required by state law to have a County Historical Commission (CHC), which is an official body of county government. Many Texas municipalities also have a local historic preservation officer and landmark commission. Historic downtown commercial districts may participate in the Texas Main Street Program, and the local Main Street manager would be interested in projects in the Main Street district. Some communities may also have local or regional non-profit preservation organizations. The federal agency or Responsible Entity should identify and consider including all of these entities in the consultation process, when appropriate. City or county governments, as well as the Texas SHPO, can provide contact information for preservation organizations in a community.

TRIBAL CONSULTATION

Section 101(d)(6)(B) of the NHPA requires the agency official to consult with any federally recognized Indian tribe that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement is not limited to undertakings on tribal lands; it applies to all undertakings regardless of location. The federal government has a unique legal relationship with Native American tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with a tribe must, therefore, recognize the government-to-government relationship between the federal government and tribes. A federal agency or Responsible Entity must ensure that Native American tribes have opportunities to identify concerns and participate as consulting parties in all aspects of consultation for projects that are of interest to them. It is necessary to contact the Indian tribes early in the process in order to determine whether the project has a potential to affect properties of religious and cultural significance to them and to discuss relevant preservation issues early in project planning.

On June 15, 2012, HUD issued CPD Notice CPD-12-006, "Process for Tribal Consultation in Projects That Are Reviewed Under 24 CFR Part 58." To ensure that Responsible Entities are aware of responsibilities to consult with tribes that may have an interest in HUD assisted projects, they should ensure that they are fully cognizant of the contents of this notice. It can be found at: www.onecpd.info/environmental-review/historic-preservation/. The HUD Tribal Directory Access Tool at egis.hud.gov/tadat/Tribal.aspx can also be helpful in this regard. In addition, maps showing counties that various tribes have indicated are of interest to them and guidance on consulting with tribes is available on the Texas SHPO website at www.thc.state.tx.us/project-review/tribal-consultation-guidelines.

INVOLVING THE PUBLIC IN THE SECTION 106 REVIEW PROCESS

The views of the public are essential to informed decision-making in the Section 106 process, and it is incumbent upon the federal agency or Responsible Entity to seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties. The federal agency or Responsible Entity must provide the public with information about the project and allow the public to comment. Members of the public may also provide views on their own initiative for consideration. The federal agency must decide early how and when to involve the public in the Section 106 review process. A formal plan is not required, although that may be appropriate depending upon the scale of the undertaking and the magnitude of its effects on historic properties.

Because Section 106 compliance is the responsibility of the federal agency or Responsible Entity, concerns expressed by the public about specific projects should first be directed to the appropriate federal, state, county, or municipal contact, not the SHPO. Doing otherwise may result in inefficient and erroneous communication and possible unforeseen delays in the consultation process. It is generally not appropriate for the public to contact the SHPO unless communication efforts with the federal agency or Responsible Entity have been unsuccessful.

Role of the SHPO

The NHPA requires the governor of every state to appoint a State Historic Preservation Officer (SHPO) to administer a preservation program in the state. In Texas, the Executive Director of the Texas Historical Commission (THC) serves as SHPO. Founded in 1953 as the Texas State Historical Survey Committee and renamed in 1973, the THC is composed of 13 citizen members appointed by the governor to staggered six-year terms. The agency employs individuals who work in various fields, including archeology, architecture, history, economic development, heritage tourism, public administration, and urban planning. The THC's mission is to protect and preserve the state's historic and prehistoric resources for the use, education, enjoyment, and economic benefit of present and future generations.

Under the NHPA, the SHPO reflects the interests of the state and its citizens in the preservation of their cultural heritage and ensures that historic properties are taken into consideration at all levels of planning and development.

To do so, SHPOs identify and nominate eligible properties to the National Register of Historic Places, advise and assist federal and state agencies and local governments in carrying out preservation responsibilities, and provide the public with the information, education, training, and technical assistance necessary to get the job done.

As specified in the Section 106 regulations, the SHPO is a mandatory consulting party in the Section 106 review process. **The SHPO is not required or empowered to conduct research, identify historic properties, or determine project effects related to Section 106 projects on behalf of a federal agency. Rather, the SHPO is tasked with responding, either with concurrence or non-concurrence, to a federal agency's or Responsible Entity's adequately documented finding of eligibility or effect. Furthermore, the SHPO does not have the authority to provide "clearance" or authorize federally funded, licensed, or permitted projects.**

In order to avoid misunderstandings about the SHPO's role in the Section 106 process, the following points should be clarified:

The SHPO does not have a complete list or database of all historic properties in the state, but the SHPO maintains:

1. The Texas Historic Sites Atlas, available at atlas.thc.state.tx.us, is an online GIS database of historic properties that are listed in the National Register of Historic Places or have the state-level designations of Recorded Texas Historic Landmark or State Antiquities Landmark (buildings only). Please keep in mind that the Atlas does not include properties that have been determined eligible for the National Register, and further, that comprehensive survey efforts have not been undertaken throughout the state. Additional measures to identify historic properties will likely be necessary as part of your project.
2. The Texas Archeological Sites Atlas contains records of State Antiquities Landmarks, other identified archeological sites, and archeological surveys that have been conducted in Texas. Access to this information is restricted to qualified archeologists. Archeological site locations are not public information – they are considered confidential under federal and state laws.
3. Records on designated historic properties, historic resource surveys, and prior Section 106 consultation are maintained as paper and/or digital files. Access to this information is available only at SHPO offices. Please contact the SHPO to make arrangements for research.

The SHPO cannot conduct site visits. The SHPO generally cannot accommodate requests for site visits concerning Section 106 projects, except in unusual or complex situations. For this reason, it is critical that the information submitted as part of the Section 106 consultation is complete and adheres to the guidelines in this document.

Section 106 Process

INITIATING THE SECTION 106 PROCESS (§ 800.3)

Section 106 is triggered by the presence of a federal undertaking. As defined in 36 CFR § 800.16(y), an undertaking is "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including those carried out on behalf of a federal agency; those carried out with federal financial assistance; and those requiring a federal permit, license, or approval." As the first step in the Section 106 process, the responsible federal agency determines whether its proposed action is an undertaking, and if so, whether it is a type of activity that could affect historic properties. This question should be considered in a general sense based on the activity proposed and prior to any efforts to identify historic properties. If based on the type of activity an undertaking has **no potential to cause effects** to historic properties, should any be present, the agency is finished with its Section 106 obligations, pursuant to 36 CFR 800.3(a)(1). Agencies are strongly advised to keep appropriate records of such findings in case members of the public or other parties raise questions at a later date.

As part of 24 CFR 58 (Environmental Review Procedures for Entities Assuming HUD Environmental Responsibilities), HUD has determined that certain project types have no potential to affect historic properties. These include activities with no physical impact on the natural or built environment, such as educational programs or supportive services. The list of activities considered exempt from Section 106 review is included in **HUD Projects Not Requiring Consultation with the SHPO** on page 17.

Other project types, including those listed in **HUD Projects Requiring Consultation with the SHPO** on page 15, do have the potential to affect historic properties and require Section 106 consultation. In these cases, the federal agency or Responsible Entity must identify the appropriate SHPO and THPO(s) for consultation, identify other potential consulting parties, and plan to involve the public, as described in the **Role of the Federal Agency** above.

The following steps in the Section 106 process may be combined into a single submittal, provided that sufficient information is included to address identification of and effects to historic properties.

IDENTIFYING HISTORIC PROPERTIES (§ 800.4)

Area of Potential Effects: If the undertaking could affect historic properties, the federal agency or Responsible Entity determines an appropriate scope for identification efforts and proceeds to identify historic properties in the Area of Potential Effects (APE). The APE is defined in 36 CFR § 800.16(d) as the: “geographic area or areas within which an undertaking may directly or indirectly cause changes in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.” For example, the APE for a housing rehabilitation project, particularly when the project is confined to the building’s interior, may address only **direct** effects and consist of the physical boundaries of the house itself. In contrast, the APE for the development of a new industrial park may include a broad area surrounding the project site that will face **indirect** effects of the development, such as visible or audible changes in the environment. The industrial park may spark additional development in the area, a phenomenon known as secondary, or **cumulative**, effects. Possible secondary effects must also be considered when defining the APE.

The Section 106 regulations are very specific and require that an agency first determine and document the APE. Only after an APE has been determined and received SHPO concurrence should the necessary steps be taken to identify historic properties, if such properties exist. An agency cannot first discern where historic properties are located and then define the APE so as to avoid including these properties within it. Determining the APE is not intended to center on what is convenient for the agency to avoid affecting historic properties.

Historic Properties: The goal of identification efforts is to determine if any historic properties are present in the APE. A historic property is defined in 36 CFR § 800.16(l)(1) as: “any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places.” The term “eligible for inclusion” refers to properties that are not formally listed but do meet the criteria for listing in the National Register. Under Section 106, properties determined eligible are given equal consideration to those formally listed in the National Register.

The National Register of Historic Places is the official list of properties recognized by the federal government as worthy of preservation. To be included in or eligible for inclusion in the National Register, a property must be significant under at least one of four criteria. The property must be:

- A. Associated with events that have made a contribution to the broad patterns of history;
- B. Associated with persons significant in the past;
- C. Embody the distinctive characteristics of a type, period, or method of construction, or represent the work of a master, or possess high artistic values; or
- D. Have potential to yield information important in history or prehistory (archeological data).

The property must also retain integrity, defined as the ability to convey significance. The seven aspects of integrity are location, design, setting, materials, workmanship, feeling, and association. The criteria for evaluation and aspects of integrity are further explained in the bulletin *How to Apply the National Register Criteria for Evaluation* at www.nps.gov/history/nr/publications/bulletins/nrb15.

Generally, properties must be at least 50 years of age to be eligible for the National Register. Certain properties that have achieved significance *within* the last fifty years and are thus not yet 50 years of age may be listed if they are of exceptional importance. Examples in Texas include the Apollo Mission Control Room and other early manned spaceflight resources at the Johnson Space Center in Houston. **The Texas SHPO requests that your submittal address all properties 45 years of age or older**, to allow evaluation of properties nearing the 50-year mark for exceptional significance. This also provides a buffer for cases where the date of a property has been recorded incorrectly, as is sometimes the case in tax appraisal records, or where the date has been approximated.

The National Register is not a complete list of all historic properties – it is dynamic, with new properties being added continually. In Texas, more than 3,000 properties are listed in the National Register, and of these, 46 have been designated National Historic Landmarks. National Historic Landmarks are nationally significant historic places that possess exceptional value or quality in illustrating or interpreting the heritage of the United States; properties listed in the National Register may be significant at the local, state, or national level. In addition to designated properties, many thousands more historic resources have been determined to be eligible for the National Register.

National Park Service guidance for the National Register categorizes property types as buildings, structures, sites, objects, and districts. HUD projects most often involve individual buildings or groupings of buildings and other resources as historic districts. The bulletin *Historic Residential Suburbs*, <http://www.nps.gov/history/nr/publications/bulletins/suburbs/index.htm>, will be of assistance in identifying and evaluating residential properties. Particularly for projects occurring in rural settings, it is also important to consider landscape features as part of potential historic districts. A cultural landscape is defined as “a geographic area, including both cultural and natural resources and the wildlife or domestic animals therein, associated with a historic event, activity, or person or exhibiting other cultural or aesthetic values.” The National Park Service defines four general types of cultural landscapes that are not mutually exclusive: historic designed landscapes (such as a park or formal garden), historic vernacular landscapes (such as a farmstead), historic sites (such as a battlefield), and ethnographic landscapes. Another term for ethnographic landscape, a traditional cultural property is defined as one that is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community. These practices or beliefs must be rooted in that community’s history, and be important in maintaining its continuing cultural identity. National Register bulletins on evaluating landscapes, traditional cultural properties, and other resource types can be found on the National Park Service website at www.nps.gov/nr/publications/index.htm.

Identification of Historic Properties: The scope of identification efforts will depend on the nature of the project. The federal agency or Responsible Entity should compile information on known historic properties in the APE by consulting the SHPO’s databases and files. If the APE contains properties over 45 years old that have not been inventoried, a survey may be necessary. Even a small project, such as the rehabilitation of an individual residence, may require documentation of surrounding properties in order to determine if the area constitutes a historic district. Historic resource surveys are necessary for projects affecting broad areas and also facilitate coordination of multiple disparate projects within a community. A minimum level of information can be obtained through a reconnaissance-level, or windshield, survey of historic-age architectural resources. This type of survey typically involves photographing areas that are likely to contain historic properties and evaluating their historic significance. Research is conducted to develop a general history of the area and can be gathered from available local resources (see page 13). Surveys should be supervised or carried out by a professional meeting the Secretary of the Interior’s Professional Qualifications Standards in the area of history, architectural history, or historic architecture (see www.nps.gov/history/local-law/arch_stnds_9.htm). Once the survey is completed, communities consult with the SHPO to evaluate the eligibility of any historic properties that were documented. It is important to note that because historic properties are newly identified on a continuing basis, surveys should periodically be updated.

Conducting a survey enables National Register-eligible properties to be identified and, in the case of historic districts, their boundaries defined. With adequate survey information, projects that fall outside the boundaries of these historic districts, specifically in areas that are not currently nor likely to become National Register-eligible, may eventually be exempt from Section 106 reviews. The SHPO believes that such an effort will significantly streamline the Section 106 review process.

For projects that involve the identification of archaeological properties, it is important to note that the survey effort must be led by a professional who meets the Secretary of the Interior's qualification standards for archaeology. In addition, the archeologist must receive an Antiquities Permit from the Texas Historical Commission for investigations on non-federal public land, i.e. land owned by the state or a political subdivision of the state, including a municipal government, school district, or county. With respect to traditional cultural properties, please note that identifications of such properties can only be made by consulting with the culturally affiliated groups, including Native American tribes.

SHPO Review: Once adequate documentation of historic properties in the APE has been assembled, it must be submitted to the SHPO for review and comment. If the federal agency/Responsible Entity and SHPO concur that properties within the APE are *not eligible* for listing in the National Register, this concludes the agency's obligations under Section 106, and the project may proceed without further consultation. This determination may also be phrased as *no historic properties affected*. However, if the agency and SHPO concur that historic properties are present, the agency must assess possible adverse effects as the next step in the consultation process. Please note that information on the effects of the project may be submitted simultaneously to expedite the review process. If the agency and SHPO cannot concur on National Register eligibility, the agency may seek a formal determination of eligibility from the Keeper of the National Register of Historic Places per 36 CFR § 800.4(c)(2) and 36 CFR § 63.2.

ASSESSING ADVERSE EFFECTS (§ 800.5)

Effect is defined in 36 CFR § 800.16(i) as: "alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register." When a project will affect a historic property, the federal agency/Responsible Entity must apply the criteria of adverse effect to determine if the effect will be adverse, or negative. Adverse effect is defined in 36 CFR § 800.5(a)(1) as an action that may: "alter, directly or indirectly, any of the characteristics 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... adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance, or be cumulative." Evaluation of visual effects, as noted above, may be particularly important if eligible traditional cultural properties and/or cultural landscapes are in the APE.

Adverse effects include, but are not limited to:

- Physical destruction or damage to all or part of a property (including demolition);
- Alteration of a property that is not consistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties;
- Removal of a property from its historic location;
- Change of the character of a property's use or of physical features within the property's setting that contribute to its historic significance;
- Introduction of visual, atmospheric, or audible elements that diminish the integrity of a property's significant features; and
- Neglect of a property which causes its deterioration.

Demolition of a historic property, regardless of the property's condition, is always considered an adverse effect. Likewise, rehabilitation or hazardous material remediation projects will have an adverse effect if the work destroys

historic fabric or otherwise does not meet accepted preservation practice, as outlined in the Secretary of the Interior's Standards for the Treatment of Historic Properties and associated guidelines.

Secretary of the Interior's Standards for the Treatment of Historic Properties: The Standards, which can be applied to any type of historic property, provide philosophical consistency to a preservation project. In general, the Standards place value on repairing and retaining historic fabric, where possible, and guide necessary changes so that they will have minimal impact. The Standards include four treatments:

- Preservation involves measures to sustain the existing form, integrity, and materials of a historic property and includes activities such as stabilization, maintenance, and repair;
- Rehabilitation makes possible a compatible use for a property through repair, alterations, and additions while preserving those portions or features which convey its historical, cultural, or architectural values;
- Restoration results in an accurate depiction of the form, features, and character of a property as it appeared at a particular period of time; and
- Reconstruction replicates, through new construction, a non-surviving property in its historic location.

Choosing an appropriate treatment depends on a variety of factors, including the significance of the property, its condition and proposed use, and intended interpretation. The full text of the Standards and accompanying guidelines are available at www.nps.gov/tps/standards.htm.

The Standards for Rehabilitation are most commonly applied to HUD projects. They state:

1. A property will be used as it was historically or be given a new use that requires minimal change to its distinctive materials, features, spaces, and spatial relationships.
2. The historic character of a property will be retained and preserved. The removal of distinctive materials or alteration of features, spaces, and spatial relationships that characterize a property will be avoided.
3. Each property will be recognized as a physical record of its time, place, and use. Changes that create a false sense of historical development, such as adding conjectural features or elements from other historic properties, will not be undertaken.
4. Changes to a property that have acquired historic significance in their own right will be retained and preserved.
5. Distinctive materials, features, finishes, and construction techniques or examples of craftsmanship that characterize a property will be preserved.
6. Deteriorated historic features will be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature will match the old in design, color, texture, and, where possible, materials. Replacement of missing features will be substantiated by documentary and physical evidence.
7. Chemical or physical treatments, if appropriate, will be undertaken using the gentlest means possible. Treatments that cause damage to historic materials will not be used.
8. Archeological resources will be protected and preserved in place. If such resources must be disturbed, mitigation measures will be undertaken.
9. New additions, exterior alterations, or related new construction will not destroy historic materials, features, and spatial relationships that characterize the property. The new work will be differentiated from the old and will be compatible with the historic materials, features, size, scale and proportion, and massing to protect the integrity of the property and its environment.
10. New additions and adjacent or related new construction will be undertaken in such a manner that, if removed in the future, the essential form and integrity of the historic property and its environment would be unimpaired.

When evaluating direct effects of a project on a historic property, work meeting the Standards will be found to have no adverse effect.

Additional guidance on interpreting the Standards can be found on the National Park Service (NPS) website at www.nps.gov/tps/standards/applying-rehabilitation.htm. Specific guidelines on incorporating sustainable practices at historic properties are available at www.nps.gov/tps/standards/rehabilitation/guidelines/index.htm. NPS also publishes Preservation Briefs, which describe appropriate preservation work based on material or property type. They are available in print form from the SHPO office or electronically at www.nps.gov/tps/how-to-preserve/briefs.htm. The following briefs may be of particular interest:

- #9: The Repair of Historic Wooden Windows;
- #32: Making Historic Properties Accessible;
- #37: Appropriate Methods of Reducing Lead Paint Hazards in Historic Housing; and
- #45: Preserving Historic Wooden Porches.

SHPO Review: A Responsible Entity finding of no adverse effect must be submitted to the SHPO for review and concurrence. Accompanying documentation should fully explain the work proposed; evaluate direct, indirect, and cumulative effects, as applicable to the project; and justify the agency's determination of effect. Documentation for direct effects of construction activities should include architectural plans and specifications, work write-ups, and product or material cut sheets, as appropriate. This information may be submitted simultaneously with the identification of historic properties to expedite the review process.

A determination of **no adverse effect**, as discussed in 36 CFR § 800.5(b) means that there are historic properties present in the project's APE and the project will have an effect on them; however, this effect does not meet the criteria of adverse effect. For example, rehabilitation of a historic house meeting the Secretary of the Interior's Standards for Rehabilitation would have no adverse effect. If the agency and SHPO concur that the project will have no adverse effect, the project may proceed without further consultation, provided that the scope of work does not change following SHPO review. However, further consultation will be necessary if the project will have an **adverse effect** on any historic properties in the APE.

RESOLVING ADVERSE EFFECTS (§ 800.6)

When adverse effects are found, the federal agency/Responsible Entity must continue consultation with the SHPO/THPO and consulting parties in an attempt to resolve the effects. The agency must also provide an opportunity for members of the public to express their views on the undertaking. The goal of ongoing consultation and public input is to seek methods to "avoid, minimize, or mitigate" the adverse effects, in that order of preference.

Additionally, the agency official must notify the Council when adverse effects are found, and the agency, SHPO, or a consulting party may invite the Council to join consultation. The Council will decide on its participation within fifteen (15) days of receipt of a request, basing its decision on criteria set forth in Appendix A to 36 CFR Part 800. Unless requested by one of the parties, the Council generally declines to become involved in routine consultation.

In some cases, ongoing consultation results in an outcome that will avoid the adverse effect. Examples include revising the proposed work in a rehabilitation project to meet the Secretary of the Interior's Standards for Rehabilitation, or changing the scope of work from demolition to stabilization and mothballing. If the federal agency chooses to alter the project, resubmits it for review, and the SHPO concurs that the revised work will have no adverse effect, the project may proceed without further consultation.

If the adverse effect cannot or will not be avoided, the agency official or Responsible Entity must consult with the SHPO/THPO, other consulting parties, and the Council, if applicable, to develop a Memorandum of Agreement. This legally binding document outlines the steps that will be taken to minimize and/or mitigate the adverse effect. Mitigation should be relevant to the project at hand but can take any form the parties agree upon. Common examples include archival documentation to offset the loss of a historic property to be demolished, or revising architectural drawings to make a new construction project more compatible with a surrounding historic district. If

consultation to develop an agreement is successful, the agency official and SHPO/THPO execute the agreement as signatories. Any other parties who are tasked with responsibilities under the agreement should be included as invited signatories, and those who wish to indicate their support for the agreement may sign as concurring parties. The agreement goes into effect when fully executed by the required and invited signatories and filed with the Council. This concludes the Section 106 process, and the agency may proceed with the project in accordance with the terms of the agreement.

PROGRAMMATIC AGREEMENTS AND STREAMLINING CONSULTATION

For communities in Texas, the Section 106 review process may be streamlined by entering into a Programmatic Agreement (PA) with the SHPO and the Council pursuant to 36 CFR § 800.14(b). A PA may set forward alternate procedures for consultation in response to local conditions and program goals. Communities that are Certified Local Governments (CLGs) and have strong local historic preservation programs may be able to take a more proactive role in identification and evaluation efforts for projects. Please contact the SHPO if you are interested in pursuing a PA.

Guidelines for HUD Program Consultation with the SHPO

HUD and the SHPO have developed the following guidelines for consultation with the SHPO. When preparing your annual action plan, please include the information described in these guidelines for the appropriate project type. The information described in these guidelines reflects the **minimum requirements** for a Section 106 review. Please contact HUD or the SHPO to determine if a project not mentioned in these guidelines requires consultation with the SHPO.

WHEN IS CONSULTATION WITH SHPO REQUIRED?

Most HUD-funded projects require consultation with the SHPO. Policy regarding affordable housing has been promulgated by the Council (72 FR 7387, February 15, 2007; see www.achp.gov/docs/fr7387.pdf). This policy provides implementation principles to be followed in consulting on affordable housing projects. Taking these principles into account, HUD, in consultation with the SHPO, has determined that the undertakings or types of projects listed in **HUD Projects Requiring Consultation with the SHPO** on page 15 may affect historic properties and require consultation with SHPO. HUD has also identified types of projects or work that do not have the potential to affect historic properties and thereby do not require consultation. These types of projects are listed in **HUD Projects Not Requiring Consultation with the SHPO** on page 17.

WHO CAN SUBMIT PROJECTS TO THE SHPO?

Federal agencies, Responsible Entities, and direct recipients of HUD funds including those under the Housing and Community Development Act (42 USC 5301) may submit projects to the SHPO. Consultants, property owners, housing authorities, and developers are not recognized as Responsible Entities. *These entities may prepare and submit information to the SHPO, but the SHPO will issue a response directly to the federal agency or Responsible Entity.* For this reason, the submittal must include federal agency or Responsible Entity contact information – including agency name, contact person, address, telephone number, and email address.

HOW TO SUBMIT YOUR PROJECT

Specific guidelines for submitting projects are outlined in the subsequent pages of this memorandum. All projects, including housing rehabilitation projects, that lack complete information may be returned for revision and resubmission, or with a request for more information. To assure a timely response from the SHPO, you are advised to initiate all consultation with the SHPO in accordance with these guidelines.

WHEN CAN I EXPECT A RESPONSE FROM SHPO?

The SHPO has thirty (30) calendar days from the receipt of an adequately documented finding of eligibility or effect to respond. The SHPO **cannot guarantee** a thirty-day response to projects submitted without adequate documentation, demonstration of a reasonable, good-faith effort to identify historic properties within the project's APE, and assessment of the effects of the project on historic properties. Material submitted in response to a request for additional information will be reviewed within thirty days of its receipt, **not** within thirty days of receipt of the original submittal.

If the SHPO does not issue a response within thirty days of receipt of adequate documentation, you may assume concurrence and move to the next step in the Section 106 process. However, you may not assume SHPO concurrence unless your submittal includes determinations with which the SHPO could concur; you must make determinations of eligibility and/or effect. If you are uncertain whether thirty days have passed since the SHPO received documentation, you may contact the project review coordinator at 512.463.5394 to determine the status of the review.

WHAT IS AN ADEQUATELY-DOCUMENTED FINDING?

The adequacy of documentation necessary to support a finding of effect and documentation specifics are outlined in 36 CFR § 800.11. A finding must be supported by sufficient documentation to enable any reviewing parties to

understand its basis. Documentation specifics are reflected in the information the SHPO requires for a project review and are, again, outlined in the subsequent pages of this memorandum.

WHAT IS A REASONABLE AND GOOD FAITH EFFORT?

36 CFR § 800.4(b)(1) indicates that federal agencies shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. The agency shall take into account past planning, research and studies, the magnitude and nature of the project 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 project's APE.

WHAT IS A FINDING OF EFFECT?

According to the Section 106 regulations, the final step in the process is to assess the effect(s) that a project may have on any historic properties in the APE. There are three possible findings of effect: 1) no historic properties affected; 2) no adverse effect; and 3) adverse effect (see **Assessing Adverse Effects** on page 8).

WHERE TO GO FOR INFORMATION ABOUT HISTORIC PROPERTIES:

The SHPO recognizes that communities, non-profits, and housing authorities may not know where to go to gather information about historic properties in a project's APE, and there may not be any readily available information in some instances. However, it is the responsibility of the federal agency or Responsible Entity to conduct research on historic properties before submitting project information to the SHPO. The SHPO suggests that the following resources be considered:

General Resources

- City or county assessors' offices
- Colleges and universities, particularly those with faculty interested in local history
- Local historians
- County and local historical commissions
- Local historical societies
- Local, regional, or state libraries
- Long-term property owners and neighbors

Specific Resources

- City directories
- City atlases and plat maps
- County and local histories
- Deed records
- Property abstracts
- Tax records
- Sanborn Fire Insurance Maps
- Texas Historic Sites Atlas and SHPO records
- Historic resource surveys

In addition, the National Park Service maintains a list of properties listed in the National Register of Historic Places. Please reference their website at: www.nps.gov/nr/research. The Texas SHPO maintains the Historic Sites Atlas at atlas.thc.state.tx.us, which includes historic properties that are listed in the National Register of Historic Places or have state-level designations. The Responsible Entity may also contact the SHPO to determine if additional information is on file, such as previous historic resource surveys of the area.

Remember, for purposes of Section 106 consultation, federal agencies or Responsible Entities are required to identify historic properties included in, or eligible for inclusion in, the National Register within the project's APE. Recognizing properties already listed in the National Register is a good starting point but is not sufficient to complete this step, as many significant properties have not yet been identified and designated. The identification of historic properties typically involves a survey of the APE, but a survey is not always necessary. The SHPO is happy to assist federal agencies and Responsible Entities in determining the appropriate level of effort to identify resources during the Section 106 process. Again, the SHPO does not conduct research or identify historic properties in a project's APE on behalf of an agency.

EMERGENCY SITUATIONS

36 CFR § 800.12 addresses procedures to be followed in emergency situations. An emergency is defined as an action undertaken in response to a disaster or emergency declared by the President of the United States, a tribal

government, a state governor, or a local government's chief executive officer or legislative body to immediate threats to life, public health, public safety, or property. The federal agency must notify the Council, SHPO, THPO, and any Indian tribe that may attach religious or cultural significance to the historic properties likely to be affected, and afford them seven (7) days to comment, or less if necessitated by circumstances. Section 106 emergency provisions are applicable only to actions that will be undertaken within thirty (30) days after formal declaration of the disaster or emergency, unless circumstances warrant an extension of that timeframe.

The Section 106 regulations are clear and denote that emergencies must be of a unique and unusual community/neighborhood-wide nature, **not** concerning single residences. Also, emergencies must be the result of a sudden event or a natural disaster. **A gradually deteriorating situation over a period of time resulting in part from neglect or diminished maintenance would not be considered an emergency.** Single-family residential rehabilitation actions are generally not considered emergencies under these regulations or 24 CFR § 58.33.

DISCOVERIES OF HUMAN REMAINS AND UNMARKED HUMAN BURIALS

Human burials are afforded special protection and treatment under both federal and state law. Even if an undertaking is funded by a federal source, municipalities and other political subdivisions of the state and are bound by the provisions of the state law and regulation when unmarked burials are discovered (see www.thc.state.tx.us/preserve/projects-and-programs/cemetery-preservation/cemetery-laws). Disturbance in area of the discovery location must cease **immediately** and further consultation with the SHPO must be initiated when such discoveries occur. Consultation with Native American tribes is also necessary when remains are or may be Native American. Numerous burials are discovered annually. Thus, it is important for municipal officials to understand their responsibilities in the event of such a discovery.

HUD Projects Requiring Consultation with the SHPO

HUD, in consultation with the SHPO, has determined that the following types of projects or activities are undertakings that have the potential to affect historic properties per 36 CFR 800.3(a). Recipients of federal funds from HUD under the Housing and Community Development Act (42 USC 5301) are Responsible Entities for purposes of Section 106 consultation and must identify historic properties (36 CFR § 800.4), assess whether the project will result in adverse effects to historic properties (36 CFR § 800.5), and attempt to resolve adverse effects (36 CFR § 800.6).

HUD PROJECTS THAT REQUIRE CONSULTATION WITH SHPO INCLUDE, BUT ARE NOT LIMITED TO:

- Rehabilitation projects that affect structures or buildings forty-five (45) years of age or older;
- Community improvement projects in an established neighborhood forty-five (45) years of age or older (e.g., where trees, sidewalks, or other streetscape features may be added, altered, removed, or demolished to accommodate the project);
- Infrastructure projects affecting previously undisturbed soil (e.g., utility lines, curb and gutter installation, etc.);
- New build/infill projects;
- New construction in undeveloped natural areas;
- Construction of public housing units;
- Commercial rehabilitation or development projects;
- Transfer, lease or sale of historic properties;
- Construction of new government facilities; and
- Any project that may affect a property included in or eligible for inclusion in the National Register of Historic Places, designated as a Recorded Texas Historic Landmark or State Antiquities Landmark, or located within a locally designated historic district.

STANDARD INFORMATION NEEDED FOR SECTION 106 CONSULTATION

The Request for SHPO Consultation Form, available at www.thc.state.tx.us/project-review/what-send-project-review, is an effort by the Texas SHPO to standardize the project review request information that is sent to the SHPO. The SHPO believes standardizing this information will help expedite Section 106 project reviews because the SHPO will not have to request additional information due to inadequate submissions. Therefore, when you are preparing to submit a project for review, please either fill out and submit this form and any supplemental information, or send the information listed below.

In lieu of the form, you may submit a cover letter requesting consultation under Section 106 of the National Historic Preservation Act. In the text of the letter or as attachments, please provide the following information:

- **Project information:** Provide the project name and a brief project summary. Identify the project location, including county; when appropriate, provide a complete street address for the property.
- **Project contact information:** Include your organization's contact information, including the name and title of a primary contact person at your organization.
- **Federal involvement:** Indicate HUD and the Responsible Entity as the federal agency, and include type of HUD funding or program. Provide contact information for a primary contact person with the Responsible Entity.
- **State involvement:** Specify whether the property is owned or controlled by a public agency, including the State of Texas or a political subdivision of the state. Control in this sense includes any easement that would allow an entity to construct utility lines across private property. If owned or controlled by a public agency, provide the agency's name and address.

- **Project work description:** Include a detailed written description of the project that fully explains what will be constructed, altered, or demolished. Include architectural or engineering plans, site plans, specifications, or NEPA documents, as necessary, to illustrate the project.
- **Project location:** Include maps indicating the location and specific boundaries of the project. Road names must be included and legible. Projects involving ground disturbance must include the appropriate 7.5 minute U.S. Geological Survey quadrangle, with the map name clearly noted on the copy.
- **Area of Potential Effect:** Include a written description of the Area of Potential Effects (APE), as specified at 36 CFR 800.4(a)(1) and 36 CFR 800.16(d). Discuss the potential for the project to have direct and indirect effects on historic properties and justify the boundaries chosen for the APE.
- **Identification of historic properties:**
 - **Archeological resources:** If the project entails ground disturbance, describe the nature of the project, including the proposed impacts that will occur to the ground surface, noting the surface area that will be impacted and the depth of impact, as well as any extenuating circumstances that may be important for the review, such as evidence of severe erosion or previous construction within the project area.
 - **Structures:** Indicate whether there are any structures, buildings, designed landscape features, or historic districts 45 years old or older within the APE. Include an actual or estimated date of construction and the location of each of these features. Provide a brief history of each property and names of architects or builders, if known. Indicate whether the identified properties are listed in or eligible for listing in the National Register of Historic Places.
- **Photographs:** Include clear, high-resolution color photographs that illustrate the APE. Images from the internet are not acceptable due to low resolution. Photography should include clear views of any buildings and structures. Where applicable, include photographs of the surrounding area from the project site and streetscape images. Should your project entail alteration of existing structures, please also provide photographs of their current condition and areas to be affected by the work.
- **Determination of effect:** Indicate the effect of the project on historic resources and provide a basis for your determination of “no historic properties affected,” “no adverse effect,” or “adverse effect” per 36 CFR 800.4(d)(1) and 800.5.
- **Consulting parties/public notification:** Describe the actions taken to notify the public or invite consultation with parties other than the Texas SHPO. Refer to 36 CFR 800.2 for information about other participants who are entitled to comment on the Section 106 process, including Native American tribes, interested parties, and the public.

We are not able to accept submissions via electronic mail or fax. Please submit all requests for consultation to:

Address for delivery by U.S. Mail:
 Mark Wolfe
 State Historic Preservation Officer
 Texas Historical Commission
 P.O. Box 12276
 Austin, Texas 78711

Address for hand delivery or private express delivery:
 Mark Wolfe
 State Historic Preservation Officer
 Texas Historical Commission
 108 West 16th Street
 Austin, Texas 78701

HUD Projects Not Requiring Consultation with the SHPO

HUD has determined that the following activities 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)(1) or they have limited potential to affect historic properties and therefore no historic properties will be affected by these undertakings per 36 CFR 800.4(d). **In addition to the list below, you are not required to initiate consultation with the SHPO for undertakings that solely affect resources that are less than 45 years of age and entail minimal or no ground disturbance.**

If you conclude that your project is exempt from Section 106 consultation, you are required to document your determination in your Environmental Review Record.

General Activities (Exempt under 24 CFR § 58.34 or Categorically Excluded under 24 CFR § 58.35(b))

- A. Environmental and other studies, resource identification, and the development of plans and strategies. (Implementation of such plans with federal funds may require consultation. If historic properties may be affected, SHPO recommends early consultation during planning stages.)
- B. Information and financial services.
- C. Administrative and management activities (including overhead and salaries).
- D. Public services that will not have a physical impact or result in any physical changes to buildings, structures, sites, or objects, including but not limited to services concerned with employment, crime prevention, child care, health, drug abuse, education, counseling, energy conservation, and welfare or recreational needs.
- E. Inspections and testing of properties for hazards or defects. (Includes code enforcement. Action taken pursuant to such inspections with federal funds will require consultation.)
- F. Purchase of insurance (e.g. homeowners or flood insurance; does not include HUD mortgage insurance).
- G. Purchase of tools.
- H. Engineering or design costs. (Construction activities undertaken with federal funds will require consultation. If historic properties may be affected, SHPO recommends early consultation during design.)
- I. Technical assistance and training.
- J. Assistance for temporary or permanent improvements that do not alter environmental conditions and are limited to protection, repair, or restoration activities necessary only to control or arrest the effects from disasters or imminent threats to public safety including those resulting from physical deterioration (see **Emergency Situations** on page 13).
- K. Payment of principal and interest on loans made or obligations guaranteed by HUD.
- L. Tenant-based rental assistance.
- M. Supportive services including, but not limited to, health care, housing services, permanent housing placement, day care, nutritional services, short-term payments for rent/mortgage/utility costs, and assistance in gaining access to local, state, and federal government benefits and services.
- N. Operating costs, including maintenance, security, operation, utilities, furnishings, equipment, supplies, staff training and recruitment, and other incidental costs.

- O. Economic development activities, including but not limited to, equipment purchase, inventory financing, interest subsidy, operating expenses, and similar costs not associated with construction or expansion of existing operations.
- P. Activities to assist homebuyers to purchase existing dwellings or dwelling units under construction, including closing cost and down payment assistance, interest buy downs, and similar activities that result in transfer of title.
- Q. Affordable housing pre-development costs, including legal, consulting, developer, and other costs related to obtaining site options, project financing, administrative costs, and fees for loan commitments, zoning approvals, and other related activities which do not have a direct physical impact.
- R. Approval of supplemental assistance, including insurance or guarantee, to a project previously approved, if the prior approval was made by HUD or the same responsible entity and the project scope has not materially changed.