

SECTION 106 REVIEW IN TENNESSEE
UNDER THE REVISED
36 CFR PART 800 REGULATION

by

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INTRODUCTION:

The revised 36 CFR Part 800 regulation that went into effect June 17, 1999, has modified meaningfully the process by which Section 106 review is conducted under the National Historic Preservation Act. A number of factors prompted this regulatory modification. First, amendments to the National Historic Preservation Act (NHPA), which went into effect in October 1992, shifted the emphasis of the Section 106 review process and strengthened it. Second, the Clinton Administration mandated that the Advisory Council on Historic Preservation comport its regulation more closely with the National Performance Review. Third, Federal agencies proposed modifications in the regulation based upon their less-than-happy experiences with the 1986 edition. Fourth, SHPOs proposed changes in the Section 106 process predicated upon a desire to become more central to that process. Fifth, the Advisory Council on Historic Preservation desired to re-position itself within the process. Sixth, American Indian tribes, encouraged by passage of the Native American Graves Protection and Repatriation Act, desired a more central role in Section 106 review.

Finally, applicants for Federal assistance desired more input into the consultation associated with Section 106 review.

The revised regulation is a reasoned reflection of the 1992 amendments to NHPA. First, it substantively redefines, broadens, and formalizes what is a federal “undertaking.” Second, it enhances the role of Native Americans in the Section 106 review process. Third, it addresses “anticipatory neglect” by applicants for federal assistance. Fourth, it specifically designates the agency head as the person within a federal agency tasked with direct response to Council comment. Fifth, it clarifies confidentiality concerns relative to potentially threatened cultural resources discovered during Section 106 review.

The revised regulation also addresses National Performance Review goals. First, the revised Section 106 process strengthens the role of tribes and Tribal Historic Preservation Officers. Second, it refocuses Council attention toward larger policy issues having to do with the overall Section 106 process and away from routine project review. Third, it streamlines a number of Section 106 procedures. Fourth, it melds Section 106 review more closely with the National Environmental Policy Act compliance process.

In deference to agency requests, the revised regulation relaxes the “counterpart regulations” requirements of the 1986 regulation but retains the necessity for Council approval of any agency document which purports to interpret Section 106 review within that agency’s corporate culture. Agency desires for timely agency/SHPO review and resolution of routine cases without Council oversight on a case-by-case bases are also reflected in the revised regulation. Agencies’ wishes to comport Section 106 review more closely with the National Environmental Policy Act review process have found some place in

the revised regulation's stipulation that certain classes of Federal programs and projects could be categorically defined as not affecting historic properties.

SHPO requests to be more central to the day-to-day review of Federal programs are reflected in the revised regulation by removal of the Council from review of routine no adverse effect determinations and routine Memoranda of Agreement. Under the revised regulation, SHPOs have increased responsibility for certifying agency compliance; responsibility which adds force to SHPO decisionmaking.

Applicants' desires to be formal consulting parties in Section 106 review are reflected in the revised regulation. Also, under the revised regulation, applicants may now be formally certified by Federal agencies to act in their stead for purposes of initial coordination and consultation.

The revised regulation reflects the wishes of the Advisory Council to reserve its resources of staff and policy making for issues of critical concern to the protection of historic properties instead of the routine day-to-day work of Section 106 review. The Council also wanted more formalized access to heads of Federal agencies than was called for in the 1986 regulation.

Finally, Indian tribes' expression of concerns for traditional cultural properties both on and off tribal lands are reflected in their elevated status as Consulting Parties in Section 106 consultation reflected by the revised regulation.

The revised regulation makes federal agencies more accountable throughout Section 106 review than did its 1986 antecedent. Under the revised regulation, agencies shall ensure that:

- project-related decisionmaking has the benefit of the earliest and the broadest range of consultation
- cultural resources affected by federal projects and programs are Identified and evaluated early in the consultation process
- project-related adverse effect is avoided or minimized if at all possible and mitigated only after a good faith effort to avoid or minimize

This is true for all federal undertakings whether they be funded, or licensed, or permitted.

The revised regulation mandates that State Historic Preservation Offices (SHPOs) consult with federal agencies and other Consulting Parties as defined in the revised regulation. This consultation shall begin very early in the federal agency's project planning process and run throughout that process. SHPO consultation has specific importance to federal agency identification, evaluation, and protection of cultural resources affected by federal undertakings.

The Tennessee SHPO is fulfilling part of its consultation obligation under the revised regulation by preparing this guidance document for use by federal agencies, Consulting Parties, and the public. This guidance document is the culmination of our best efforts to understand and interpret the revised regulation. It describes the revised Section 106 process. It explains the steps necessary for federal agency compliance. It defines the best practices and standard operating procedures for Section 106 review in Tennessee. To prepare this guidance, Tennessee SHPO staff used information, regulatory citations, and

interpretations provided by the Advisory Council on Historic Preservation in its own comprehensive revised regulation briefing documents.

This guidance is only one of a number of Section 106 guidance documents being prepared and disseminated by a variety of federal agencies, State Historic Preservation Offices, tribes, and other stakeholder organizations. Standard operating procedures discussed in it are solely those of the Tennessee State Historic Preservation Office and do not necessarily conform to the day-to-day practices of others. They do, we believe, conform to the letter and the spirit of the revised regulation.

Our interpretation of the revised 36 CFR Part 800 regulation is always subject to reinterpretation by the Advisory Council on Historic Preservation. In the event that the Council interprets the revised regulation in a manner different from this guidance document, the Council's interpretation prevails. The Tennessee SHPO strongly recommends that federal agencies, Consulting Parties, and the public use this guidance document in conjunction with the Council's own guidance.

The Council has handily provided an electronic copy of the revised regulation and a great deal of specific guidance on its website (www.achp.gov). The Council also has made several publications available that help interpret the revised regulation. Close and timely reference to this Council guidance will prove very helpful to federal agencies, Consulting Parties, and the public.

THE "WHO" OF SECTION 106 REVIEW:

THE FEDERAL AGENCY OFFICIAL:

The revised regulation assigns principal Section 106 responsibility within each federal agency for each undertaking to an “Agency Official” (800.2(a)). 36 CFR Part 800.2(a), 800.2(a)(1), and 800.2(a)(2) clearly define the Agency Official and her/his Section 106 responsibilities.

The Agency Official is that person within a federal agency who initiates the Section 106 process. She/he must possess documented authority to make agency commitments to abide by the 36 CFR Part 800 regulation. She/he must also possess documented authority to implement the conditions and stipulations of any agreement document. The Agency Official must also ensure that all actions taken by the agency and its designated collaborators in the Section 106 review process meet the appropriate secretary of the interior’s professional standards.

The federal agency shall submit the name, title, and mailing address of the “Agency Official” to all parties in the Section 106 review process at the beginning of project review. This person is the accepted point of contact unless she/he formally delegates that responsibility to another.

This guidance document will generally refer to the Agency Official as either the Agency Official, the federal agency, or the agency. Participants in Section 106 review should not take this to mean that anyone other than the Agency Official is ultimately accountable for matters relating to the federal agency’s Section 106 review. References to the federal agency or agency are matters of convenience within this document.

THE ADVISORY COUNCIL ON HISTORIC PRESERVATION:

Pivotal to the Section 106 review process is the Advisory Council on Historic Preservation (800.2(b), 800.2(b)(1), 800.2(b)(2) and 800.9(b)). This fact, so clearly stated in the National Historic Preservation Act, is strongly reflected in the revised regulation.

For example, the Council has ultimate comment authority in cases of dispute resolution. The Council has reserved for itself a 15 day comment period for dispute resolution cases submitted to it. Furthermore, all formal Council comments are binding upon all disputing parties (800.5(c)(2) and 800.5(c)(3)).

There is a check and balance in the revised regulation. Lack of Council response after 15 days of receipt of the case equals concurrence with the federal agency. This is true so long as the Council has received sufficient documentation to ensure adequate review.

A further example. The Advisory Council, solely at its discretion, may choose to participate in consultation with the federal agency and others relative to the Section 106 review of an undertaking. In point of fact, the Council has chosen not to participate directly in the Section 106 review of most federal undertakings. There are instances, however, in which the federal agency may reasonably expect the Council to participate in consultation. The Council might participate in project consultation pursuant to an adverse effect notification by the agency, or when a National Historic Landmark is found to exist within an undertaking's Area of Potential Effect. The Council may also participate when it determines that one or more conditions defined at Appendix "A" of the revised 36 CFR Part 800 regulation has been met. There are four types of Appendix "A" undertaking that might trigger Council consultation:

- those that have a substantial impact upon significant cultural resources
- those that involve questions of policy and interpretation of the regulation
- those that involve procedural issues
- those that involve issues of concern to Native Americans

The Council may also choose to participate in Section 106 consultation when there is disagreement between the federal agency and Consulting Parties concerning project effect. The Council may also choose to participate in response to a tribe that brings Section 106 related concerns to its attention.

The Council will always participate in consultations concerning nationwide or regionwide programmatic considerations. It shall be a signatory to any programmatic agreement document that results from such consultations.

The revised regulation sanctions periodic Council review and comment (800.9(d) and 800.9(d)(2)) concerning:

- how participants are fulfilling their Section 106 responsibilities
- how well the outcomes of the Section 106 review process advance the National Historic Preservation Act

Specifically, the Council may review and comment upon how compliant federal agencies and others are being relative to carrying federal actions through the four steps of the Section 106 review process.

With respect to non-compliance with the Section 106 process and problematic federal agencies, the Advisory Council has a number of recursive actions at its disposal. It may contact agency policy makers directly in an attempt to elicit compliance. It may consult with the Department of Justice and the Office of Management and Budget to seek redress. It may interject itself into the Section 106 process under provisions codified at 36 CFR Part 800.9(d)(2) to satisfy itself by direct participation that Section 106 review is completed correctly.

CONSULTING PARTIES:

STATE HISTORIC PRESERVATION OFFICES:

Charged with assisting the Agency Official in carrying out her/his Section 106 responsibilities are individuals and organizations collectively referred to as "Consulting Parties." 36 CFR Part 800.2(c) categorically defines Consulting Parties.

Among the Consulting Parties is the State Historic Preservation Officer (SHPO) (800.2(c)(1)(i) and 800.3(c)(2)). The role of the SHPO remains central to the identification, evaluation, and protection of cultural resources. Federal agencies consult with SHPOs:

- to determine whether a federal action shall be classified as an undertaking under the law
- to determine an appropriate area of potential effect for each undertaking
- to prepare lists of other Consulting Parties contacted by the federal agency and invited to participate in Section 106 consultation
- to devise a methodology for informing the public of the undertaking and for seeking its views
- to devise a methodology for melding Section 106 review into other federal environmental review procedures
- to locate, identify, and evaluate cultural resources
- to assess project effects upon cultural resources
- to examine alternatives to proposed undertakings which avoid or minimize adverse effect
- to concur upon appropriate mitigations if adverse effect cannot be avoided or minimized
- to prepare agreement documents which formalize the mitigation of adverse effect

CULTURAL RESOURCES:

Cultural resources are “all those buildings, districts, structures, sites, and objects, identified as yet or not, that are eligible for listing in the National Register of Historic Places.” Cultural resources are National Register eligible if they retain sufficient integrity of:

- design
- feeling
- association
- workmanship
- setting
- location
- materials

at the time they are evaluated and if they meet one or more of the four National Register of Historic Places Criteria. These criteria are:

- association with historic figures
- association with historic events

- association with significant architecture
- association with the answers to significant research questions

Cultural resources also include historic landscapes and viewsheds directly associated with one or more of the above-referenced criteria as well as traditional cultural properties that encompass areas of distinct and ongoing religious and cultural importance to Native Americans and/or other traditional cultural groups which are directly associated with one or more of the above-referenced criteria.

Cultural resource identification, evaluation, and protection is the driving force behind the entire Section 106 review process. Congress passed and president Lyndon Johnson signed into law the National Historic Preservation Act of 1966 (of which Section 106 is a part) with the express purpose of compelling federal agencies to identify, evaluate, and take cultural resources into account as they planned and executed undertakings. Various amendments to the National Historic Preservation Act over the years since 1966 have changed many things about the manner in which federal agencies conduct Section 106 review. Amendments to the Act, however, have never changed the central definition of a cultural resource.

SHPOs are the chief nominators of cultural resources to the National Register of Historic Places. Their experience in identifying and evaluating cultural resources is comprehensive. For this reason, the revised regulation recognizes the central role of SHPOs in the Section 106 review process.

OTHER SHPO RESPONSIBILITIES:

The revised regulation requires federal agencies to consult with SHPOs to generate lists of other appropriate Consulting Parties. SHPOs have long experience with the constituency groups that maintain a legitimate interest in the cultural resources of the state. These Consulting Parties are major stakeholders in the state's cultural resource base. They, like the SHPO, have a key interest in ensuring the proper identification, evaluation, and protection of cultural resources.

The revised regulation also mandates that SHPOs consult early and expeditiously with federal agencies to establish mutually-agreed-to definitions of project areas of potential effect. SHPOs have a great deal of familiarity with the state's cultural resource base and its geographic dispersion. SHPOs also have long experience with project-related effects upon that resource base. They also have a broad understanding of cumulative and secondary project effects and the "if but for" aspects of undertakings.

TRIBAL HISTORIC PRESERVATION OFFICERS:

Another important Consulting Party is the Tribal Historic Preservation Officer (THPO). She/he is a Consulting Party for projects on tribal lands (800.16(m) and 800.16(x)). She/he assumes the role of SHPO on tribal lands. THPOs may also participate as a Consulting Party relative to federal undertakings off tribal lands where the tribe has evidenced a religious or cultural interest in the resources affected.

Tennessee currently contains no federally designated tribal lands, that is, tribal lands as defined in the revised regulation. Even so, various tribes have long

expressed a deep cultural and religious interest in cultural resources located within the state. They have expressed particular interest in those resources containing human remains and funerary objects. Therefore federal agencies contemplating undertakings in Tennessee should contact those tribes which inhabited Tennessee in past times and invite their duly appointed THPOs to participate as Consulting Parties.

The Tennessee SHPO has gathered together a list of names, titles, and addresses of some of the appropriate tribes that federal agencies should contemplate contacting. Our office will make this list available to any federal agency contemplating an undertaking in Tennessee. We also strongly suggest that federal agencies contact the Tennessee Commission on Indian Affairs for additional recommendations. We have found the TCIA to be an excellent point of contact and clearinghouse for issues relating to the Native American community. But consultation with TCIA alone is not sufficient to be in compliance with Section 106 review relative to Native American consultation.

TRIBES:

Another important Consulting Party that is distinct from the THPO is a tribe or tribes that may attach religious or cultural significance to affected cultural resources off tribal lands (800.2(c)(3)). The difference lies in the fact that all tribes which have expressed a cultural or religious interest in Tennessee cultural resources may not have formally designated a Tribal Historic Preservation Officer. In these cases, the federal agency should still invite tribes to participate as Consulting Parties. Whomever the tribe certifies may represent it in Section 106 consultation. This designation is completely at the discretion of the tribe.

The revised regulation does not require the concurrence of THPOs and tribes in determinations of National Register of Historic Places eligibility when the affected cultural resources are off tribal lands. The federal agency shall still document a good faith effort to identify and consult with tribes and to consider their views. The revised regulation recognizes that tribes have special expertise in identifying properties of religious and cultural interest to them. The Tennessee SHPO concurs with this recognition. All parties to the Section 106 review process shall take this special expertise into account.

Tribes may obtain additional rights to participate as Consulting Parties in Section 106 review beyond those specified in the revised regulation if the affected federal agency agrees.

Federal agencies shall contact tribes and invite them to participate in Section 106 consultation. This is true when there is either an expressed tribal cultural or religious interest or the reasonable expectation of such an interest. Agencies should initiate contact and extend invitation very early in the Section 106 review process to allow for the broadest range of consultation. Furthermore, federal agencies shall recognize the government to government relationship between the federal government and tribes. Federal agency contacts and invitations, therefore, shall be made by persons of appropriate rank within the federal agency. It is always best to seek concurrence from the tribe relative to whom it feels appropriate within the agency to initiate formal contact.

LOCAL GOVERNMENTS:

Another Consulting Party is the affected local government or governments (800.2(c)(4), 800.2(c)(5), 800.3(f)(1) and 800.2(a)(3)). Local governments, through duly elected or appointed officials, must be invited to participate as Consulting Parties and may do so at their discretion. They possess a clear interest in federal projects that have the potential to affect cultural resources within their jurisdictions. Often, local governments have established a high level of control over cultural resources within their jurisdictions through historic preservation zoning ordinances or other municipal statutory devices. This fact should be seriously considered by federal agencies and other Consulting Parties; especially by applicants for federal funds, licenses, and permits.

APPLICANTS FOR FEDERAL ASSISTANCE:

Applicants for federal assistance (800.2(c)(4), 800.2(c)(5), 800.3(f)(1) and 800.2(a)(3)) may also be Consulting Parties. Applicants may be, but are not limited to being:

- large state transportation, housing rehabilitation, community development, military, conservation, agricultural, recreational, veterans services, and environmental protection agencies
- regional housing, utility, and mental health agencies and companies
- regional planning agencies
- county and municipal governments and housing authorities

- individual seekers of federal grants, loans, and loan guarantees
- individuals and groups attempting to obtain federal licenses and permits

Applicants clearly have a stake in the outcome of Section 106 review. Often, federal agencies task applicants or their consultants with the responsibility of initial Section 106 consultation. The revised regulation permits federal agencies to delegate some initial contact and consultation responsibility to applicants and those representing applicants. The regulation makes it very clear, however, that the federal agency shall formalize such delegation through written agency notification and certification. Final and formal responsibility for ensuring Section 106 compliance rests squarely with the Agency Official and with no one else.

OTHER CONSULTING PARTIES:

Another important Consulting Party is that individual or group of individuals or organizations with clearly demonstrable legal, economic, cultural, or historic preservation interest. The outcome of consultation between the affected federal agency and the Tennessee SHPO shall determine the level and legitimacy of this interest. Other Consulting Parties may be, but are not limited to being:

- property owners with a demonstrable historic preservation interest through the cultural resources they own that are affected by federal undertakings
- county and municipal preservation agencies with local historic preservation zoning authority

- local historical or archaeological societies with a clear and long standing interest in the historic preservation concerns of the community
- Certified Local Governments
- neighborhood associations in historic districts with long standing and well defined historic preservation interests
- affinity organizations with long standing and well defined ethnic or gender related historic preservation interest
- local membership organizations such as the congregations of historic churches, fraternal associations owning historic buildings, and cemetery associations

Consulting Parties may also be any others invited by the agency, SHPO, THPO, or the Advisory Council on Historic Preservation due to specific interest or relevance to the cultural resources associated with the undertaking under review. So far as the Tennessee SHPO is concerned, the appropriateness of any individual or group to be considered as an Other Consulting Party will be defined in direct proportion to a long standing and clear historic preservation interest concerning the specific undertaking under review.

THE PUBLIC:

In addition to Consulting Parties, the revised regulation requires the participation of the general public in the Section 106 review of federal

undertakings (600.2(d)(1)). The views of the public are “essential to informed Federal decisionmaking.” Even so, the revised regulation does not require the public either to emphasize or even to submit specific historic preservation concerns to federal agencies. Therefore, the Tennessee SHPO’s assessment of the pertinence of the public’s expressed views will be in direct proportion to the level of its demonstrable historic preservation stake in the particular undertaking under review.

Plainly speaking, the Tennessee SHPO may exercise its consultation authority under the revised regulation only with respect to explicit historic preservation issues as they relate directly to federal agency undertakings. Public issues involving any other environmental considerations, no matter how valid, fall outside the jurisdiction of the Tennessee SHPO unless they also have a direct bearing upon the identification, evaluation, and protection of cultural resources.

THE FOUR STEP PROCESS OF SECTION 106 REVIEW:

Once the federal agency contemplating an undertaking in Tennessee has designated an Agency Official, identified all appropriate Consulting Parties, and formulated a methodology for seeking the views of the public, then it may begin the Section 106 review process.

The stages in the Section 106 process have been dramatically re-constructed under the revised regulation. Replacing the 1986 regulation’s five step process is one with four steps. The revised four step process is perceptibly more all-encompassing than was the previous five step process.

These four steps oversee a federal undertaking all the way from planning stage to completion and beyond. To comply with the revised regulation, the federal agency shall:

- initiate the process
- identify historic properties
- assess adverse effect
- resolve any adverse effect

For purposes of clarification, the revised regulation refers to cultural resources as “historic properties.” We at the Tennessee SHPO feel that “historic properties” is a bit parochial. It dismisses by inference significant pre-historic resources with which Tennessee is replete. Therefore, within the confines of this guidance document, we will continue to use the more inclusive “cultural resources” to mean what is “historic properties” in the revised regulation.

The federal agency that initiates the undertaking is completely responsible for taking any and all steps necessary to a particular undertaking’s Section 106 review. It is, therefore, clearly in the federal agency’s best interest to avail itself of the advantages associated with the consultation and technical assistance provided by the SHPO, other Consulting Parties, the public, and interested others. It is also a basic policy requirement of the revised regulation.

Consultation assists the federal agency quickly and efficiently to determine whether its proposed action constitutes an undertaking as defined in the law, to invite all appropriate Consulting Parties to become a part of the federal decision making process, to establish an undertaking's area of potential effect, to identify and evaluate cultural resources located within the area of potential effect, and to assess potential for project effect upon those cultural resources. Early cultural resource identification and evaluation advance the timely review of undertakings and help insulate the federal agency from such unfortunate consequences as long administrative delays and litigation.

STEP ONE: INITIATE THE PROCESS (Part 800.3)

ASCERTAIN UNDERTAKING STATUS:

The federal agency initiates the Section 106 review process (800.3). In doing so, it and only it ascertains whether its projects and programs are undertakings as defined in the law (800.3(a) and 800.9(a)). The federal agency, however, does not make this determination in a vacuum.

The revised regulation obliges each federal agency to base its assertion as to whether its action is an undertaking upon the outcome of consultation with others. The agency does so in light of, strict statutory and regulatory definitions of an undertaking, best practices, and standard operating procedures. Best practices, standard operating procedures, and a close reference to the law and the revised regulation come together to define a federal undertaking in Tennessee as any one or more of the following actions funded, licensed, or permitted in whole or in part by a federal agency:

- any new construction
- any ground disturbance directly or indirectly associated with the action
- any partial or complete demolition of any structure
- any modification of any structure
- any relocation of any structure
- any ground-covering activity such as a landfill, aeration field, spoil, staging area, or riprap
- any planting or removal of vegetation, including reforestation or tree removal
- any reclamation program such as superfund or mining reclamation
- any transfer or lease of any federal property, including structures, out of federal control or from one federal agency to another
- any mortgage guarantee or any other similar type of federal financial support to applicants

The general rule of thumb is; "an undertaking is defined in the law as any action that a federal agency funds, or licenses, or permits, in whole or in part, either out of its own statutory authority or at the request of an applicant, which has the potential to alter any eligibility-defining characteristic of a

cultural resource which qualifies that cultural resource for listing in the National Register of Historic Places.”

Furthermore, the Tennessee SHPO considers the following federal actions undertakings:

- any purposeful and deliberate federal agency neglect of any structure or archaeological resource under its jurisdiction or control that has been determined National Register eligible
- any survey-related data recovery of any significant archaeological cultural resource that is not Archaeological Resources Protection Act permitted
- any data recovery of any archaeological resource that is significant for reasons other than purely research (Criterion “D”) value (that is, significant for reasons of religious or cultural or historical association)
- removal of any significant archaeological resources that contain human remains or directly associated funerary objects
- neglect of any federally owned or controlled land surface that contains or has the likelihood to contain significant archaeological or historical resources through such actions as the knowing sanction of streambank erosion, wind erosion, rain erosion, or other preventable natural force.

The Tennessee SHPO considers such actions on the part of a federal agency to be undertakings as they bespeak an explicit and deliberate federal agency policy that has the likelihood to affect cultural resources.

Upon determining that its action is an undertaking as defined in the law, the federal agency shall notify the Tennessee SHPO that it has initiated the Section 106 process (800.16(f), 800.3(c), 800.3(f), 800.3(f)(1) and 800.3(f)(2)). The revised regulation permits the federal agency to take this initial notification step in one of two ways. It may, on its own by an agency-direct consultation request, initiate consultation. It may also initiate the process indirectly through a review request initiated by a duly certified applicant for federal funds, licenses, or permits.

The Tennessee SHPO shall acknowledge a federal agency's direct consultation request or a duly certified applicant's review request within thirty days. The agency and Tennessee SHPO then shall consult together to identify other appropriate Consulting Parties (800.16(f), 800.3(c), 800.3(f), 800.3(f)(1) and 800.3(f)(2)). The federal agency shall invite all agreed-upon Consulting Parties to participate in the consultation process. The federal agency shall take the views of all Consulting Parties into account. Consultation with all Consulting Parties runs through the entire Section 106 review process. The level of consultation and the specific parties consulted are proportionate to and dependent upon the following (800.3(c)(3), 800.1(c) and 800.16(f)):

- the agency's planning process for the particular undertaking under review
- the nature of the undertaking
- the nature of the undertaking's potential effects upon cultural resources

The federal agency involves the public in the Section 106 process (800.3(e), 800.2(d)(1) and 800.11(c)). As is the case with Consulting Parties, the federal agency shall consult with the Tennessee SHPO respecting a methodology for involving the public. This methodology shall demonstrate a good faith attempt to take the public's views on preservation issues into account. In arriving at this methodology, the agency should consider:

- the nature and complexity of the undertaking
- the nature and complexity of its potential effects upon cultural resources
- the amount and nature of likely public interest
- concerns relative to the confidentiality of information produced as a consequence of the consultation, identification, evaluation, and protection process.

The revised regulation requires the federal agency to provide basic information to the public relative to:

- the existence of cultural resources within the undertaking's Area of Potential Effect (but not necessarily their exact location)
- the general nature of the potential for project effect upon these cultural resources

Certainly and within reason the agency may utilize its existing procedures for informing the public based upon federal law, regulation, policy document, or

the particular agency's corporate culture. Such procedures shall be commensurate with proper identification of cultural resources within the project's area of potential effect and evaluation of project effect.

The check and balance is that the revised regulation allows the public on its own to provide its views on the boundary of an Area of Potential Effect, the eligibility of properties within it and the effect of the undertaking upon them (800.2(d)(2) and 800.2(d)(3)) to the SHPO, other Consulting Parties, and the Council, even absent an agency invitation to do so.

Federal agencies that elect to delegate initial Section 106 review responsibility shall consult with the Tennessee SHPO prior to doing so. Federal agencies shall provide the Tennessee SHPO with mutually-agreed-upon certification from the Agency Official that the agency has delegated initial Section 106 review contact. In Tennessee, Federal agencies may accomplish this by:

- a blanket written notification that lists its designated applicants and/or application packagers or consultants
- an individual certification letter attached to each applicant, packager, or consultant review request
- some other mutually-agreed-upon means

Absent agency certification, the Tennessee SHPO cannot, under the revised regulation, consider a review request from an applicant or applicant's agent as binding consultation. This is true except for the U. S. Department of Housing

and Urban Development's review authority, which federal law has delegated to certain applicants.

Absent agency certification, the Tennessee SHPO shall consider applicant requests as technical assistance requests. We will provide whatever information we have at hand to satisfy the request. We shall not, however, consider technical assistance responses binding consultation under the revised regulation. Tennessee SHPO responses to technical assistance requests shall be dependent upon staff time allocations and the responsibilities of binding consultation with federal agencies that have previously certified their applicants.

Federal agencies that delegate initial Section 106 review responsibility to their applicants shall have previously come to agreement with the Tennessee SHPO upon such issues as:

- a mutually acceptable definition of area of potential effect
- general lists of other Consulting Parties to be invited to participate in Section 106 consultation
- appropriate methodologies for soliciting and taking into account the views of the public

Agencies shall have communicated appropriate instructions to their applicants through guidance documents that delineate mutually-agreed-upon APEs, lists of Consulting Persons, and methodologies for involving the public prior to

applicant-SHPO consultation. Such guidance documents should be the culmination of consultation between the agency and the Tennessee SHPO.

SUMMING UP:

The federal agency shall:

- notify the Tennessee SHPO of its designated "Agency Official" for each undertaking
- consult with the Tennessee SHPO and agree upon appropriate project APEs
- consult and agree upon additional Consulting Parties
- consult and agree upon methods for taking the views of the public into account
- communicate appropriate instructions to applicants concerning project APEs, additional Consulting Parties, and public participation
- provide written documents to applicants to be presented to the Tennessee SHPO at the time a review request is submitted which indicate agency certification that the applicant is acting for the agency in initiating Section 106 review

Upon receipt of good faith evidence that all those things agreed to with the federal agency have been communicated to applicants, the Tennessee SHPO shall recognize review requests as binding consultation under the revised

regulation. Timely Section 106 review, therefore, necessitates federal agency and Tennessee SHPO formalization of these mutually agreed upon items as soon as possible. Federal agencies shall then ensure that all applicants are aware of them.

The federal agency has the option to coordinate Section 106 review with other required environmental reviews (800.3(b)) such as National Environmental Policy Act (NEPA) review. The revised regulation presents this option to federal agencies in the interests of streamlining federal review processes and reducing duplication of effort.

The revised regulation clearly encourages federal agencies to meld Section 106 review into other relevant environmental review requirements such as those imposed by NEPA. For example, federal agencies may use NEPA documents such as Environmental Assessments (EA) and Environmental Impact Statements (EIS) to document their undertakings for purposes of Section 106 review. Federal Agencies may also use NEPA endgame documents such as Findings of No Significant Impact and Records of Decision to satisfy Section 106 review. This is the case so long as such documents were the product of due consultation as defined in the revised regulation. To ensure that NEPA documents satisfy the requirements of Section 106 review, federal agencies shall:

- develop a common set of project documents that satisfies the stated documentation needs of all pertinent review authorities including the Tennessee SHPO
- develop and implement a policy document that clearly asserts that certain projects and programs categorically excluded from National Environmental

Policy Act review or other statutory environmental review are not necessarily exempt from Section 106 review

Federal agencies should always keep in mind that NEPA documents such as EAs and EISs are promulgated relatively late in a project's planning and environmental review cycle. Therefore, any agency wishing to meld Section 106 review and NEPA review risks a finding of foreclosure on the part of the Tennessee SHPO should we find that agency submittal of the EA or EIS is our first and only awareness of the undertaking. It is best for agencies to initiate Section 106 review long before beginning the preparation of NEPA documents.

CONCLUSIONS TO STEP ONE:

At the end of this initiation process, the federal agency may:

- determine that there is no undertaking as defined in the law
- determine that there is an undertaking as defined in the law, but that this specific undertaking has no potential whatsoever to affect cultural resources should they exist within any reasonable and foreseeable area of potential effect (an agency may wish to consult with the Advisory Council to have such undertakings or classes of undertakings categorically excluded from further Section 106 review)
- determine that there is an undertaking as defined in the law, and that this specific undertaking has the potential to affect cultural resources should they exist within any reasonable and foreseeable area of potential effect

If the agency formally determines that there is no undertaking or that there is an undertaking with no possibility to affect cultural resources, the Section 106 process is completed, absent Council comment to the contrary. Agencies should keep in mind that the definition of an undertaking under the law is an exact one, and that they invite charges of noncompliance and litigation should they not pay close attention to that definition.

If the agency formally determines that there is an undertaking under the law and that the undertaking has the potential to affect cultural resources, then the agency shall initiate Step Two in the Section 106 review process.

STEP TWO: IDENTIFY HISTORIC PROPERTIES (Part 800.4)

The agency identifies historic properties within the undertaking's "Area of Potential Effect" (APE).

DEFINE THE APE:

Each federal agency shall establish each undertaking's APE in consultation with the Tennessee SHPO (800.16(d), 800.4(a) and 800.2(c)(3)(iv)). The Tennessee SHPO has many years of experience surveying our state and identifying and evaluating cultural resources. We also have many years of experience reviewing many thousands of federal undertakings from a wide variety of agencies and assessing project effect upon cultural resources. Our SHPO consultation is therefore recognized by the revised regulation as central to the Section 106 process.

Agency definitions of an undertaking's APE shall also be guided by consultation with all other appropriate Consulting Parties. Each of these brings experience and expertise of which the agency shall avail itself.

Best practices in this state, standard operating procedures, and a close review of the revised regulation define an APE in Tennessee as "that geographic area within whose definable boundaries there is a reasonably and foreseeable potential for cultural resources to be either directly or indirectly affected by the undertaking should such cultural resources exist within it."

When determining an APE, the federal agency shall take into account the following aspects of its undertaking (800.4 (b)(1) and 800.11(c)):

- the magnitude and nature of the undertaking
- the degree of federal involvement in the undertaking
- the nature and likely location of cultural resources within the footprint of and adjacent to the undertaking
- past historic preservation related studies of the vicinity of the undertaking
- applicable standards and guidelines published by the Tennessee SHPO, the Tennessee Division of Archaeology, and other appropriate agencies
- The views of Consulting Parties
- confidentiality concerns

The federal agency shall balance all these concerns when defining a project's APE and identifying cultural resources potentially affected. For example, the degree of federal involvement in an undertaking may be minimal (issuing licenses for cellular towers), but the magnitude and nature of the undertaking (issuing licenses for cellular towers) may be inordinately large. This is true because of the nature of and likely location of cultural resources affected by cellular towers within project APEs.

Undertakings may have both direct and indirect effects. That is, effects may be both cumulative over time as well as a direct and immediate consequence of a specific federal undertaking. Under the revised regulation, federal agencies shall apply the "if but for" rule as they determine a particular undertaking's ultimate and foreseeable area of potential effect. For example, an agency receives an application for a permit to build a marina on the edge of a watercourse in conjunction with the construction of an adjacent condominium development. The agency is obliged, in establishing the undertaking's foreseeable APE, to determine whether the marina is essential to the condominium development. A standard operating procedure for making such a determination involves reviewing the condominium development site plan to determine whether the marina is among its programmatic elements. If the agency determines after a good faith analysis that the condominium development is directly dependent upon the construction of the marina, then the APE of the undertaking should include both the marina and the condominium development. The marina has the potential directly to affect cultural resources along the watercourse and indirectly to affect cultural resources disturbed during the construction of the condominium development.

If the condominium development does not directly depend upon the marina, the APE includes only the marina footprint.

Here is another example. An agency receives a request to fund an underground water line stretching from the community water treatment plant to a proposed industrial park. In defining the project APE, the agency shall test the proposed industrial park against the “if but for” rule. If the industrial park is dependent upon the water line, then the project’s APE includes both the route of the water line and the site of the industrial park. If the industrial park could function without the water line (most unlikely), then the APE would only include the route of the line.

The “if but for” rule is a direct concomitant of the concept of cumulative and foreseeable project effect. Since the revised regulation states very clearly that any federal undertaking may have both direct and indirect (cumulative and foreseeable) effects, then federal agencies shall apply the “if but for” rule as a matter of course.

Agencies that do not take both direct and indirect effects into account when delineating their APEs risk charges of noncompliance and litigation. Such agencies also risk Tennessee SHPO findings of foreclosure of opportunity meaningfully to comment.

In Tennessee, each federal agency defining an undertaking’s APE shall be diligent in gathering information from Indian tribes (off tribal lands, since there are no designated tribal lands in Tennessee) and other Consulting Parties with special cultural or religious interest. Tribes and other Consulting Parties may

have determined their own definitions of project APEs based upon the presence of properties of religious and cultural significance to them.

Federal agencies that as a matter of course initiate projects and programs affecting large geographic areas in Tennessee almost always retain among their employees particular staff members that meet the secretary of the interior's professional qualification standards. These cultural resources staffs are tasked with in-house cultural resources identification and evaluation responsibilities within those agencies. Other federal agencies that fund large programmatic undertakings for state executive branch agencies or municipal applicants often require that those applicants maintain qualified cultural resource staffs as well. Agencies and applicants with whom the Tennessee SHPO has concluded agreement documents often are required by the stipulations delineated within those agreement documents to retain certified cultural resources staffs.

The revised regulation tacitly obliges these federal agency project planners and applicants for federal assistance to consult with their intra-agency or intra-applicant cultural resources specialists very early on and as a matter of course when determining the boundaries of a project or programmatic APE. Formal documentation of such intra-agency consultations presented to the Tennessee SHPO will evidence that there has been appropriate internal oversight concerning agency opinions relative to defining areas of potential project effect. Agency findings which have not had the benefit of such intra-agency consultation will be suspect as a matter of course by the Tennessee SHPO.

IDENTIFY CULTURAL RESOURCES:

Once a federal agency has defined the project APE, it shall identify any cultural resources within its boundary which may be affected by the undertaking. This often involves an on the ground survey of the APE for archaeological and historic cultural resources. Cultural resources surveys may be conducted by qualified agency staff, qualified applicant staff, or qualified cultural resources contractor. The Tennessee SHPO has prepared a reporting standard that federal agencies should use as a guidance document for the preparation of cultural resources surveys within our borders. The scope of such cultural resource surveys shall be defined pursuant to consultation between the federal agency or its duly certified applicant, the Tennessee SHPO, and other Consulting Parties. All survey reports and those who prepare them shall conform to the secretary of the interior's standards and guidelines for archaeology and historic preservation. Survey reports which do not meet documentation standards established in the revised regulation and reporting standards established by the Tennessee SHPO shall be returned to the agency for appropriate revision.

A federal agency has the option under the revised regulation to identify cultural resources within an APE using a phased approach (800.4(b)(2)), if and only if that undertaking affects:

- corridors
- large land areas
- areas where current access is restricted

In taking a phased approach to cultural resource identification, the agency shall establish the likely presence of cultural resources within the undertaking's entire APE early on in the review process. This shall be done in direct consultation with the Tennessee SHPO and other Consulting Parties.

In those cases not involving corridors, large land areas, or when access is not restricted, federal agencies shall identify any cultural resources inside project APEs as soon as possible after agreement on the boundary of a particular APE has been reached by the agency, the Tennessee SHPO, and the other Consulting Parties.

In any event, final identification of cultural resources shall proceed in a timely manner. In the case of corridors, or multiple sites, or alternative sites, final identification shall precede the preparation of the final list of viable project alternatives. The agency cannot forego cultural resources identification until after the list of agency-suitable alternatives has been so refined as to preclude good faith consultation on the broadest range of project alternatives. This means that federal agencies shall bring Consulting Parties including the Tennessee SHPO into the earliest stages of their project and program planning.

The agency may defer final identification of cultural resources until agency or certified applicant legal access to the APE has been gained. But again, this deferral cannot preclude good faith consultation on a range of alternatives.

The agency may also defer final identification and evaluation of cultural resources if this course of action has been anticipated and memorialized by a ratified Memorandum Of Agreement (MOA), Programmatic Agreement (PA), or NEPA document such as a Record of Decision (ROD), prepared and executed

after due consultation under the revised regulation and before any project-related work begins.

In evaluating the significance of discovered resources within the APE, the federal agency shall (800.4(c)(1)) take into account such authorities as:

- National Park Service National Register of Historic Places Eligibility Criteria
- the results of consultation with the Tennessee SHPO and other Consulting Parties
- the findings of qualified cultural resources surveyors
- the findings of qualified agency and applicant cultural resources staff
- the written notifications of tribes (off tribal land, as there are no tribal lands in Tennessee) and others who attach religious or cultural significance to the resources
- the views of the public

As federal agencies evaluate any buildings, structures, districts, sites, and objects discovered within an APE, they should be mindful that such are not necessary eligible for listing in the National Register of Historic Places merely because they are fifty years old or older. Recourses may have lost sufficient integrity to make them no longer National Register eligible. Agency consultation in good faith with Consulting Parties such as the Tennessee SHPO will almost always eventuate in a proper eligibility determination.

The federal agency or duly-certified applicant will review the above-referenced authorities on cultural resources and any other appropriate authorities and render a determination of National Register of Historic Places eligibility/ineligibility (800.4(c)(2) and 600.2(b)(1)) concerning any resource discovered within the APE. The agency will then:

- consult with the Tennessee SHPO and other Consulting Parties
- inform the Tennessee SHPO and other Consulting Parties of its determinations of National Register eligibility/non-eligibility
- seek the concurrence of the Tennessee SHPO and other Consulting Parties

There are two possible outcomes to this consultation:

- the Tennessee SHPO may agree with the federal agency's eligibility determination through a consensus determination of eligibility/non-eligibility, thus leading to the next step in the Section 106 review process
- the Tennessee SHPO may disagree with the federal agency's determination of eligibility/non-eligibility thus forcing a formal determination of eligibility

The Council may, at its discretion, also request a formal determination of eligibility. It is likely to do so whether there is agreement or disagreement between the federal agency and the SHPO when another Consulting Party or someone the Council determines should have been a Consulting Party requests

it. This is a check and balance against collusion between the federal agency and the SHPO.

A federal agency shall take into account the eligibility findings of tribes (as Consulting Parties) concerning resources off tribal lands. The revised regulation, however, does not compel the federal agency to agree with tribes' findings of eligibility. Where there is disagreement, tribes that are, or should have been, Consulting Parties may request the Council to institute a formal determination of eligibility.

The revised regulation requires federal agencies to acknowledge that tribes possess special expertise in assessing the eligibility of cultural resources that may possess religious and cultural significance to them. Agencies may reasonably expect both the Council and the Keeper of the National Register to take due cognizance of this special expertise when requesting and rendering a formal eligibility determination respectively.

CONCLUSIONS OF STEP TWO:

If, after due process, the federal agency determines that there are no cultural resources within the APE affected by the undertaking, the agency shall make a finding of "no historic properties affected." This finding shall be interpreted to mean (800.4(d):

- there are in fact no cultural resources to be affected within the APE

or

- there are cultural resources within the APE, but the nature of the undertaking precludes any possibility of project direct or foreseeable indirect effect upon them

Absent Council comment, a finding of “no historic properties affected” concludes the Section 106 review process.

If the agency determines that:

- there is at least one cultural resource identified within the undertaking’s APE

and

- the nature of the undertaking has the potential to affect it (which, by definition, it already has or else it would not be classified as an undertaking in the first place)

the agency will make a finding of “historic properties affected.”

This finding initiates step three in the Section 106 review process.

STEP III: ASSESS ADVERSE EFFECTS (Part 800.5)

The federal agency shall employ the Criteria of Adverse Effect (800.5(a)(1) and 800.5(a)(2)) in seeking to determine the type and nature of project effect upon cultural resources.

The Criteria of Adverse Effect include, but are not limited to the following:

- any physical destruction or damage of a cultural resource which would diminish its integrity for listing in the National Register of Historic Places currently or in the foreseeable future (the Tennessee SHPO will be especially mindful of effects which render a cultural resource ineligible for listing in the National Register currently or in the foreseeable future)
- any alteration of a cultural resource not in accordance with the secretary of the interior's standards for treatment
- any removal of a cultural resource from its location when location and setting have been determined to be part of the resource's eligibility
- any changes to the cultural resource's character or setting that diminish its integrity (the Tennessee SHPO will be especially mindful of effects which render a cultural resource ineligible for listing in the National Register currently or in the foreseeable future)
- any introduction of out of character elements into the affective vicinity of the cultural resource which diminish its integrity (the Tennessee SHPO will be especially mindful of effects which render a cultural resource ineligible for listing in the National Register currently or in the foreseeable future)

- any neglect that causes the cultural resource to lose integrity (unless the resource has demonstrable significance wholly as a religious or cultural property and the Consulting Party making the assertion of significance deems neglect as not adverse)
- any lease, transfer, or sale of a cultural resource out of federal control without adequate protection
- any removal of or data recovery of any archaeological cultural resource unless determined eligible wholly under National Register Criterion "D" (this adverse effect may be resolved by using the Advisory Council on Historic Preservation's "Recommended Approaches for Consultation on Recovery of Significant Information from Archaeological Sites" 64 FR 27085-27087)

As a general rule of thumb, "adverse effect occurs when the archaeological, architectural, or historical integrity of a cultural resource that qualifies it to be eligible for listing in the National Register of Historic Places will be diminished to such an extent by the undertaking that future National Register eligibility of the cultural resource under any and all National Register Criteria is threatened by the undertaking." Federal agencies, therefore, shall determine whether their undertaking would so diminish the integrity of a National Register eligible property to threaten its future eligibility under any of the four National Register Criteria.

Properties listed in the National Register of Historic Places under less than all four criteria are still subject to evaluation of their eligibility under all four criteria. The National Register of Historic Places is not a planning tool of the Section 106 process. Eligibility for listing not listing itself is the key here.

When the agency contemplates applying the Criteria of Adverse Effect to its undertaking, it shall (800.4(d)(2) and 800.5(a)):

- notify all Consulting Parties of its decision and invite their views on the matter
- make a good faith effort to obtain the written comments of all Consulting Parties
- apply the Criteria of Adverse Effect in direct consultation with the Tennessee SHPO and any tribe or other Consulting Party that attaches cultural or religious significance to the identified and designated cultural resource being reviewed
- take into account the findings of all Consulting Parties
- take into account the views of the public

Again by way of emphasis, the revised regulation makes it clear that adverse effect may be both direct and indirect (cumulative and/or reasonably foreseeable) (800.5(a)(1)). Federal agencies shall, therefore, project their effect determinations into the foreseeable future in a good faith attempt to assess the possibility for indirect or cumulative effect. While such an exercise may at times prove difficult, the revised regulation allows the agency no alternative.

This is standard operating procedure for National Environmental Policy Act review. Federal agencies that employ the NEPA process regularly should be used to it.

Again, by way of emphasis, just as in the case of defining the project APE, federal agencies shall assess adverse effect in light of any and all characteristics of a property that may qualify it as National Register eligible (800.5(a)(1)). This means that federal agencies shall employ all four National Register Criteria to evaluate significance. Cultural resources may be National Register eligible under more than one Criterion. In such cases, undertakings that may not affect a property's integrity under one Criterion might well adversely affect the same property under another Criterion.

For example, the federal agency may determine a Nineteenth Century ferry operator's house along a streambank eligible under Criterion "C" for architecture. At the same time, the agency may determine an adjacent and associated historic archaeological site such as a ferry crossing ruin situated along the streambank eligible under Criterion "D" for research significance. Placing riprap along the streambank to stabilize it will not affect the architectural characteristics of the house but will likely affect the ruin adversely.

If the agency determines that none of the Criteria of Adverse Effect has been met, it shall make a determination of no adverse effect. This determination may be either non-conditional or conditional. A non-conditional no adverse effect determination means that the undertaking, as proposed and unmodified by any conditions placed upon it by Consulting Parties, will not adversely affect the cultural resources. A conditional no adverse effect determination means

that, after due consultation, the federal agency has placed mutually agreed upon conditions upon the undertaking that will render the undertaking as not adversely impactful. Such conditions may include, but are not limited to:

- mutually-agreed-to rehabilitation plans that adhere to the secretary of the interior's standards
- mutually-agreed-to historic preservation covenants attached to transfer documents
- mutually-agreed-to conditions which ensure avoidance or minimization of adverse effect through the re-design of the undertaking

The federal agency shall provide all Consulting Parties notification of its conditional or non-conditional no adverse effect finding and request their comment. If the determination is conditional, the federal agency shall inform the Consulting Parties of the conditions. The federal agency shall make a good faith effort to obtain the views of Consulting Parties and the public relative to the no adverse effect determination.

Absent Tennessee SHPO comment within 30 days of receipt of adequate documentation, the agency may assume Tennessee SHPO concurrence with the no adverse effect determination. The Tennessee SHPO shall make its best effort to respond well before the 30 day suspense date. Currently, more than 98% of our responses fall well within the 30 day rule.

CONCLUSIONS TO PART THREE:

If the federal agency finds that no cultural resources are adversely affected by the undertaking, it:

- collects written concurrence from all Consulting Parties, including the Tennessee SHPO

or

- assumes concurrence after 30 days of receipt of finding

Absent Council action to the contrary, the federal agency may then conclude the Section 106 review process. If, however, after due consultation, the agency determines that cultural resources will be adversely affected, the agency moves to resolving the adverse effect.

STEP IV: RESOLVING ADVERSE EFFECT (800.6)

In the event of an adverse effect determination, the federal agency shall (800.6(a)), (800.6(a)(4), 800.6(a)(5) and 800.11(c)):

- continue consultation with the Tennessee SHPO and all other Consulting Parties
- develop, assess, and evaluate alternatives or modifications to the undertaking that will avoid or minimize the adverse effect
- seek the views of the public in resolving the adverse effect

Tennessee SHPO policy emphasizes a good faith attempt on the part of the federal agency to avoid or minimize adverse effect. We do so for a number of reasons:

- because our agency is chartered by the State of Tennessee with the responsibility of protecting cultural resources in this state
- because the National Historic Preservation Act under whose authority we consult with federal agencies was made a federal law with the express purpose of reducing the number and size of federal project adverse impacts upon cultural resources in the United States
- because, in those cases where the resource is significant because of its cultural or religious value, the most appropriate course of action is protective avoidance
- because, in so many instances, avoidance of adverse effect to cultural resources proves to be both prudent and feasible once an agency sets its mind to such a course of action
- because, in so many instances, the agency comes to understand that its undertaking has no true programmatic or public interest imperative and so abandons the undertaking

If and as soon as the federal agency has made an adverse effect determination, the agency shall (800.6(a)(i)(a,b,c,)):

- notify the Advisory Council on Historic Preservation of the adverse effect determination
- invite Council participation in the consultation

For its part, the Council, at its discretion, may accept the agency's invitation when:

- the agency genuinely desires Council participation
- a National Historic Landmark is involved (the interior secretary must also be invited to participate)
- a programmatic agreement is proposed to resolve a programmatic adverse effect
- it determines that one or more of the "Appendix A" criteria have been met

The revised regulation contains a check and balance. Any Consulting Party, including the Tennessee SHPO, may request Council participation in consultation to resolve adverse effect (800.6(a)(1)(ii)).

After a good faith effort by the agency to avoid or minimize the project adverse effect, all Consulting Parties may come to agree that the adverse effect cannot be avoided or minimized. In such cases, the agency shall draft an appropriate agreement document (800.6(c)(1), 800.7(a)(2), 800.7(a)(3) and 800.2(c)(3)(iv)) that will:

- acknowledge the adverse effect
- stipulate a methodology for mitigating or resolving it

The “Agency Official” and the Tennessee SHPO will usually be the minimal signatories of an agreement document (Memorandum of Agreement). The Council will sign if it participated in the consultation. The agency will invite Consulting Parties with direct responsibilities for carrying out any stipulation under the MOA to be primary signatories. Federal agencies may also invite tribes and other Native American organizations (off tribal lands) or recognized others that attach religious and cultural significance to properties, and other invited parties having a clear and demonstrable historic preservation interest to sign as concurring co-signatories.

After the MOA has been signed by all appropriate parties, the agency shall file a copy of the ratified MOA along with regulation-specified documentation with the Council whether the Council has participated in the consultation or not (800.6(c)(5) and 800.6(c)(8)).

All ratified MOAs shall contain a “sunset clause” that delineates a specific termination date. MOAs shall also contain an “amendment” clause covering ways to resolve adverse effects under those circumstances where any stipulation of the MOA cannot be implemented. MOAs shall also contain a “termination” clause that specifies:

- a notification methodology whereby any primary signatory may terminate the agreement document

- a notification time period
- a methodology for resolving adverse effect once this occurs

Only the federal agency or a Consulting Party (Tennessee SHPO, THPO, tribe, local government, applicant) or the Council, if a signatory (and absent Council comment), may terminate an MOA under the revised regulation. Concurring co-signatories may not terminate an MOA. If the agency, or any Consulting Party, or affected tribe acting as a Consulting Party, or the Council terminates an agreement document, the agency shall either:

- execute another MOA with the Tennessee SHPO and the other Consulting Parties

or

- seek Council comment

FAILURE TO RESOLVE ADVERSE EFFECT:

In those extremely rare instances where there is failure to resolve adverse effect (800.6(b)(1)(v) and 800.7(a)), the revised regulation requires Council consultation, or comment, or termination of consultation at its discretion.

TERMINATION OF CONSULTATION:

In the extremely rare event that further consultation would not be productive, the agency, or the Tennessee SHPO, or the Council may terminate consultation. In such an instance, the agency head and not the "Agency Official" shall terminate consultation for the agency. If the SHPO terminates consultation, the Council and the agency may still continue to consult and execute an MOA that resolves the adverse effect. Prior to Council termination, the Council may consult with the agency Federal Preservation Officer (FPO) in an attempt to resolve the adverse effect.

COUNCIL COMMENT:

When the Council makes a comment relative to a failure to resolve adverse effect (800.7(c)(2), 800.7(c)(3) and 800.7(b)) it retains a 45 day comment period unless otherwise negotiated. The Council shall direct its comment to the head of the federal agency and forward copies to the federal agency FPO and all Consulting Parties. The Council may also provide an advisory comment in conjunction with signing an MOA.

Under the revised regulation, the agency shall respond to Council comment (800.7(c)(4)). The agency head shall document his/her final decision in response to Council comment prior to approving the undertaking. The agency shall provide copies of the final decision to Consulting Parties, and shall notify the public of its final decision.

EMERGENCY SITUATIONS AND POST-REVIEW DISCOVERIES:

The procedure delineated in Subpart B defines federal agency responsibilities with respect to emergency situations (800.12) and post-event discoveries(800.13).

The revised regulation encourages federal agencies to consult with the SHPO/THPO, tribes, and the Council to develop procedures for taking cultural resources into account in the event of a declared emergency. If approved by the Council, these procedures shall govern how the federal agency carries out its historic preservation responsibilities. The federal agency may memorialize such Council-approved procedures in a Programmatic Agreement. It may also memorialize procedures having to do with how cultural resources, discovered after completion of the Section 106 review process, are to be taken into account. Again, such procedures should be the produce of consultation between the federal agency and Consulting Parties. Absent an agreement document, federal agencies shall make all reasonable effort to avoid, minimize, or mitigate project effect upon those cultural resources. Federal agencies shall use the review procedure delineated in 36 CFR Part 800, Subpart B to do so.

ALTERNATIVE PROCEDURES:

The revised regulation allows for alternative procedures for the implementation of Section 106 review. Unless otherwise agreed to pursuant to the revised regulation, however, the specific procedure described above and delineated at 36 CFR Part 800 Subpart B shall be observed in carrying out Section 106 review in Tennessee.

AGREEMENT DOCUMENTS:

By way of clarification, all parties to agreement documents ratified prior to June 17 that reference specific parts and sub-parts of the 1986 regulation will continue to interpret them using the 1986 regulation. All parties to agreement documents ratified prior to June 17 that make general references to 36 CFR 800 will interpret them under the revised regulation. All parties to agreement documents ratified after June 17 will interpret them under the revised regulation.

CONCLUSION:

The revised regulation mandates that the affected SHPO (800.2(c)(1)(i) and 800.3(c)(2)) consult very early on with the federal agency:

- to ensure that an “Agency Official” is designated by each agency for each of its programs carried out in the state
- to formulate mutually-agreed-upon definitions of project areas of potential effect
- to formulate methodologies for inviting other Consulting Parties to participate in Section 106 review consultation
- to formulate methodologies for inviting the public to participate in Section 106 review consultation

SHPOs also have a role in ensuring satisfactory completion of the four steps in the Section 106 process. SHPOs are especially mindful of these enhanced

responsibilities as the revised regulation empowers the Council to review and comment upon our level of performance under the regulation.

The Tennessee SHPO has a clear interest in consulting with all federal agencies that plan or initiate undertakings in this state to assure compliance with the conditions of the revised regulation. The Tennessee Historical Commission, therefore, will conduct timely and pro-active consultation with federal agencies the better to identify, evaluate, and protect cultural resources in our state.

POSTSCRIPT:

After reading this guidance document, if you have any questions concerning the specific role of the Tennessee Historical Commission in Section 106 review under the revised regulation, you may direct them to Dr. Joseph Y. Garrison (615)532-1559, at the Tennessee Historical Commission, 2941 Lebanon Road, Nashville, Tennessee 37243-0442. You may direct more general questions to the Advisory Council on Historic Preservation at its web site (www.achp.gov).