

23 December 1997

Re: NEPA Technical Inquiry 0023 - Section 106 Responsibility

Dear NEPA Call-In User:

This letter is in response to your February 6, 1997 request for information on the delegation of GSA's Section 106 compliance responsibilities to a non-Federal entity. You wanted to clarify if the National Historic Preservation Act (NHPA) prohibits Federal agencies from delegating their Section 106 compliance responsibilities to non-Federal groups.

NEPA Call-In reviewed Titled 16 United States Code (USC) 470f, Section 106 of the NHPA (enclosed). This section states:

"The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation (ACHP) established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking."

Section 106 requires that all Federal agencies consider the effects of their actions on historic properties and seek comment from the ACHP. Section 106 was designed to avoid unnecessary harm to historic resources as a result of Federal actions. The procedures for implementing Section 106 are outlined in Title 36 Code of Federal Regulations (CFR) Part 800, "Protection of Historic Properties" (enclosed).

NEPA Call-In reviewed 36 CFR Part 800.1(c)(1)(i) which states:

"The Agency Official with jurisdiction over an undertaking has legal responsibility for complying with Section 106. It is the responsibility of the Agency Official to identify and evaluate affected historic properties, assess an undertaking's effect upon them, and afford the Council its comment opportunity. The Agency Official may use the services of grantees, applicants, consultants, or designees to prepare the necessary information and analyses, but remains responsible for Section 106 compliance."

Therefore, the Federal agency may delegate tasks associated with the Section 106 process to non-Federal entities but the Federal agency remains responsible for Section 106 compliance.

NEPA Call-In also reviewed 36 CFR 800.13, "Programmatic Agreements." Programmatic Agreements may be used to fulfill an agency's section 106 responsibilities and, according to 36 CFR 800.13(a), are appropriate for programs or projects:

- 1) When effects on historic properties are similar and repetitive or are multi-State or national in scope;

- 2) When effects on historic properties cannot be fully determined prior to approval;
- 3) When non-Federal parties are delegated major decisionmaking responsibilities;
- 4) That involve development of regional or land-management plans; or
- 5) That involve routine management activities at Federal installations."

Item 3) above indicates non-Federal parties can be delegated responsibilities to satisfy Section 106 requirements. If a Federal agency wishes it may develop a PA in consultation with the ACHP, designating a non-Federal party to which the agency delegates its Section 106 compliance responsibility. Additionally, when a particular State is affected, the State Historic Preservation Officer (SHPO) should be a consulting party. The ACHP and the Agency can agree to include other Federal agencies or other groups in the consultation process. The process for developing a PA allows for public involvement and input from interested groups. Once a final agreement is reached, the Agency Official and the ACHP execute the PA. An approved PA satisfies the Agency's Section 106 responsibilities for all undertakings executed in accordance with the PA.

NEPA Call-In contacted Rebecca Rodgers with the ACHP, (202) 606-8505. Ms. Rodgers confirmed a PA can be used to delegate an Agency's Section 106 responsibilities to a non-Federal entity and indicated PAs are a common and useful alternative approach to Section 106 compliance. Ms. Rodgers also stated the Department of Housing and Urban Development (HUD) is permitted by the Housing and Community Development Act to delegate its Section 106 responsibilities to local governments in certain programs. HUD is the only Federal agency which has such a law delegating Section 106 compliance responsibilities.

NEPA Call-In contacted a GSA Advisor, Cultural Resource Compliance, GSA. The advisor stated GSA does not have any PAs delegating Section 106 Compliance to non-Federal entities.

In summary, a Federal agency may delegate its Section 106 responsibilities to a non-Federal agency after it has developed a PA in consultation with the ACHP indicating this transfer of responsibility.

The materials in this TI have been prepared for use by GSA employees and contractors and are made available at this site only to permit the general public to learn more NEPA. The information is not intended to constitute legal advice or substitute for obtaining legal advice from an attorney licensed in your state and may or may not reflect the most current legal developments. Readers should also be aware that this response is based upon laws, regulations, and policies in place at the time it was prepared and this response will not be updated to reflect changes to those laws, regulations and

Sincerely,

(Original Signed)

NEPA Call-In Researcher