

November 12, 1998

Re: Call-in Technical Inquiry 0415 – Section 106 Consultation/NEPA Guidance

Dear NEPA User:

This letter is in response to your October 1, 1998 request for guidance on implementing Section 106 of the National Historic Preservation Act (NHPA) for a proposed action potentially adversely affecting a property eligible for or listed on the National Register of Historic Places (National Register). You stated you have been involved in the consultation process under Section 106 of the NHPA for the potentially historic property as part of an environmental impact statement (EIS) being prepared under the National Environmental Policy Act (NEPA). In the EIS, your preferred alternative for the proposed action of acquiring a new courthouse would involve demolishing the potentially historic structure with mitigation of its loss by conducting a Historic American Buildings Survey (HABS). HABS documentation is often used to provide the basis for enforcing preservation easement. In addition, HABS documentation is often the last means of preservation of a property, when a property is to be demolished, and provides future researchers access to valuable information that otherwise would be lost. The HABS would be conducted according to the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation. You have developed a Memorandum of Agreement (MOA), signed by the California State Historic Preservation Officer (SHPO), discussing mitigation in the form of a HABS. You have sent the MOA to the Advisory Council on Historic Preservation (Council) to be signed. However, some local controversy exists over the current preferred alternative and the Council is hesitant to sign the MOA in light of the controversy. You would like to know if you must wait for the Section 106 process to be concluded in order to issue the Record of Decision (ROD). You would also like to know what conditions constitute conclusion of the Section 106 process.

SUMMARY OF FINDINGS

Issuing a ROD on the proposed action before the Section 106 process has been formally concluded would be in violation of the NHPA. After an MOA has been signed by the SHPO, it should be forwarded to the Council with documentation specifically requesting a review. The Council may accept the MOA as is, make changes to the MOA which must be agreed upon by the agency and SHPO, or provide direct comment on the MOA. The Section 106 process is not completed until either: 1) the Agency, Council and SHPO agree on the MOA, or 2) the Council provides direct comments to the Agency Official and the Agency Official considers these comments in reaching a final decision. The Agency Official must report the decision directly to the Council, which concludes the Section 106 process in this case. NEPA Call-In's detailed findings are provided below.

DETAILED FINDINGS

NEPA Call-In first reviewed Section 106 guidance on the Council's world wide web site located at (<http://www.achp.gov>). We reviewed the document titled, "Step-by-Step" (enclosed), which is intended to guide applicants through the Section 106 process and explain the Section 106 regulations located in Title 36 Code of Federal Regulations (CFR) Part 800 (enclosed). The section of this document on the MOA provides specific guidance related to your inquiry. This section states the MOA is the product of consultation with various parties and that the MOA specifies how the undertaking will be carried out in order to avoid or mitigate adverse effects, or documents acceptance of such effects. The MOA is a legally binding document.

According to the Council guidance, when the Council is not a consulting party, the MOA is signed by

the agency and SHPO and is then submitted to the Council specifically requesting a review. If the Council reviews and accepts the MOA as submitted, its acceptance serves as the Council's comments and concludes the Section 106 process. If the Council does not accept the submitted MOA, the following following two scenarios may occur:

1. Within 30 days after it receives the MOA and accompanying documentation, the Council advises the agency of changes to the MOA that would make it acceptable to the Council. If the agency, SHPO, and Council reach agreement on alternative changes, the modified MOA will be accepted by the Council, concluding the Section 106 process. If the agency, SHPO, and Council cannot agree on changes, the agency official must notify the Council of the disagreement. The Council is to provide written comment to the agency within 30 days of receiving this notice. According to 36 CFR Part 800.6(c)(2), "Response to Council Comment," the Agency Official shall "consider the Council's comments in reaching a final decision on the proposed undertaking. The Agency Official shall report the decision to the Council and, if possible, should do so prior to initiating the undertaking." This would conclude the Section 106 process in this scenario.
2. Within 30 days after it receives the MOA and accompanying documentation, the Council advises the agency that it has decided to comment directly on the undertaking rather than accepting or seeking to modify the agreement. Unless the agency agrees to a longer time period, the Council issues written comments within 60 days after it receives the complete MOA submission. The Agency should respond to Council comments following 36 CFR Part 800.6(c)(2) as cited above.

We then contacted an Expert Advisor; Cultural, Environmental, and Accessibility Program; GSA National Office to inquire about the Section 106 process as it relates to your inquiry. The Advisor stated a ROD on the proposed action cannot be issued until a formal conclusion to the Section 106 process has been reached and that issuing a ROD before concluding the Section 106 process would be in violation of the NHPA. The Advisor further stated that he and an Architect, Cultural Resources Program, GSA National Office, have consulted with you on this project and that you should maintain direct contact with them throughout the Section 106 process.

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 about 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 that this response will not be updated to reflect changes to those laws, regulations and policies.

Sincerely,

(Original Signed)

NEPA Call-In Researcher