

APPENDIX D

Delegated Section 106 Process

This Appendix describes the delegated Section 106 process which the Department of Transportation and Public Facilities (DOT&PF) will follow for any Federal-Aid Highway Program (FAHP) undertakings (NEPA Assignment Program and non-NEPA Assignment Program) not processed under the terms of Stipulation V *Streamlined Project Review*.

Under the NEPA Assignment Program, the DOT&PF is deemed a federal agency and has responsibility for conducting the Section 106 process for the undertakings it has assumed. For all other FAHP undertakings, the DOT&PF will be acting under the authority delegated by the FHWA in this Agreement. The DOT&PF will notify the SHPO and consulting parties whether it has assumed responsibility for an undertaking under the NEPA Assignment Program.

Under both Programs, the DOT&PF is authorized to initiate consultation with Tribes. The DOT&PF will ensure that consultation to identify places of traditional religious and cultural importance to Tribes is initiated early in the planning process to allow adequate time for their consideration, and that the consultation will continue throughout the Section 106 review process prescribed by this Agreement. In accordance with Stipulation III.A *FHWA Responsibilities* and Stipulation IV *Consultation with the Tribes* the FHWA shall honor the request of any Tribe for government-to-government consultation regarding an undertaking covered by this Agreement.

The delegated Section 106 process follows 36 CFR 800.3-800.6. (Refer to 36 CFR 800 for the comprehensive Section 106 processing steps.) Processing details are provided to clarify the roles of the DOT&PF Professionally Qualified Individual (PQI) during the general review of projects and are not intended to recreate each Section 106 regulatory processing step. The DOT&PF will perform or approve: initiation of the Section 106 process, identification of historic properties, assessment of effects, and resolution of adverse effects. There are slight processing differences between the two FAHP Programs and these are identified in the steps where they arise. For example, for non-NEPA Assignment Program undertakings, the FHWA will handle elevations of disputes over determinations of eligibility to the Keeper of the NRHP, resolution of objections regarding findings of adverse effect, and elevations of consultation to the ACHP when consulting parties are unable to agree on resolution of adverse effects.

For the purposes of this agreement, undertakings requiring no further documentation under 36 CFR 800.3(a)(1) are limited to those which would not do any of the following: change a building, structure, or landscape in any way; disturb the ground (regardless of whether previous disturbance has occurred); alter noise levels or change visual characteristics in the area; or change traffic patterns or land use of an area.

A. Initiation of the Section 106 Process

1. The DOT&PF will be responsible for establishing the undertaking and initiating the Section 106 Review Process. The DOT&PF will identify and invite consulting

- parties to participate in the Section 106 review in accordance with 36 CFR 800.2(c) and 36 CFR 800.3(c-f).
2. A PQI will prepare or oversee and approve initiation notifications to the consulting parties using the currently approved Consultation Initiation letter templates. Exceptions to the submittal of formal consultation initiation letters will be made by the PQI on a case by case basis using the currently approved Direct to Findings Form documentation to project files.

B. Identification and Evaluation of Historic Properties

1. Determine and Document the Area of Potential Effects
A PQI will determine for each undertaking the Area of Potential Effects (APE), in consultation with the SHPO and any other consulting parties in accordance with 36 CFR 800.4. The PQI is responsible for conducting the consultation.
2. Identify and Evaluate Significance of Historic Properties
 - a. The PQI may prepare documentation and consultation letters supporting the identification of historic properties that may be affected by the undertaking in accordance with 36 CFR 800.4, or oversee and approve documentation from consultants who meet the Secretary of Interior's Professional Qualification Standards in the appropriate field of expertise.
 - b. Consistent with the confidentiality provisions of 36 CFR 800.11(c) as needed, the PQI will submit the documentation to all consulting parties, including the SHPO and the Tribes, for comment.
 - c. Determinations regarding the National Register of Historic Places (NRHP) eligibility of properties evaluated hereunder, and any disagreements pertaining thereto, shall be governed by 36 CFR 800.4(c)(2), except that in the event of a disagreement the PQI will first consult with the consulting parties to resolve the issue.
 - i. For Regional Office projects, if a dispute raised by any consulting party cannot be resolved by the Regional Office, the Regional Environmental Manager (REM) will consult with the Regional Office and the Statewide Environmental Office (SEO) PQIs to resolve the issue. If after consultation the issue remains unresolved, the REM along with the Regional Office and SEO PQIs will refer the dispute to the appropriate Environmental Program Manager. For non- NEPA Assignment Program undertakings, this will be the FHWA Environmental Program Manager. For NEPA Assignment Program undertakings, this will be the Statewide Environmental Program Manager
 - ii. For projects where the SEO takes the lead environmental processing roles, the SEO PQI will consult to resolve the issue before referring the dispute to the appropriate NEPA Assignment Program or non- NEPA Assignment Program Environmental Program Manager as described above.
 - iii. If the disagreement is not resolved, the Environmental Program Manager will proceed in accordance with 36 CFR 800.4(c)(2).

C. Findings of No Historic Properties Affected

1. In accordance with 36 CFR 800.4(d)(1), if the PQI finds that no historic properties are present within the APE or historic properties are present but the undertaking will have

- no effect on the characteristics that qualify the properties for inclusion in the NRHP, the PQI will submit documentation to the SHPO and all consulting parties using the currently approved No Historic Properties Affected letter templates.
2. Consistent with the confidentiality provisions of 36 CFR 800.11(c) as needed, the PQI will submit the finding of effect and supporting documentation to all consulting parties, including the SHPO and the Tribes, for comment.
 3. If the SHPO does not comment on determinations and findings contained in a submission within thirty (30) calendar days of receipt, the DOT&PF's responsibilities under Section 106 are fulfilled pursuant to 36 CFR 800.4(d)(1)(i).
 4. If the SHPO or any consulting party object within thirty (30) calendar days of receipt of the finding, the PQI will consult with all consulting parties to resolve the issue and the DOT&PF will ensure the Section 106 process is completed on the undertaking in accordance with 36 CFR 800.4(d).

D. Assessments of Effect on Historic Properties

If a PQI determines that historic properties may be affected, the Criteria of Adverse Effect set forth in 36 CFR 800.5 will form the basis for determining whether there is an adverse effect. The PQI will apply the Criteria of Adverse Effect at 36 CFR 800.5(a) to any historic property eligible for listing in the NRHP in consultation with the SHPO. Consistent with the confidentiality provisions of 36 CFR 800.11(c) as needed, the PQI will submit the finding of effect and supporting documentation to all consulting parties, including the SHPO and the Tribes, for comment.

1. Finding of No Adverse Effect

- a. If the PQI finds that the undertaking will have no adverse effect on historic properties, the PQI will submit documentation to the SHPO and all consulting parties using the currently approved No Adverse Effect letter templates.
- b. If the SHPO does not comment on determinations and findings contained in a submission within thirty (30) calendar days of receipt, the DOT&PF may assume concurrence and proceed to the next step in the consultation process pursuant to 36 CFR 800.3(c)(4).
- c. If the SHPO or any consulting party object within thirty (30) calendar days of receipt of the finding, the PQI will consult with all consulting parties to resolve the issue and the DOT&PF will ensure the Section 106 process is completed on the undertaking in accordance with 36 CFR 800.5(c)(2).

2. Finding of Adverse Effect

- a. If the PQI finds that the undertaking will have an adverse effect on historic properties:
 - i. Finding Determinations
 1. For Regional Office projects, the Regional PQI will consult with the SEO PQI before making the finding of Adverse Effect on historic properties. The Regional Office PQI will submit documentation to the SHPO and all consulting parties, including notification of the ACHP, using the currently approved Adverse Effect letter templates.

2. For projects where the SEO takes the lead environmental processing role, the SEO PQI will make the finding of Adverse Effect on historic properties. The SEO PQI will submit documentation to the SHPO and all consulting parties including notification of the ACHP, using the currently approved Adverse Effect letter templates.
 3. If the SHPO does not comment on determinations and findings contained in a submission within thirty (30) calendar days of receipt, the DOT&PF may assume concurrence and proceed to the next step in the consultation process pursuant to 36 CFR 800.3(c)(4).
- ii. Resolution of Objections
1. For Regional Office projects, if the SHPO or any consulting party objects within thirty (30) calendar days of receipt of the finding, the Regional Office and SEO PQIs will consult with the consulting parties to resolve the issue. If after consultation the issue remains unresolved, the REM along with the Regional Office and SEO PQIs will refer the dispute to the appropriate Environmental Program Manager. For non-NEPA Assignment Program undertakings, this will be the FHWA Environmental Program Manager. For NEPA Assignment Program undertakings, this will be the Statewide Environmental Program Manager.
 2. For projects where the SEO Office takes the lead environmental processing role, the SEO PQI will consult with the consulting parties to resolve the issue before referring the dispute to the appropriate Environmental Program Manager as described above.
 3. The FHWA (for non-NEPA Assignment Program undertakings) or the DOT&PF (for NEPA Assignment Program undertakings) will ensure the Section 106 process is completed on the undertaking in accordance with 36 CFR 800.5(c)(2).

E. Resolution of Adverse Effect

If the PQI determines an undertaking may have an adverse effect on historic properties, the PQI will continue consultation to resolve the adverse effects in accordance with 36 CFR 800.6.

1. Resolution Consultation
 - a. For Regional Office projects, the Regional Office and the SEO PQIs will consult with the SHPO and other consulting parties to develop and evaluate alternatives or mitigation that could avoid, minimize, or mitigate adverse effects of the undertaking to historic properties. The SEO PQI has the discretion to participate in the consultations as needed.
 - b. For projects where the SEO takes the lead environmental processing role, the SEO PQI will consult with the SHPO and other consulting parties to develop and evaluate alternatives or mitigation that could avoid, minimize, or mitigate adverse effects of the undertaking to historic properties
2. Such alternatives or mitigation will be documented in a Section 106 Memorandum of Agreement (MOA) or other appropriate agreement document executed by the DOT&PF and the SHPO.

- a. The DOT&PF will ensure the Section 106 review process is completed in accordance with 36 CFR 800.6(a). The DOT&PF shall notify the ACHP of the adverse effect finding and provide the ACHP and all consulting parties with the documentation specified in 36 CFR 800.11(e). If the ACHP has elected to participate in consultation it will also be a signatory to the MOA. When the ACHP is participating in consultation or when a Tribe so requests, the FHWA will also participate in consultation and be a signatory to the MOA (except for NEPA Assignment Program undertakings).
 - b. For Regional Office projects, the Regional Office and SEO PQIs will assist in the development of and review the MOA. Text of the MOA will be approved by the SEO PQI. The Regional Office Directors will have signature authority on the MOA.
 - c. For projects where the SEO takes the lead environmental processing role, the SEO PQI will assist in the development of and review the MOA. Text of the MOA will be approved by the SEO PQI. The Chief Engineer will have signature authority on the MOA.
3. If the DOT&PF, the SHPO, and FHWA (if participating) fail to reach agreement on the resolution of adverse effects,
 - a. For non-NEPA Assignment Program undertakings, the SEO will refer the issue to the FHWA. The FHWA shall request the ACHP to join the consultation in accordance with 36 CFR 800.6(b)(1)(v). If the parties are still unable to agree on the terms of a MOA, the FHWA, the SHPO, or the ACHP may terminate consultation and the FHWA shall request the ACHP comment in accordance with 36 CFR 800.7.
 - b. For NEPA Assignment Program undertakings, the SEO shall request the ACHP to join the consultation in accordance with 36 CFR 800.6(b)(1)(v). If the parties are still unable to agree on the terms of a MOA, the DOT&PF, the SHPO, or the ACHP may terminate consultation and the SEO will request the ACHP comment in accordance with 36 CFR 800.7.