Case No. 18-16836

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY, TURTLE ISLAND RESTORATION NETWORK, JAPAN ENVIRONMENTAL LAWYERS FOR FUTURE, SAVE THE DUGONG FOUNDATION, ANNA SHIMABUKURO, TAKUMA HIGASHIONNA, and YOSHIKAZU MAKISHI,

Plaintiffs-Appellants,

v.

JAMES MATTIS, in his official capacity as Secretary of Defense;
And the UNITED STATES DEPARTMENT OF DEFENSE,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellants Center for Biological Diversity, Turtle Island Restoration Network, Japan Environmental Lawyers For Future, and Save the Dugong Foundation, certify that they have no parent corporations and that no publicly held corporation owns more than 10% of the Plaintiffs-Appellants.

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INTRODUCTION

Anna Shimabukuro, Takuma Higashionna, Yoshikazu Makishi, along with Japanese and U.S. conservation and community organizations with close ties to Okinawa, challenge the United States Department of Defense's failure to comply with the requirements of the National Historic Preservation Act (NHPA), 54 U.S.C. §§ 300101 *et seq.*,[1] in designing, constructing and operating a Marine Corps air base in Okinawa, Japan. The planned base, the Futenma Replacement Facility, will include a V-shaped runway built on landfill dumped into a pristine ocean bay. These waters are important habitat for a critically endangered and culturally significant population of manatee-like creatures, the Okinawan dugong. The community members and conservation organizations assert that the Department of Defense (DoD) did not adequately take into account the adverse effects of the base on the dugong for purposes of avoiding or mitigating any adverse effects, as required by the NHPA.

JURISDICTIONAL STATEMENT

The community members and conservation groups brought their case before the U.S. District Court for the Northern District of California, asserting that DoD's failure to comply with section 402 of the NHPA, 54 U.S.C. § 307101(e), is

[1] Formerly codified at 16 U.S.C. §§ 470 *et seq*.

arbitrary, capricious, and without observance of procedures required by law pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 706(2), and therefore subject to judicial review. *Id.* §§ 701-706. The district court had jurisdiction pursuant to 28 U.S.C. § 1331, as this action arises under the laws of the United States. This Court has jurisdiction under 28 U.S.C. § 1291 ("[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States").

On August 1, 2018, the district court granted the DoD's cross-motion for summary judgment and entered final judgment. On September 24, 2018, pursuant to Federal Rule of Appellate Procedure 3(a) and within the time designated by Federal Rule of Appellate Procedure 4(a)(1)(b), the community members and conservation groups filed their Notice of Appeal. Excerpt of Record (ER)[2] 1.

STATEMENT OF THE ISSUES

Did DoD violate section 402 of the NHPA, 54 U.S.C. § 307101(e), when it excluded community members and conservation groups from its "take into account" process and failed to consult on the effect of the Futenma Replacement Facility on the Okinawa dugong as a cultural resource?

[2] Citations to ER denote documents in Plaintiffs-Appellants' Excerpts of Record. Citations to CR denote the docket number of documents in the Clerk's Record.

Was DoD's finding that the Futenma Replacement Facility would have "no adverse effect" on the dugong arbitrary, capricious and contrary to procedure required by law, 5 U.S.C. §§ 706(2)(A), (2)(D), when: (1) DoD did not have the baseline biological data necessary to make a reliable determination of effects on the dugong; (2) DoD did not consider the full range of impacts of the Futenma Replacement Facility on the dugong; and (3) the determination of "no adverse effect" is contradicted by evidence in the record?

STATEMENT OF PRIMARY AUTHORITY

Pursuant to Ninth Circuit Rule 28-2.7, section 402 of the NHPA provides:

> Prior to the approval of any undertaking outside the United States that may directly and adversely affect a property that is on the World Heritage List or on the applicable country's equivalent of the National Register, the head of a Federal agency having direct or indirect jurisdiction over the undertaking shall take into account the effect of the undertaking on the property for purposes of avoiding or mitigating any adverse effect.

54 U.S.C. § 307101(e).

STATEMENT OF THE CASE

The Okinawa dugong is a critically endangered marine mammal that holds a central place in the culture of Okinawa, Japan, and is protected as a cultural icon under Japanese law. This case arises out of DoD's obligation, pursuant to the NHPA, to respect and protect foreign cultural heritage by taking into account the

effect on the dugong of DoD's participation in the construction and operation of a new Marine Corps air base in Okinawa, the Futenma Replacement Facility. Construction of the Futenma Replacement Facility will require landfilling portions of two bays off the coast of Okinawa. ER 148-49 (U.S. Marine Corps Recommended Findings (Findings)). Operation of the base will involve vessel traffic, noise and light pollution in Henoko and Oura bays. ER 149-50 (Findings). The sea grass beds in these bays are important feeding grounds for the dugong, and community members and conservation groups search for, learn about, and connect with dugong in the area. *See, e.g.,* ER 225-29 ¶¶ 3-8 (Decl. of Takuma Higashionna in Supp. of Pls.' Mot. for Summ. J. (Higashionna Decl.)). Because construction and operation of the Futenma Replacement Facility may impact the dugong, section 402 of the NHPA requires DoD to "take into account the effect [of the Futenma Replacement Facility on the dugong] for purposes of avoiding or mitigating any adverse effects." 54 U.S.C. § 307101(e).

In 2008, the district court held that DoD failed to comply with the obligations of the NHPA. ER 90 (Mem. and Order Re: Cross-Mots. for Summ. J., CR 119, Jan. 24, 2008 (2008 Order)). The court ordered DoD to take into account the effect of the Futenma Replacement Facility on the dugong and held the case in abeyance "until the information necessary for evaluating the effects of the Futenma Replacement Facility on the dugong is generated, and until defendants take the

information into account for the purpose of avoiding or mitigating adverse effects to the dugong." ER 93 (2008 Order).

In 2014, DoD notified the district court that it had completed its Findings under section 402. CR 151. The Findings illustrate numerous flaws in DoD's "take into account" process, which led to an unsubstantiated determination that the Futenma Replacement Facility would have no adverse effects on the dugong. DoD did not notify the public that it was undertaking the "take into account" process, let alone consult with community members and conservation groups or afford them any opportunity for comment on the impact of the final design of the base on the dugong.

DoD concluded that the construction and operation of the Futenma Replacement Facility would have no adverse effect on the Okinawa dugong, "because of the extremely low probability" of Okinawa dugongs being in the project area. ER 155 (Findings). However, DoD did not have the baseline biological data necessary to make a reliable determination of effects on the dugong and did not consider the full range of impacts of the Futenma Replacement Facility on the dugong. Moreover, there is ample evidence in the administrative record showing that the base *will* adversely affect the dugong.

On July 31, 2014, the community members and conservation groups filed a supplemental complaint seeking a judgment declaring that DoD's Findings violate

section 402, setting aside the Findings, and enjoining DoD's activities in furtherance of the project until DoD remedies the flaws in its "take into account" process. ER 126; CR 152-1.

On cross-motions for summary judgment, the district court ruled that DoD's Findings satisfy the requirements of the NHPA. ER 46-47 (Order Den. Pls.' Mot. for Summ. J. and Granting Defs.' Cross Mot. for Summ. J., CR 231, Aug. 1, 2018 (2018 Order)). The district court acknowledged that section 402 of the NHPA requires consultation, ER 26, 30, but in the absence of "persuasive agency guidance" on how and with whom to consult, the court concluded it "cannot say Defendants violated [the] procedural requirements of Section 402," ER 47, or that "the consultation was unreasonable and violative of Section 402." ER 39. The district court also held that DoD's "conclusions of no adverse effect were not arbitrary or capricious." ER 47.

The district court's inquiry was not sufficiently "searching and careful." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989). The record reveals that DoD avoided consulting with any community members or cultural practitioners regarding the impacts of the Futenma Replacement Facility on the dugong. DoD did not have the baseline biological data necessary to reliably determine whether the base would adversely affect the dugong. Nonetheless, DoD disregarded evidence that the base *will* adversely affect the dugong, arguing that

dugong would simply move away from any harm without considering the adverse effects that such displacement would cause. *See, e.g.,* ER 158 (Findings). The community members and conservation organizations therefore ask this Court to set aside DoD's Findings as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, 5 U.S.C. § 706(2)(A), and without observance of procedures required by law. *Id.* § 706(2)(D).

STATEMENT OF FACTS

I. The Futenma Replacement Facility

Since 1945, the United States has maintained military bases on the island of Okinawa, Japan, one of which is the Marine Corps Air Station Futenma. ER 50 (2008 Order). In 1996, the United States and Japan agreed that the United States would return Marine Corps Air Station Futenma to Japan after Japan constructed a replacement facility for U.S. Marine Corps activities in Okinawa. ER 52 (2008 Order). The new base is referred to as the Futenma Replacement Facility. DoD provided detailed operational requirements and design specifications for the replacement facility that Japan is required to meet for the relocation to proceed. *Id.*

In 2006, the United States and Japan reached agreement on the plan for the Futenma Replacement Facility. ER 233 (U.S.-Japan Roadmap for Realignment Implementation). The plan calls for relocating the base to expanded facilities at another U.S. base in Okinawa—Camp Schwab, on Cape Henoko. *Id.* The

expansion requires construction of a "V-shaped" runway that would be built partially on landfill extending more than a mile into the waters and seagrass beds of Oura and Henoko Bays. ER 7 (2018 Order).

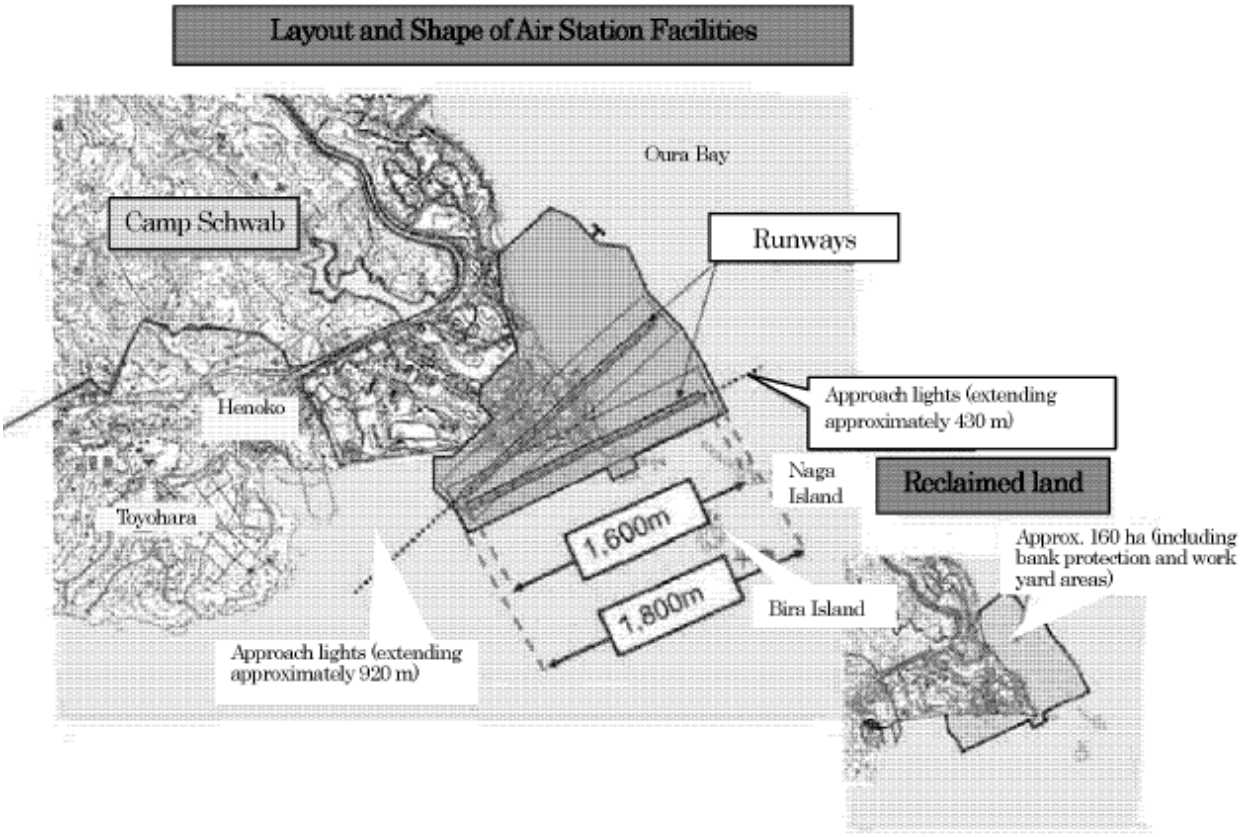

Fig. 2.2.5.1 Layout and Shape of Air Station Facilities

ER 10 (2018 Order) (reproducing map from ER 247, Draft EIS).

The area of Henoko Bay that would be destroyed by the runway is currently rich in seagrass beds. *See, e.g.,* ER 146 (Findings) ("feeding trails have been intermittently observed in the seagrass beds within the footprint of the FRF"); ER 149 ("78.1 ha of seagrass beds [exist] beneath the fill lands created to support the runways. This amounts to the loss of 7.3% of the seagrass beds in the sea area in

front of Henoko Bay and 37.7% of the beds on the side of Oura Bay"). These seagrass beds are critical to the dugong's survival. ER 206-07 ¶¶ 30, 32 (Decl. of Ellen Hines, Ph. D., in Supp. of Pls.' Mot. for Summ. J. CR 85-14) (Hines Decl.). Henoko and Oura bays are also important areas for community members and conservation groups to search for, learn about, and feel a connection with the dugong. ER 191-94 ¶¶ 3-6 (Decl. of Anna Koshiishi in Supp. of Pls.' Mot. for Summ. J.) (Koshiishi[3] Declaration); Higashionna Decl., ER 225-29 ¶¶ 3-8.

Japan is responsible for funding and completing the construction of the Futenma Replacement Facility. ER 185 ¶ 13 (Joint Statement of Undisputed Facts (Undisputed Facts)). Nonetheless, the Futenma Replacement Facility is a federal undertaking, because "the United States has been substantially involved in the design and site selection for the Futenma Replacement Facility, will continue to monitor and oversee the construction of the facility to ensure that it meets U.S. requirements, and will have exclusive authority to operate the facility once it is completed." ER 71 (2008 Order). Pursuant to Japanese law, Japan completed a

[3] In previous proceedings, Plaintiff-Appellant, Anna Shimabukuro was identified as Anna Koshiishi. She subsequently married and changed her family name from Koshiishi to Shimabukuro.

draft environmental impact statement (EIS)[4] for the Futenma Replacement Facility in 2009, and a final EIS in 2012. ER 147-48 (Findings).

Construction of sea walls in Henoko-Oura Bay has commenced but the new base will be completed no earlier than 2022. ER 369 (Cong. Research Serv., R42645, *The U.S. Military Presence in Okinawa and the Futenma Base Controversy* (CRS Report)). Once the sea-wall is built, soil and rock will be dumped into the enclosed area, completely destroying approximately 78.1 hectares of seagrass beds. ER 156 (Findings). Construction of the Futenma Replacement Facility requires DoD to issue work entry permits for access to Camp Schwab and to adjacent U.S.-controlled waters, ER 75-76 (2008 Order).

II. **The Okinawa Dugong and the NHPA**

The Okinawa dugong is a globally threatened marine mammal species that is listed as "endangered" under the U.S. Endangered Species Act, 16 U.S.C. §§ 1531 *et seq*. The waters surrounding Okinawa are home to the few remaining Okinawa dugong, a rare, genetically isolated, and unique population of the dugong species. *See* ER 199 ¶ 14 (Hines Decl.).

The Japanese Ministry of the Environment has listed the Okinawa dugong as "critically endangered" in Japan. ER 181 ¶ 2 (Undisputed Facts). In 1997, the

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[4] The administrative record refers to Japan's environmental review as both an environmental impact statement and an environmental impact assessment (EIA). These terms are used interchangeably and refer to the same document.

Mammalogical Society of Japan estimated the population at fewer than 50 individuals. ER 433 (Survey of the Marine Mammals of Okinawa Report, Aug. 28, 2013 (SuMMO Report)). The most recent surveys by the Government of Japan concluded that there are at least three remaining Okinawa dugongs. ER 155 (Findings).

Preservation of the Okinawa dugong depends entirely upon the preservation of its habitat. *See generally* ER 195 (Hines Decl.). Despite the Okinawa dugong's critically low numbers, some Japanese scientists believe that the dugong population around Henoko Bay can possibly recover if steps are taken to preserve (a) deep areas off the outer edge of the coral reef where dugongs rest and avoid human activities during the day; (b) seagrass beds used for foraging; and (c) corridors used for dugong travel between the reefs and seagrass. ER 206 ¶ 29 (Hines Decl.).

Dugongs are deeply significant in Okinawan culture. ER 181 ¶ 3 (Undisputed Facts). They are "associated with traditional Okinawan creation mythology, sometimes being considered the progenitor of the local people." *Id*. Because dugongs have "special importance in native Okinawa mythology and culture," ER 146 (Findings), Japan protects the dugong as a "Natural Monument" under Japan's Law for the Protection of Cultural Properties. ER 145 (Findings).

Pursuant to the NHPA, it is "the policy of the Federal Government, in cooperation with other nations" to "provide leadership in the preservation of the prehistoric and historic resources of the United States and of the international community of nations." 54 U.S.C. § 300101(2). As part of the NHPA Amendments of 1980, Congress enacted section 402, 54 U.S.C. § 307101(e), to comply with U.S. obligations under the Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) and to mitigate the adverse effects of federal undertakings outside the United States. Section 402 requires that

> [p]rior to the approval of any Federal undertaking outside the United States which may directly and adversely affect a property which is on … the applicable country's equivalent of the National Register, the head of a Federal agency having direct or indirect jurisdiction over such undertaking shall take into account the effect of the undertaking on such property for purposes of avoiding or mitigating any adverse effects.

54 U.S.C. § 307101(e). This requirement is intended to

> "generat[e] information about the impact of federal actions on the environment," and to "require[] ... the relevant federal agency [to] *carefully consider* the information produced," *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1097 (9th Cir. 2005) (emphasis added), and to "*weigh* effects in deciding whether to authorize" a federal undertaking, *Save Our Heritage v. Fed. Aviation Admin*., 269 F.3d 49, 58 (1st Cir. 2001) (emphasis added).

ER 78-79 (2008 Order). Because the list of protected cultural properties under Japan's Cultural Properties Law is the "equivalent" of the U.S. National Register

of Historic Places, the NHPA applies to federal undertakings that may affect the Okinawa dugong. ER 74 (2008 Order).

III. Procedural History

On September 25, 2003, Okinawan community members and U.S. and Japanese conservation groups filed suit challenging DoD's involvement in the design, development, and approval of the Futenma Replacement Facility, claiming that the agency's failure to "take into account" adverse effects of the proposed facility on the Okinawa dugong violated the NHPA, 54 U.S.C. § 307101(e), and APA, 5 U.S.C. §§ 706(1), (2)(A), (2)(D). CR 1.

On May 17, 2004, DoD moved to dismiss the case, arguing that the plaintiffs had failed to state a claim upon which relief could be granted because the dugong is not "property" within the meaning of the NHPA, in part because the Japanese Law for the Protection of Cultural Properties is not "equivalent" to the U.S. National Register of Historic Places. CR 23 at 2-3.

On March 2, 2005, the district court denied the motion, holding that the NHPA applies to protect the Okinawa dugong, ER 111 (Mem. and Order Den. Defs.' Mot. to Dismiss (2005 Order)), that section 402 applies extraterritorially, ER 121, and that the lawsuit does "not thrust this court into issues of foreign affairs; rather, it summons the court's attention to matters under the control of the United States Department of Defense." *Id.*

Following discovery on whether DoD's activities constitute a "federal undertaking" under the NHPA, the parties filed cross-motions for summary judgment. CR 85, 90. On January 24, 2008, the district court granted the plaintiffs' summary judgment motion and denied DoD's motion. ER 93 (2008 Order). The court held that the Futenma Replacement Facility was a "federal undertaking" within meaning of section 402 of NHPA. ER 76. DoD was therefore required to "'take into account' the effect of the undertaking on the dugong," ER 77-84, for purposes of "avoiding or mitigating any adverse effect." 54 U.S.C. § 307101(e).

The district court ordered DoD to comply with section 402 of the NHPA, including by "produc[ing], gather[ing], and consider[ing]" the information necessary for "taking into account the effects of the FRF [Futenma Replacement Facility] on the Okinawa dugong and for determining whether mitigation or avoidance measures are necessary and possible," ER 90, and held the case in abeyance "until defendants take the information into account for the purpose of avoiding or mitigating adverse effects to the dugong." ER 93.

On April 16, 2014, the Department of Defense notified the district court that it had completed its "Findings" under the NHPA, and that these Findings and an accompanying "Action Memo" concluded the NHPA process. CR 151. This was the first time the community members and conservation groups learned that DoD

had undertaken a "take into account" process concerning the Futenma Replacement Facility. DoD did not provide public notice of the process, disclose how it selected those whom it allowed to participate, make the Findings or supporting documents publicly available, or consult with the community members and conservations groups. *See generally* ER 173 (Defs.' Notice of Completing NHPA Section 402 Findings).

In its Findings, DoD determined that the Futenma Replacement Facility would have "'no adverse effect' on the Okinawa dugong." ER 155 (Findings). In reaching this conclusion, DoD relied primarily on two documents:

(i) Welch Report: an anthropological study commissioned by the agency to document the cultural significance of the Okinawa dugong, ER 277; and

(ii) Japanese EIS: Translated excerpts of the Government of Japan's draft and final environmental impact statement. *See,* ER 243, 442.

Although the Findings cite only to the Welch Report and the Japanese EIS in support of its conclusions, ER 165-68 (table correlating each topic in Findings with sections from "Welch" study and the EIS), DoD also considered:

(iii) Jefferson Report: a study by Dr. Thomas A. Jefferson titled "Biological Assessment of the Okinawan Dugong: A review of

Information and Annotated Bibliography Relevant to the Futenma Replacement Facility," ER 475;

(iv) Bi-Lateral Expert Study Group: the 2010 report of a bi-lateral group composed of Japanese and U.S. government officials directed to study the Futenma Replacement Facility's location, configuration, and construction method, ER 467; and

(v) SuMMO Report: Survey of Marine Mammals in Okinawa commissioned to update the Integrated Natural Resources/Cultural Resources Management Plan for Marine Corps Base Camp Smedley D. Butler. ER 389.

On July 31, 2014, the community members and conservation groups filed their First Supplemental Complaint, in which they challenged two aspects of DoD's compliance with the NHPA "take into account" process. ER 126 (First Supplemental Compl.). First, Plaintiffs challenged DoD's failure to satisfy the consultation and public participation requirements of section 402, including by failing to consult Plaintiffs as interested parties and make the Findings and supporting data public. ER 140 ¶¶ 48-50. Second, because of numerous flaws in the process of gathering and assessing information, Plaintiffs challenged the conclusion that the construction and operation of the Futenma Replacement Facility will not adversely affect the Okinawa dugong. ER 134, 139 ¶¶ 28, 44-46.

In light of these concerns, Plaintiffs requested a judgment declaring that DoD's Findings, and the process used to develop them, violate NHPA section 402. ER 140-41. Plaintiffs also requested an order setting aside DoD's Findings, and an order "that DoD not undertake any activities in furtherance of the FRF project … until it complies with section 402." *Id.*

On September 29, 2014, DoD moved to dismiss Plaintiffs' complaint, arguing that their claims are barred by the political question doctrine. CR 163. Plaintiffs opposed the motion, CR 167, but on February 13, 2015, the district court dismissed the case on standing and political question grounds. CR 36 at 43. Plaintiffs appealed and, in August 2017, this Court reversed and remanded to the district court for consideration of Plaintiffs' claims on the merits. *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 830 (9th Cir. 2017).

The parties again filed cross-motions for summary judgment. CR 221, 222.[5] On August 1, 2018, the district court ruled in favor of DoD, holding that "Plaintiffs have not shown that Defendants' scoping of the consultation was unreasonable and violative of Section 402." ER 39. The court also held that "Defendants'

[5] The parties stipulated to stay briefing on remedy until after the court ruled on the merits. CR 224 (Joint stipulation requesting stay of briefing on remedy). The district court has thus not addressed the issue of injunctive relief. CR 225 (Order staying briefing on remedy).

conclusions of no adverse effect were not arbitrary or capricious." ER 47. Plaintiffs now appeal the district court's ruling.

SUMMARY OF ARGUMENT

Section 402 of the NHPA requires that DoD "take into account" the effect of the Futenma Replacement Facility on the dugong, for purposes of avoiding or mitigating any adverse effects. 54 U.S.C. § 307101(e). In completing this process, a federal agency must "engage[] the host nation and other relevant private organizations and individuals in a cooperative partnership." ER 80 (2008 Order). The plaintiff community members and conservation organizations have demonstrated specific interest in the Futenma Replacement Facility and its potential to harm the Okinawa dugong. Yet, DoD did not notify them or the public of the agency's process for taking into account the impact of the Futenma Replacement Facility on the dugong until DoD informed the district court that its process was complete. Although DoD commissioned a study examining the significance of the dugong in Okinawan culture, it did not consult with any community members or cultural practitioners regarding the impacts that the Futenma Replacement Facility would have on the dugong. The DoD's failure to consult on the impacts of the base on the dugong violates the procedural requirements of the NHPA.

DoD concluded that the construction and operation of the Futenma Replacement Facility would have no adverse effect on the Okinawa dugong, "because of the extremely low probability" of Okinawa dugongs being in the project area, or "should dugongs in fact be present, the construction and operational activity is primarily of the type that would not have an adverse effect." ER 155 (Findings). This determination is arbitrary and capricious because (1) the Department of Defense did not have the baseline biological data necessary to make a reliable determination of effects on the dugong; (2) the agency did not consider the full range of impacts of the Futenma Replacement Facility on the dugong; and (3) the determination of "no adverse effect" is contradicted by evidence in the record. For these reasons, the community members and conservation groups ask this Court to hold DoD's Findings to the standards for sound administrative decision-making set forth in the APA and set those Findings aside as arbitrary, capricious, and contrary to law.

STANDARD OF REVIEW

This Court reviews a district court's summary judgment *de novo*, applying the same standards that applied in the district court. *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 778 (9th Cir. 2006). The Administrative Procedure Act provides the standard for judicial review of agency decisions under the NHPA. *Id.* A reviewing court "shall…hold unlawful and set aside agency action, findings and

conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] without observance of procedure required by law." 5 U.S.C. §§ 706(2)(A), (2)(D). This inquiry, while narrow, must be "searching and careful." *Marsh*, 490 U.S. at 378. In this Circuit, a court

> will strike down agency action as "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency," or if the agency's decision "is so implausible that it could not be ascribed to a different view or the product of agency expertise."

Turtle Island Restoration Network v. U.S. Dep't. of Commerce, 878 F.3d 725, 732-33 (9th Cir. 2017) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983)). The deference a court owes an administrative agency under the arbitrary and capricious standard of review of the APA is not unlimited; the court may not automatically defer to an agency's conclusions, even when those conclusions are scientific. *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014). *See also Brower v. Evans*, 257 F.3d 1058, 1067 (9th Cir. 2001) ("The presumption of agency expertise can be rebutted when its decisions, while relying on scientific expertise, are not reasoned.") (citing *Defenders of Wildlife v. Babbitt,* 958 F. Supp. 670, 679 (D.D.C. 1997)). Because this is a record review case, this Court may direct that summary judgment be granted to either party based upon *de novo* review of the administrative record. *Pit*

River Tribe, 469 F.3d at 778 (citing *Ecology Ctr., Inc. v. Austin*, 430 F.3d 1057, 1062 (9th Cir.2005)).

ARGUMENT

I. The Department of Defense's "Take Into Account" Process Violated the Procedural Requirements of the NHPA.

A. The NHPA's "take into account" provision requires engagement with the public and consultation with relevant interested parties.

The NHPA establishes that "[i]t is the policy of the Federal Government, in cooperation with other nations," to "provide leadership in the preservation of the historic resources of the United States and of the international community of nations." 54 U.S.C. § 300101(2). Congress enacted section 402 of the NHPA to comply with U.S. obligations under the World Heritage Convention and to mitigate the adverse effects of federal undertakings outside the United States. *See* 54 U.S.C. § 307101.

Section 402 of the NHPA requires that, "[p]rior to the approval of any undertaking outside the United States that may directly and adversely affect a property that is on the World Heritage List or on the applicable country's equivalent of the National Register," the head of a Federal agency shall "take into account the effect of the undertaking on the property for purposes of avoiding or mitigating any adverse effect." 54 U.S.C. § 307101(e). There are no regulations directly implementing the "take into account" requirement of section 402.

However, the language of section 402 is "identical in all material respects" to section 106—the domestic provision of the NHPA[6]—and "there is no indication that Congress intended the basic framework of foreign and domestic take into account procedures to differ." ER 82 (2008 Order). The section 402 "take into account" process "follow[s] the basic outline of section 106," which governs the process for taking into account the effects of agency actions on domestic historic properties, ER 81, and includes "at a minimum:"

> (1) identification of protected property, (2) generation, collection, consideration, and weighing of information pertaining to how the undertaking will affect the historic property, (3) a determination as to whether there will be adverse effects or no adverse effects, and (4) if necessary, development and evaluation of alternatives or modifications to the undertaking that could avoid or mitigate the adverse effects.

ER 80. In completing this process, a federal agency must "engage[] the host nation and other relevant private organizations and individuals in a cooperative partnership." *Id*.

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[6] Section 106 provides:

> 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.

54 U.S.C. § 306108.

"Congress' intent that the section 402 take into account process contain basic elements," including "consultation with interested parties and organizations—is evident." ER 83. "When it enacted section 402 in 1980, Congress declared that '[i]t shall be the policy of the Federal Government, *in cooperation with* other nations and in partnership with the States, local governments, and Indian tribes, *and private organizations and individuals'* to 'provide leadership in the preservation of the . . . resources of the United States and the international community of nations.'" ER 79 (citing 54 U.S.C. § 300101(2)) (emphasis added by the district court).

The U.S. Department of the Interior, which Congress authorized to "direct and coordinate" U.S. participation in the World Heritage Convention, 54 U.S.C. § 307101(b), issues guidance documents which the Ninth Circuit considers authoritative interpretations of the NHPA. *See, e.g., Muckleshoot Indian Tribe v. U.S. Forest Serv.,* 177 F.3d 800, 807 (9th Cir. 1999) (Department of Interior National Register Bulletin 38 "provides the recognized criteria for the Forest Service's identification and assessment of places of cultural significance."). Department of Interior guidelines directly addressing implementation of section 402 state that "efforts to identify and consider effects on historic properties in other countries should be carried out in consultation with the host country's historic preservation authorities, with affected communities and groups, and with relevant

professional organizations." Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the NHPA (Department of Interior Guidelines), 63 Fed. Reg. 20,496, 20,504 (Apr. 24, 1998).

The Advisory Council on Historic Preservation, the body tasked with promulgating regulations to implement the domestic "take into account" process, 54 U.S.C. § 304108, has issued regulations prescribing specific review and consultation requirements. *See* 36 C.F.R. § 800. These regulations emphasize that "[t]he views of the public are essential to informed Federal decisionmaking in the section 106 process." 36 C.F.R. § 800.2(d)(1). A federal agency "must . . . provide the public with information about an undertaking and its effects on historic properties and seek public comment and input." *Id.* § 800.2(d)(2). Beyond notification to the general public, "[c]ertain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties." 36 C.F.R. § 800.2(c)(5); *see also Tyler v. Cuomo*, 236 F.3d 1124, 1133-34 (9th Cir. 2000) (consultation required the plaintiffs and defendant government agency to "sit down together in a face-to-face meeting," so that the plaintiffs "could, conceivably, directly impact the City's decisions"). Consultation confers the right to provide input regarding potential adverse effects for the agency's consideration, 36 C.F.R.

§ 800.5(a), to review the agency's draft finding of adverse effect and offer input before it becomes final, *id.* § 800.5(c), and, if an adverse effect is found, to provide input and review proposals for mitigation efforts. *Id.* § 800.6.

Section 402's "take into account" process tracks the domestic process outlined in the ACHP regulations. ER 26 (2018 Order) ("Section 106 is the domestic analog for Section 402"); ER 57 (2008 Order) ("Section 402, therefore, is the international counterpart to section 106"). Section 402, therefore, requires engagement with the public and consultation with interested parties. ER 80 (2008 Order). Agency decisions made without adherence to these procedural requirements violate the NHPA and should be set aside. *See, e.g., Pit River Tribe*, 469 F.3d at 787-88 (because the agency violated its duties under the NHPA to consult with the Tribe, the lease extensions must be undone). "If the Government has not followed NHPA Section 402, then [] the underlying determinations about effects and mitigation lack validity." *Ctr. for Biological Diversity v. Mattis*, 868 F.3d at 818.

B. Plaintiffs are "relevant private organizations and individuals" whom the Department of Defense should have consulted.

The NHPA requires federal agencies to consult with any Indian tribe and Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by the agency's undertakings. 54 U.S.C. § 306102(b)(4); 36 C.F.R. § 800.2(c)(1)-(4). While not directly applicable in the

international context, this requirement recognizes that for consultation to be meaningful, the communities for whom the protected property is significant must be able to provide input on how an agency's actions might affect their use and enjoyment of, and cultural connection to, that property. *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't. of Interior*, 608 F.3d 592, 607 (9th Cir. 2010) ("The NHPA implementing regulations require the [agency], at all stages of the section 106 process, to consult with tribes that 'attach[ ] religious and cultural significance to historic properties that may be affected by an undertaking.'") (citing 36 C.F.R. § 800.2(c)(2)(ii)). The cultural significance of the dugong in Japan is unique to Okinawa. ER 145-46 (Findings). It is essential that DoD consult with members of the local community with a cultural and spiritual connection to the dugong, and whose interests are directly impacted by the Futenma Replacement Facility.

The plaintiff community members and conservation organizations have demonstrated specific interest in the Futenma Replacement Facility and its potential to harm the Okinawa dugong. *See* ER 65 (2008 Order) (Plaintiffs have demonstrated concrete interests to preserve the dugong for cultural, educational, aesthetic, inspirational and economic benefits to themselves and their descendants and these interests are "directly linked" to DoD's failure to comply with the NHPA); *see also* ER 187-90 ¶¶ 2-8 (Decl. of Yoshikazu Makishi in Supp. of Pls.'

Mot. for Summ. J.). Yet DoD did not notify Plaintiffs of its process for taking into account the impact of the Futenma Replacement Facility on the dugong until DoD informed the district court that its process was complete. ER 173-74 (Defs.' Notice of Completing NHPA Section 402 Findings). At no time did DoD notify the public, Okinawa state or local government,[7] Plaintiffs, or other interested parties that it was undertaking this process, or invite public participation.

> DoD's NHPA Findings state that
>
> [t]he [U.S. Marine Corps] used several methods to engage the host nation and other relevant private organizations and individuals. The USMC's contracted experts contacted a range of interested Japanese and non-Japanese organizations and individuals to solicit input regarding the cultural significance of the dugong and the potential effects of the proposed Undertaking on the dugong as cultural property.

ER 163. However, nothing in the record shows that DoD solicited input from Plaintiffs or other local community members for whom the dugong is culturally and spiritually significant.

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[7] Indeed, on April 16, 2018, Governor Onaga sent a letter to Secretary Mattis and other DoD officials formally requesting that DoD "consult with the Okinawa Prefectural Government regarding the impact on the Okinawa dugong from the construction of the U.S. Marine Corps Futenma Air Base Replacement Facility," and stating that DoD "did not consult with the Okinawa Prefectural Government and Nago City" or "with experts and environmental organizations which could have provided views contrary to those presented in the [Japanese] EIA." *See* Letter from Takeshi Onaga, Governor of Okinawa, to James Mattis, U.S. Secretary of Defense, Apr. 16, 2018, *available at* http://www.pref.okinawa.lg.jp/site/chijiko/henoko/documents/requesteng.pdf.

In response to the district court's 2008 order that it take into account the effects of the Futenma Replacement Facility on the dugong, DoD hired U.S.-based contractors International Archeological Research Institute, Inc. to conduct an "Ethnographic Study" to "obtain information on the modern significance of the Okinawa dugong." ER 289 (Welch Report). This study included a literature review, ER 289-90, a review of archival data on the anthropological importance of the dugong, ER 280, a review of biological information, *id*., and "informant interviews conducted for the ethnographic study." ER 163, 322-57. Other than bi-lateral communications with the Government of Japan, these informant interviews represent the entirety of DoD's public outreach and consultation process. However, the informants were academics and did not include local community members or cultural practitioners for whom the dugong is culturally significant. ER 291-94 (Welch Report) (summarizing the interviews).

Defendants' own political consultant, Mr. Hideo Henzan, recognized the relevance of local elders and practitioners and advised "that if [DoD] really want[s] to learn about the role of Dugongs in Okinawa life then they should go talk to the local ward mayors and/or the elders living around Henoko Bay." ER 363 (E-mail from Ayako Kimura (U.S. Embassy) to Jason C. Hamm (The Pentagon), Aug. 27, 2009); *see also* ER 359 (E-mail from Dr. David J. Welch to Val N. Curtis of the Department of Defense, Feb. 3, 2010) ("As I've mentioned before, the one place

where we are really weak is that we did not have sufficient time to contact and get meetings arranged with cultural practitioners").

Despite the absence of input from local community members for whom the dugong is culturally significant, the district court concluded that DoD's failure to consult with local community members and conservation organizations was reasonable because the Japanese environmental assessment process provided other opportunities through which Plaintiffs could make their views concerning the impact of the Futenma Replacement Facility known to DoD. ER 31 (2018 Order). This reasoning is flawed because the Japanese environmental assessment was limited to biological and not cultural, educational, aesthetic, or economic impacts, and thus did not provide a mechanism for the plaintiffs to convey their input on how the base would affect the cultural values that led to the dugong's protected status under both the Japanese Law for the Protection of Cultural Properties and the NHPA. CR 120 at 5 (Defs.' Response to Court Mem. and Order re. Cross Mots. for Summ. J.) ("[T]he EIA alone, as prepared by the Government of Japan for its own environmental assessment process, is not expected to address effects on cultural resources in a manner that this court has determined is required by the defendants to comply with § 402 of the National Historic Preservation Act.").

It is DoD's obligation to ensure compliance with the NHPA. 54 U.S.C. § 307101(e). To the extent that DoD relies on information generated by the Japanese

EIS process, DoD must demonstrate that the requirements of the statute are met. In this case, the Japanese environmental assessment process does not meet the requirements of section 402 because while it allowed the Japanese public to provide input on a draft environmental impact statement, it did not allow public comment on the final EIS and mitigation measures. ER 177 ¶ 8 (Decl. of Kunitoshi Sakurai in Supp. of Pls.' Response to Court Mem. and Order Re: Cross-Motions for Summ. J.). In the NEPA context, the Ninth Circuit has looked skeptically on the adequacy of public comment when the public did not have an opportunity to comment on important amendments. *See Anderson v. Evans*, 371 F.3d 475, 486 (9th Cir. 2004) ("The Draft EA did not evaluate the amended Management Plan, so there has been no opportunity for public comment on the important amendments. Nor did any of the scientific studies relied on in the EA specifically evaluate the impact of the revised Management Plan."). Consultation involves not only the right to provide input regarding potential adverse effects for the agency's consideration, *see* 36 C.F.R. § 800.5(a), but also the right to review the agency's draft finding of adverse effect and offer input before it becomes final, *id.* § 800.5(c), and, if an adverse effect is found, to provide input and review proposals for mitigation efforts. *Id.* § 800.6. It is unreasonable to conclude that commenting on the Japanese draft environmental impact statement would satisfy DoD's NHPA consultation requirement.

Reliance on the Japanese environmental assessment process to satisfy DoD's consultation obligations is also insufficient because it denies U.S. plaintiff the Center for Biological Diversity and the U.S. public the opportunity to contribute. In the domestic context, a federal agency "must . . . provide the public with information about an undertaking and its effects on historic properties and seek public comment and input." 36 C.F.R. § 800.2(d)(2). Likewise, the U.S. public has an interest in information about the effects of our government's actions on historic properties overseas. The secrecy with which DoD conducted its "take into account" process is contrary to the policy of cooperation and partnership enshrined in the NHPA. 54 U.S.C. § 300101.

The district court also suggested that DoD adequately took community members' and conservation organizations' views into account, including the views of plaintiffs, because "four declarations that Plaintiffs filed in earlier stages of this litigation were ultimately included in the administrative record and considered by Defendants." ER 31. However, two of those declarations—the Declaration of Isshu Maeda, CR 28-2, and the Declaration of Sekine Takamichi, CR 28-3—were submitted in 2004, prior to the agreement between Japan and the United States on the design of the Futenma Replacement Facility and do not address the impacts of the base on the dugong. The other two declarations were submitted by Dr. Ellen Hines in 2007, CR 85-14, CR 105, before Japan began its environmental

assessment, before DoD undertook its NHPA "take into account" process, and when details of the base design were still unsettled. *See, e.g.,* ER 458-66 (Final Environmental Impact Statement Chapter 8) (outlining the differences between the draft and final version of the EIS). Dr. Hines, an American marine biologist, does not opine on the cultural significance of the dugong and does not represent the viewpoints of community members and conservation groups. Inclusion of her declarations in the administrative record cannot reasonably amount to consultation under the NHPA.

The plaintiff community members and conservation groups submitted ample evidence demonstrating that, if consulted, they and other local stakeholders would have contributed information otherwise missing from DoD's "take into account" analysis. *See, e.g.,* ER 191-94 ¶¶ 3-6 (Koshiishi Decl.) (local cultural guide with experience relevant to how cultural, aesthetic, recreational, scientific, and economic interests in the dugong may be harmed by the Futenma Replacement Facility); ER 225-29 ¶¶ 3-8 (Higashionna Decl.) (a guide and advocate for Okinawa dugong with experience relevant to how the Futenma Replacement Facility may harm creation beliefs tied to dugong and how visitors view the dugong); CR 230 at 26 Ln. 12-23 (Transcript of Oral Argument) ("the individual plaintiffs go out in boats and spend time in Henoko Bay [and] they take people who want to see dugong and understand how the dugong lives out onto the bay").

For example, the Welch Report states that construction of the Futenma Replacement Facility will "directly impact a traditionally named place . . . called the *Jangusanumii* (the dugong's bed)," but concluded that the base "should have little direct adverse impact on the cultural significance of the dugong or on traditional cultural practices" because "project research found no indication that any culturally important activities are conducted in or associated with this area." ER 315. However, Plaintiffs submitted declarations almost three years prior indicating that culturally important activities did occur in the area, including cultural tours in the area of the *Jangusanumii*. *See* ER 225-29 ¶¶ 3-8 (Higashionna Decl.) (an eco-guide giving tours off the Henoko coast to view dugongs and their habitat for clients "motivated by a desire to learn about the Okinawa dugong's cultural and historic significance").

DoD's failure to engage the plaintiff community members and conservation organizations, who have demonstrated specific interest in impacts of the Futenma Replacement Facility on the dugong, violates the procedural requirements of section 402. Thus, DoD's Findings are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and "without observance of procedure required by law" and should be set aside. 5 U.S.C. §§ 706(2)(A), (2)(D).

C. The Department of Defense failed to consult with any entity regarding the effect of the Futenma Replacement Facility on the cultural characteristics of the dugong.

The Department of Defense acknowledges in its Findings that "assessment of effect is based on the extent to which the Undertaking would alter the characteristics of the Okinawa dugong that make it a cultural property." ER 147. DoD has failed to consult with any entity regarding the effect of the Futenma Replacement Facility on the cultural characteristics of the dugong.

The interviews that DoD's consultant conducted for the Welch Report addressed the significance of the dugong in Okinawan culture but did not address the impact that construction or operation of the Futenma Replacement Facility would have on the dugong or its habitat. When the consultant contacted "informants" to request interviews for an "anthropological study," the consultant did not disclose the context or purpose of the study. In a "Letter of Introduction" to potential interviewees dated Oct. 1, 2009, ER 361, David Welch writes that the consultant is conducting research and interviews "concerning the role of the dugong in Okinawan culture" and states that "[t]he information collected through this research will be used strictly by the Marine Corps to further its understanding of the significance of the dugong in Okinawa" and "will help the Marine Corps carry out its mission and future planning in Okinawa in way that will insure that the dugong is treated in accordance with its status as a natural monument and as a

rare and endangered species." ER 361. This letter makes no mention of the federal undertaking—the Futenma Replacement Facility—that may affect the dugong. *Id.* Nor does it disclose that the purpose of the study is to determine whether the base will have an adverse effect or that an obligation to avoid or mitigate any adverse effects hinges on the determination. *Id*. *Cf.* DoI Guidelines, 63 Fed. Reg. 20,504 ("Whether consulting on a specific project or on broader agency programs, the agency should ... [m]ake its interests and constraints clear at the beginning."). Indeed, although transcripts of the interviews were not produced in the administrative record, summaries of the interviews provide no evidence that the Futenma Replacement Facility and its impacts on the dugong were ever discussed. ER 322-57 (Welch Report).

Finally, DoD did not give any of the cultural experts interviewed an opportunity to review drafts of DoD's Findings or to comment on DoD's conclusion that construction and operation of the Futenma Replacement Facility would not adversely affect the Okinawa dugong. *Cf.* 36 C.F.R. §§ 800.5(c), 800.6. The only people allowed to review a draft of the Findings were officials of the Japanese government, *see* ER 164 (Findings); ER 241 (Letter from Department of the Navy to Mr. Kentaro Kaihara, Embassy of Japan, providing draft Findings for review), and the contractors DoD hired to conduct the anthropological study of the importance of dugong in Okinawan culture. *See, e.g.*, ER 358 (E-mail from Dr.

Goodfellow to Civ Stephen Wenderoth and Senior Executive Service Paul C Hubbell, Mar. 1, 2010) (circulating draft findings with contractors and internal personnel). Thus, although DoD's contractors interviewed local academics about the historical significance of the dugong in Okinawan culture, DoD provided no evidence that it consulted with relevant private organizations and individuals, as ordered by the district court, or with affected communities as recommended by DoI guidelines, about the Futenma Replacement Facility's impacts on the dugong. To the contrary, DoD appears to have actively concealed its engagement in the NHPA process.

The district court acknowledged that this lack of transparency "reflects a weakness in the [take into account] process," ER 38 (2018 Order), but excuses it on the grounds that not "*every* consultation [must] address *both* the cultural significance of the monument *and* the expected effects." *Id*. "[E]ven if the [] consultants did not specifically ask their interlocutors about the effects of the FRF, the Japanese public had an opportunity to comment through Japan's EIS about such effects." *Id.* However, as discussed above, the Japanese environmental impact statement does not address the impacts of the Futenma Replacement Facility on the cultural characteristics of the dugong; that element of the "take into account" process is entirely missing. This is important because it is possible that mitigation measures might reduce biological harm while amplifying cultural harm.

For example, a mitigation measure that causes dugongs to avoid ship traffic may also cause dugongs to vacate areas connected with their cultural value.

The district court also noted that DoD had engaged in "full consultation with the Japanese government." *Id*. The Findings indicate that consultation with the Japanese government occurred on some background issues related to the cultural significance of the dugong, such as the rationale for designating the dugong as a national monument, ER 145, 147-49, and archival and ethnographic research. ER 165-68. However, DoD does not cite any consultation with the Japanese government concerning how the base will affect cultural practices. DoD's analysis in its Findings of the "[e]ffects of the intrinsic cultural elements of the Okinawa dugong" relies exclusively on Chapter 9 of the Welch Report, which does not cite any interviews with government officials on cultural effects. ER 166. Thus, although DoD consulted with the national government extensively on a number of topics, either directly or through the environmental assessment process, the record does not indicate any consultation on the effects of the Futenma Replacement Facility on the cultural characteristics of the dugong, which are central to this case.

As the district court made clear in its 2008 Order, even if the "current record contains an abundance of basic scientific knowledge," this "information alone is insufficient because the statute is clear—the information considered must bear on the '*effects* of the undertaking' on the protected property." ER 90. There is no

evidence in the record showing that DoD sought input from anyone regarding how construction and operation of the Futenma Replacement Facility might affect the cultural characteristics of the dugong that qualify it for protection. This failure to consult on the crux of the "take into account" question violates the procedural requirements of section 402, ER 80, and, therefore, "the underlying determinations about effects and mitigation lack validity." *Ctr. for Biological Diversity v. Mattis*, 868 F.3d at 818. DoD's Findings are "without observance of procedure required by law" and should be set aside. 5 U.S.C. §§ 706(2)(A), (2)(D).

II. The Department of Defense's Finding that Construction and Operation of the Futenma Replacement Facility Will Have No Adverse Effect on the Dugong Is Arbitrary, Capricious, and Contrary to Law.

The NHPA is a procedural statute "similar to NEPA [the National Environmental Policy Act] except that it requires consideration of historic sites, rather than the environment." *Pit River Tribe,* 469 F.3d at 787. "Both are 'stop, look, and listen' provisions that are 'design[ed] to ensure that Federal agencies take into account the effect of Federal or Federally-assisted programs.'" *Apache Survival Coal. v. United States,* 21 F.3d 895, 906 (9th Cir. 1994) (citations omitted).

Under NEPA, agencies have a duty to ensure the scientific integrity of their analysis of the impacts of a federal action. *See Save the Peaks Coal. v. U.S. Forest Serv.*, 669 F.3d 1025, 1037-38 (9th Cir. 2015); *League of Wilderness Defenders-*

Blue Mountains Biodiversity Project v. U.S. Forest Serv., 689 F.3d 1060, 1073-75 (9th Cir. 2012). "At a minimum, an agency must support its conclusions with studies that the agency deems reliable." *Tri-Valley CAREs v. U.S. Dep't. of Energy,* 671 F.3d 1113, 1124 (9th Cir. 2012). If the agency has failed to articulate a "rational connection between the facts found and the choice made," the agency's decision cannot be upheld. *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

In its Findings, DoD concluded that the "overall determination of effect for the Undertaking is 'no adverse effect' on the Okinawa dugong, because of the extremely low probability of Okinawa dugongs being in the APE [Area of Potential Effect]; or should dugongs in fact be present, the construction and operational activity is primarily of the type that would not have an adverse effect." ER 155. This determination is arbitrary and capricious because (1) the Department of Defense did not have the baseline biological data necessary to make a reliable determination of effects on the dugong; (2) the agency did not consider the full range of impacts of the Futenma Replacement Facility on the dugong; and (3) the determination of "no adverse effect" is contradicted by evidence in the record.

A. The Department of Defense did not have baseline biological data necessary to make a reliable determination of effect.

The Department of Defense concedes that "the data are not sufficient to establish population size, status, and viability" of the Okinawa dugong. ER 155

(Findings). *See also* ER 160 ("the 1997 population estimate is not scientifically valid (i.e. it is not based on systematic survey scheme using state-of-the-art methods and incorporating an uncertainty factor, such as coefficient of variation, for the point estimate); however there is no more recent survey data"). The record makes clear that without a reasonable estimate of the total Okinawa dugong population, DoD does not have the baseline data to reliably assess the impact of construction and operation of the Futenma Replacement Facility on the dugong.

DoD did not conduct its own surveys to establish the necessary baseline data or conduct an independent impact assessment. Instead, it relied on the Japanese environmental assessment for the critical information regarding the impacts that the Futenma Replacement Facility will have on the dugong. ER 165-68 (Findings). However, the agency's own experts cautioned that the Japanese environmental assessment is scientifically flawed. In an email to the U.S. Marine Corps official overseeing the Welch Report, the marine biologist that DoD hired to review the Japanese EIS (and who also contributed to the Welch Report) warned that the Japanese EIS lacked scientific rigor:

> [T]he main problems are with the quality of the EIA itself. I think it *was extremely poorly-done and does not withstand scientific scrutiny in my opinion*. I am happy to change the wording in the report to reflect this, but as we discussed, we need to do this in diplomatic fashion.

ER 275 (E-mail from Dr. Thomas Jefferson to Dr. Sue Goodfellow, Mar. 22, 2010) (emphasis added). Discussing "the need for a program of baseline biological and ecological studies of the dugong," ER 319, the Welch Report concludes:

> The studies conducted for the EIA (Okinawa Defense Bureau 2009) provide little of value here, as there are questions about the experience of observers and the suitability of specific survey methods, and the surveys were not used to provide quantitative measures of the population's status. Without such a program, it will be difficult to impossible to assess the potential adverse effects of the FRF, develop appropriate mitigation measures, and evaluate the success of mitigation measures

ER 319.

Similarly, Dr. Jefferson, in his 2009 report reviewing the Japanese EIS and other biological information, concludes that "a better understanding of the current status of the dugong population is needed in order to understand what impacts might be expected from construction of the Futenma Replacement Facility, and to determine if mitigation measures can reduce the impacts to acceptable levels." ER 491.

Yet DoD declined to undertake the necessary surveys. In 2011-2012, the agency commissioned a Survey of Marine Mammals in Okinawa to update the Integrated Natural Resources / Cultural Resources Management Plan for Marine Corps Base Camp Smedley D. Butler of which Camp Schwab is part. ER 389 (SuMMO Report). According to one of the study's authors, a Marine Resources Specialist at the Naval Facilities Engineering Command-Pacific,

> [t]he current focus of the project that has been requested is a general marine mammal inventory of water surface areas around Okinawa, without a dugong-specific component, albeit with possible opportunistic detection of dugongs. … However, we emphasize that the data will have a high likelihood of not being able to conclusively tell us if, where, when, or how dugongs are using seagrass beds near Henoko and Oura Bay.

ER 239 (Email from Morgan Richie, Marine Resources Specialist, Naval Facilities Engineering Command-Pacific, Jul. 28, 2011). The Marine Resources Specialist went on to advise that "to gain the information which will be scientifically and legally defensible we recommend a targeted dugong monitoring project in the more rigorous manner which was proposed above.[8] We do not recommend using data from the currently designed project to make legally defensible claims regarding the presence or absence of dugongs." *Id.* Nonetheless, Dr. Sue Goodfellow, the U.S. Marine Corps official overseeing the process, declined to authorize a more robust study. ER 238 (E-mail from Dr. Goodfellow to Robin Fitch Aug. 4, 2011). Accordingly, the SuMMO report concluded that "[i]t is not possible to say

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[8] The "more rigorous" dugong monitoring project proposed but not completed included:

> a 2-phase approach in which a pilot phase was implemented in order to a) characterize the acoustic environment, b) ground truth feeding trail detection, and c) determine the level of sampling necessary such that the results would be statistically significant. The primary monitoring phase would therefore be better informed to subsequently be developed and executed as a scientifically defensible project plan for monitoring dugongs in Okinawa.

ER 239.

anything definitive about densities of dugongs," ER 415, because the study did not involve an "effective dugong monitoring program [that] would likely involve more focused, dedicated surveys involving one or more of the following: aerial surveys, diving surveys for detection of dugong feeding trails, and passive acoustic monitoring with sensors specific to the low frequency sounds made by dugongs." ER 434.

DoD's failure to generate the information necessary to reliably establish dugong densities in the project area fatally undermines the integrity of the "take into account" process. *See Oregon Natural Desert Ass'n v. Jewell,* 840 F.3d 562, 568-70 (9th Cir. 2016); *see also, Turtle Island Restoration Network*, 878 F.3d at 732 ("[W]e require the agency to 'examine the relevant data and articulate a satisfactory explanation for its action.'") (citations omitted). In *Oregon Natural Desert Association*, this Court reversed and remanded the Bureau of Land Management's approval of a wind energy project based on its failure to conduct surveys in order to determine whether sage grouse were present at the project site in the winter months. 840 F.3d at 568-70. Instead of preparing surveys for the project site, the Bureau relied on an extrapolation from surveys conducted on nearby sites to conclude that no sage grouse winter habitat was present at the project site. This Court rejected the Bureau's reliance on extrapolated surveys because,

> [w]ithout appropriate data regarding sage grouse use of the [project] site during the winter, whether direct or via a supportable extrapolation, it was not possible to begin to assess whether sage grouse would be impacted with regard to access to viable sagebrush habitat in the winter months.

840 F.3d at 570. While acknowledging the deference due the Bureau in reviewing the agency's scientific or technical analyses, this Court nevertheless emphasized that "any such extrapolation must be based on accurate information and defensible reasoning." *Id.*

The Court concluded that the Bureau's reasoning was not defensible because the fact "that *some* grouse were found at the [nearby] site in mid-winter greatly undermines the validity of the BLM's assumed absence of sage grouse at the [project] site. Given that grouse do use the [nearby] site during the winter, the BLM's own extrapolation method should have resulted in assuming the birds' *presence*, not their *absence*." 840 F.3d at 569. DoD's conclusion that there is "extremely low probability" of Okinawa dugongs being in the area despite "sporadic dugong activity observed directly in Henoko and Oura bays," ER 155, is similarly indefensible.

B. The Department of Defense did not consider the full range of impacts of the Futenma Replacement Facility on the dugong.

The Department of Defense "failed to consider an important aspect of the problem," *Turtle Island Restoration Network*, 878 F.3d at 732, because it failed to consider the full range of impacts on the Futenma Replacement Facility on the

dugong. Important impacts of the Futenma Replacement Facility that DoD did not consider include population fragmentation, the disruption of travel routes, and the loss of habitat that may be required in the future to sustain a viable population, which would be larger than the present population. ER 199, 206-07 ¶¶ 14, 29 (Hines Decl.).

Instead, DoD improperly limited its inquiry into the possible impacts of the Futenma Replacement Facility on the dugong to a list of potential impacts identified by the district court in an earlier stage of the litigation, before DoD had undertaken any "take into account" process at all. ER 146-47 (Findings). In considering whether the NHPA applies to DoD's involvement in the Futenma Replacement Facility, the district court in its 2008 Order made a threshold determination "that the undertaking may have direct and adverse effects on the dugong." ER 76. The Court found that "[t]hese potential adverse effects include physical destruction of the Okinawa dugong resulting from contamination of seagrass feeding grounds and collisions with boats and vessels, as well as long-term immune and reproductive damage resulting from exposure to toxins and acoustic pollution." *Id.* Because the question before the district court did not require the court to determine the full range of potential effects of the Futenma Replacement Facility on the dugong, the court's list was not exhaustive.

Indeed, section 402 requires DoD to conduct the "take into account" process "for purposes of avoiding or mitigating *any* adverse effects," 54 U.S.C. § 307101(e) (emphasis added), and the process is intended to require DoD, which has the best access to the relevant information, to identify the relevant effects. ER 89 (2008 Order) ("NHPA section 402 is clear on its face—it imposes an obligation on DOD to consider information 'for purposes of avoiding or mitigation adverse effects'" and while "DOD may work in conjunction with Japan to evaluate mitigation measures, the NHPA imposes a responsibility on the DOD").

Despite the clear mandate to identify *any* potential adverse effects, DoD only "gathered and assessed information on those aspects of the proposed construction and operation of the Futenma Replacement Facility identified by the Court as having the potential to affect the Okinawa dugong." ER 146-47 (Findings).[9] DoD thus did not identify or consider the full range of possible adverse effects on the dugong.

[9] The Welch Report identifies six general threats to the dugong as a species: hunting, bycatch/incidental catch (including in gill nets), vessel traffic, acoustic disturbance, chemical pollution, and habitat loss/destruction. ER 152. Although the Welch Report *identifies* these harms, it does not analyze the *likelihood* of the Futenma Replacement Facility contributing to or exacerbating these harms. *See* ER 15 (2018 Order).

C. The Department of Defense's finding of no adverse effect is contradicted by the record.

The Supreme Court has made clear that, in considering an agency's explanation for its action, courts "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 30-31. A "clear error of judgment" sufficient to constitute arbitrary and capricious agency action includes when "the agency offer[s] an explanation that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* at 43.

Contrary to DoD's finding of "no adverse effect," the record shows that the Futenma Replacement Facility *is* likely to adversely impact the dugong. As the Welch Report notes, "[t]he most likely cultural impacts of the FRF will be indirect rather than direct and will stem from the biological harm that might be done to the dugong population as result of the construction and use of the airfield in an area where dugongs feed or at least fed in the past." ER 316. "[O]ur conclusion, based on this study, is that the disappearance of the dugong population from Okinawa would have an adverse cultural impact." *Id.*

DoD determines that there will be "no adverse effect" on the Okinawa dugong "because of the extremely low probability of Okinawa dugongs being in the [area of potential impact]." ER 155 (Findings). However, DoD acknowledges

that although comprehensive monitoring data is not available, 19 dugongs and between 129 and 139 dugong feeding trails were observed by Japanese government groups between 2000 and 2003, indicating that at the time of the surveys dugongs were still active in the area of Henoko and Oura Bays. ER 151 (Findings). In particular, "Henoko village was a reported hotspot for dugongs in Okinawa." *Id.*

The Japanese EIS concludes dugongs will be harmed if they enter into Oura Bay:

> If dugongs move to the southwest side of Nakabiji [reefs in the project area] and visit the construction site and its vicinities, construction noise may reach dugongs and affect their behavior. Furthermore, if dugongs enter Oura Bay and try to avoid construction noise they may be caught in a gill net because gill nets are set in the bay.

ER 264 (Draft EIS). DoD's Findings concede that harms to the dugong from noise, vibration during construction, and light, would all occur if dugong continued to be present in the project area. ER 157-58. *See also* ER 264-65 (Draft EIS).

DoD uses the fact that dugongs will move away from disturbances to justify its conclusion that it is unlikely that a dugong would enter the project area and be exposed to adverse effects. ER 158 (Findings) ("When exposed to human activities, dugongs are known to seek deeper waters away from that activity. Should dugongs be present when construction activities are initiated, it is anticipated that they will vacate the area while construction noise is occurring."). However, being driven away from habitat is itself an adverse effect of the project.

Cf. Marine Mammal Protection Act, 16 U.S.C. § 1362(18)(A) (defining "harassment" as "any act of pursuit, torment, or annoyance which ... has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering"). Indeed, the Findings acknowledge that construction and operation of the Futenma Replacement Facility is likely to cause disruption of behavioral patterns, such as avoidance of habitat, ER 158, and interruption of feeding. ER 159 (vessel traffic from the Futenma Replacement Facility could result in a 6% decrease in dugong feeding time).

The Welch Report contradicts DoD's rationale that the dugongs' avoidance of the project area will result in avoidance of harm: "the FRF has the potential to impact the dugong population and could affect its recovery to sustainable numbers" because it "is possible that the construction of the FRF will limit further the range and number of an already rare and endangered species and perhaps hinder attempts to bring some recovery in the existing numbers." ER 316. Because the current population is so small and precarious, effects on just a few dugongs could have substantial impacts on the population as a whole. "Regardless of whether they are currently being used by dugongs, destruction of seagrass beds along Henoko Bay will limit areas that could provide habitat in the event of recovery and increase in the current dugong populations." *Id.* Indeed, the Welch

Report indicates that habitat loss and degradation is a cause of decline in the dugong population, ER 298, 316, 318, and "the FRF [Futenma Replacement Facility] has the potential to contribute to this decline." ER 316. Given the Okinawa dugong's endangered status and "precariously low" population numbers, ER 150 (Findings), destruction of this habitat adversely affects the population.

In addition to the low probability of dugong being in the project area, DoD bases its "no adverse effects" determination on the implementation of "mitigation measures to ensure the ongoing protection of any Okinawa dugongs that frequent Kayo, Oura or Henoko Bays." ER 162 (Findings). The statute requires DoD to "take into account" the effects of the Futenma Replacement Facility on the dugong "for purposes of avoiding or mitigating any adverse effects." 54 U.S.C. § 307101(e). Thus, inclusion of mitigation measures in the Findings presupposes adverse effects, and should not be used to avoid acknowledgment of those effects. Nonetheless, the mitigation measures that DoD includes in the Findings do not address all the adverse effects of the project.

The Findings list a number of mitigation measures for impacts from both construction and operation of the Futenma Replacement Facility. ER 161-63. These mitigation measures include actions that will be implemented only *after* harm has occurred, such as "analysis of the impact of underwater construction noise," a "commitment to reconsider construction techniques if noise exceeds

projections," and a "commitment to cease noise-generating activities" if a dugong is already being subjected to the impacts of those activities in the area. ER 162. The Findings do not propose mitigation measures to address the harms to dugongs caused by habitat loss and disruption of dugong feeding and diving patterns. ER 158. Nor do the Findings include measures to mitigate the impacts of the Futenma Replacement Facility on the "intrinsic cultural elements of the Okinawa dugong," ER 160, including impacts to groups "housing the cultural knowledge of the dugong," such as local ritual practitioners. The only mitigation measure proposed to address cultural harms is the recommendation to temporarily halt "construction activities in close proximity" to "dugong-related festivals or rituals" if "noise complaints by local residents reveal that construction activities are affecting the performance" of the festival. ER 162. There are no measures to address the cultural issues identified by local community members, such as the need to have access to the water to lead educational and cultural tours of the dugong and its habitat. ER 225-29 ¶¶ 3-8 (Higashionna Decl.).

The Department of Defense's conclusion that construction and operation of the Futenma Replacement Facility will have no adverse effects on the dugong runs counter to the evidence in the record and is arbitrary and capricious.

CONCLUSION

The Department of Defense's "take into account" process was secretive and contrary to the policy of cooperation and partnership enshrined in the NHPA. Its determination that the Futenma Replacement Facility would have no adverse impacts on the critically endangered dugong was based on substandard science and was contrary to both common sense and the evidence in the record.

The fact that the Futenma Replacement Facility is a joint endeavor with Japan does not warrant lowering fundamental standards of administrative decision-making under the NHPA and APA. The NHPA is a procedural statute, *Ctr. for Biological Diversity v. Mattis*, 868 F.3d at 816; a finding that the Futenma Replacement Facility would, in fact, adversely effect the dugong does not require abandonment of the project. Instead, the agency must avoid or mitigate adverse effects. The purpose of the statute is to ensure that any adverse effects are disclosed and considered so that a decision to proceed is well-informed and adverse effects are minimized. This is particularly important when an agency is acting overseas and risks damage to another country's cultural heritage.

For these reasons, plaintiffs-appellants request that this Court:

(1) Declare that the Department of Defense violated section 402 of the NHPA, 54 U.S.C. § 307101(e), when it excluded the community members and conservation groups from its "take into account"

process and failed to consult on the effect of the Futenma Replacement Facility on the Okinawa dugong as a cultural resource;

(2) Declare that the Department of Defense's finding that the Futenma Replacement Facility would have "no adverse effects" on the dugong is arbitrary, capricious and contrary to procedure required by law, 5 U.S.C. §§ 706(2)(A), (2)(D);

(3) Set aside the Department of Defense's NHPA Findings; and

(4) Remand to the district court for consideration of Plaintiffs' request for injunctive relief.

Dated: January 2, 2019

/s/ Sarah H. Burt

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Plaintiffs-Appellants hereby state that this case is not related to another appeal before this Court that arises out of the same district court proceedings. Plaintiffs-Appellants are unaware of any related cases currently pending in this court.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 18-16836

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Case No. 18-16836

ADDENDUM

63 FR 20496-01, 20,504 The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act

36 C.F.R. § 801.1

36 C.F.R. § 801.2

36 C.F.R. § 801.5

36 C.F.R. § 801.6.

63 FR 20496-01, 1998 WL 192644(F.R.)

NOTICES

DEPARTMENT OF THE INTERIOR

National Park Service

The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act

Friday, April 24, 1998

***20496** AGENCY: National Park Service, Interior.

ACTION: Final.

SUMMARY: The National Park Service is publishing for effect revisions to the Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to Section 110 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470h-2).Q02
EFFECTIVE DATE: April 24, 1998.

FOR FURTHER INFORMATION CONTACT: Mr. David M. Banks, Heritage Preservation Services, NC330, National Center for Cultural Resource Stewardship and Partnerships Programs, National Park Service, 1849 C Street, NW, Washington, DC 20240. Telephone: 202-343-9518. Facsimile: 202-343-3921. E-mail: david banks @nps.gov.

SUPPLEMENTARY INFORMATION:

Background

Section 110 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470h-2) establishes Federal agency responsibilities for the preservation of historic properties. Section 101(g) of the Act (16 U.S.C. 470a) directs the Secretary of the Interior to promulgate guidelines for Federal agency responsibilities under that part.

The proposal published here is a revision of guidelines originally published in the Federal Register on February 17, 1988 (53 FR 4727-46). The revision takes account of the 1992 amendments to the National Historic Preservation Act of 1966, as amended (title XL of Pub. L. 102-575).

These guidelines have no regulatory effect. Instead, they are the Secretary's formal guidance to each Federal agency on meeting the requirements of section 110 of the Act.

Preparation of the Final Standards and Guidelines

Public comment was invited for a 60-day period, ending on August 18, 1997 (62 FR 33105-15). Copies of the notice were sent to all Federal Preservation Officers, all State Historic Preservation Officers, and all Tribal Preservation Officers recognized pursuant to section 101(d) of the NHPA.

Twenty-three written comments were received representing 20 different organizations. That included nine federal agencies, four SHPOs, one Alaska Native association, one state transportation department, two national associations, two mining companies and four offices within NPS. Comments addressed all of the proposed standards and almost all of the guidelines for implementing those standards. All comments were fully considered in revising the proposal for publication in final form.

In general, the comments were favorable. Most comments were editorial in nature, i. e., they requested technical clarifications, or suggested improvements in format, wording and syntax. In the interest of brevity, these comments are not discussed further here. The following response to public comments focuses first on those substantive comments that were general in nature, and then on those comments that addressed particular standards and guidelines.

Response to Public Comment

General Comments

First, several commenters asked that the statement, "these guidelines have no regulatory effect" be made more prominent. We agree and have added the statement just before the listing of the standards, themselves. In a related comment, one person suggested that use of the word "standards" rather than just guidelines implies some level of regulatory enforcement. We disagree. The Secretary has over the years established and published a wide variety of standards and guidelines for historic preservation activity. None of these standards has regulatory effect, unless they are incorporated in a separate regulation that applies them as enforceable standards. These standards and guidelines for federal agency programs are no different.

Second, one commenter suggested that, because so many federal agency historic preservation activities are subject to review as undertakings pursuant to section 106 of the NHPA, these standards and guidelines should refer more often and more prominently to section 106 and to the section 106 review process set out in 36 CFR part 800. While we agree that the section 106 process is a focal point for federal agency undertakings, we believe that these standards and guidelines already make sufficient reference to the section 106 process. Additional references to the section 106 process would tend to obscure the larger message that federal agencies have affirmative responsibilities under section 110 that go beyond the responsibility for compliance with section 106. In addition, these standards and guidelines make clear that they are in addition to, not instead of, other guidance and requirements, such as section 106.

Third, one commenter expressed concern that these standards and guidelines do not include specific benchmarks for documentation of historic properties. In response, we note that such standards and guidelines already exist as a part of the Secretary of the Interior's Standards and Guidelines Architectural and Engineering Documentation (48 FR 44730-34). Consequently, they do not need to be restated here.

Comments on Specific Standards

Standard 1

First, two commenters suggested that the parameters of "consultation" with the Secretary be defined under guideline (d). We agree on the need for additional guidance on the requirement in section 110(a)(2) that each federal agency shall establish a preservation program "in consultation with the Secretary." NPS is currently working with an interagency task force of federal agency preservation officers to develop this guidance, and will publish it for comment upon completion of the task force's work.

Second, three commenters suggested that the cost of historic preservation work can become an undue burden, so that guidelines (e) and (i) should define more specifically what "reasonable preservation costs" are. We disagree. Whether something is or is not an undue burden will always be in the eye of the beholder. It is also inappropriate and impractical to try to create some dollar-based formula that would inevitably be an arbitrary measure. Each federal agency must determine what is reasonable on a case-by-case basis, taking into account the agency's programmatic needs, the alternatives that are available for meeting those needs, the significance of any affected historic resources and the nature of the work needed to protect or minimize harm to them, the nature of the undertaking, and the budgetary resources that are available for the project.

Third, one commenter noted that the NHPA requires only that federal agencies "consider" preservation of historic properties, so that these standards and guidelines should explicitly state that agencies may in some cases decide to neglect or destroy a historic property. We believe that the meaning of "consideration" is fully addressed in Standard 4 and its ***20497** guidelines, and that the full range of options available to federal agencies is addressed in Standard 7 and its guidelines. Consequently, no additional guidance in necessary in Standard 1.

Standard 2

Four comments addressed guideline (g) and asked for more clarification of and/or limitations on the need to resurvey an area that was surveyed at some point in the past. Specific suggestions included establishing a minimum time period that must have elapsed before resurvey is necessary, and establishing limits on the costs of resurvey that can be passed on to private parties. We agree with those comments that pointed out the need for clarification and have added appropriate language to the guideline. However, we disagree with the suggestions for a standard time period and for a limit on the costs to private parties. Agencies must make these latter decisions based on the facts of each case, rather than on an arbitrary formula that may or may not be relevant to the case at hand.

One commenter expressed concern that the inclusion in guideline (e) of the phrase "alter the social, cultural, or economic character of a community" exceeds the intent of the National Historic Preservation Act. We believe the phrase is appropriate. The phrase is among a list of examples of actions that can affect historic properties. Where those actions do affect historic properties, they are properly within the scope of the Act. If, on the other hand, an action alters the character of a community in a way that does not affect historic properties, the action falls outside the purview of the Act.

One commenter asked whether the requirement in guideline (b) for the identification and evaluation of historic properties by professionally qualified individuals means that the identification and evaluation process must be carried out to the exclusion of "generalist" staff members who nevertheless have some management responsibility for agency properties. While we do not believe that additional language is necessary for the guideline, we affirm here that the guideline applies only to the technical process of determining whether and why a property appears to meet the National Register's eligibility criteria. Such a technical finding should be made by someone with appropriate professional qualifications, but the agency's property management decisions both before and after such a finding are the province of the "generalists" who exercise that decision-making authority for the agency.

One commenter suggested two additional guidelines for this standard. One guideline would call on agencies to establish plans and schedules for the identification and evaluation of properties under their control. We agree that, where it is feasible for an agency to establish such specific objectives, it should do so in order to measure its own progress. However, the ability to conduct survey and evaluation work independent of specific project needs varies so greatly from agency to agency and from year to year that establishing a schedule would often be a meaningless exercise. Section 110 makes no such requirement, so we must leave it to each agency to determine whether such a schedule would be meaningful and helpful.

The second suggested additional guideline addressed the disposition of archeological collections recovered during agency activities pursuant to section 110. Omission of this guidance was an oversight. However, we have added the appropriate language to Standard 6, guideline (c), rather than to Standard 2.

Standard 3

Several commenters offered essentially editorial suggestions that were aimed at emphasizing the importance of nominating properties to the National Register. We agree that the language of section 110 anticipates that nomination of properties to the Register will be an ongoing function of agency preservation programs. We have incorporated the suggested changes as appropriate.

One commenter suggested that placing National Register nominations as the third standard could create the misimpression that only those properties that are already registered are subject to the guidance in the standards that follow. The commenter proposed making this standard the last one on the list. We disagree. While one can devise and, indeed, we did consider various sequences for the presentation of these standards, we believe that the order presented here offers a logical cadence. It is true that registration is not a prerequisite for preservation and appropriate management, and we trust that the language of the guidelines eliminates any confusion on that point. On the other hand, as noted above, registration should be an ongoing function and should not appear in these standards and guidelines as if it were an activity to be carried out only when all else is said and done.

Standard 4

Stantive comments focused on guideline (f), concerning the determination of whether an "agency's procedures for compliance with section 106 are consistent with regulations issued by the (Advisory) Council." (Section 110(2)(E)(i)). Three commenters expressed the concern that this guideline seems to say that an agency's procedures must be identical to the Council's regulations in order to be consistent with them. Such a requirement, they argue, would limit needed flexibility and inhibit innovation. We recognize the need for flexibility and innovation, and we affirm that these standards and guidelines do not mean to say or imply that agency procedures must copy the procedure set out in 36 CFR part 800. We have edited the language accordingly. An agency's procedures may satisfy the requirement of the law in one of two ways, as noted in guideline (f). First, of course, the agency can choose to adopt and use the procedure exactly as it is set out in 36 CFR part 800. Second, the agency can choose to develop alternate procedures that satisfy the purposes of the section 106 review process but that include any number of modifications to the standard process set out in 36 CFR part 800, in order to meet agency needs more effectively. Because the Advisory Council is unquestionably the appropriate judge of whether an agency's alternate procedures remain consistent with the Council's own regulations, it is sufficient and appropriate for these standards and guidelines to say that an agency's alternate procedures meet the test of section 110(2)(E)(i), if the Council has approved them .

One comment on guideline (a) cautioned that a federal agency's responsibility to consider the impact of its actions on properties outside its ownership or control must be carefully construed to avoid any implication that the non-federal owners of those properties are under any obligation to consider the impacts of their actions. In addition, the commenter cautioned that federal agencies cannot invoke their obligations under this standard as a means for interfering with the actions of private property owners outside the agency's jurisdiction or control. We agree that private property owners acting without reliance on federal permission or assistance are not within the scope of these standards and guidelines. On the other hand, a federal agency that is considering whether to issue a permit or provide assistance to ***20498** a private property owner does have to consider the impact of that property owner's actions before deciding whether to issue the permit or award the assistance.

Standard 5

Two commenters took issue with the idea set out in guidelines (b) and (c) that seeking agreement among the federal agency and interested parties is the reason for consultation. They argue that consultation is simply an exchange of views, that there is no requirement that agencies reach agreement with interested parties, and that there are many instances where the agency knows ahead of time that agreement will not be possible. Consequently, they argue, asserting that agreement is the object of consultation will create unrealistic and unwarranted expectations among interested parties and will lead to legal and procedural challenges that will compromise the agency's ability to accomplish its work. We disagree. We acknowledge that agencies are not required by law or by these standards and guidelines to reach agreements with interested parties. We also acknowledge that an agency can sometimes know in advance that a proposed activity will face the unalterable opposition of an interested party. Finally we acknowledge here and in the guidelines, themselves, that no agency is obliged to remain engaged in endless consultation when it is clear that agreement cannot be reached. However, we do not agree that meaningful consultation is accomplished by a mere exchange of views. Consultation

must include, at least as its theoretical purpose, the willingness to explore the possibilities for agreement or at least for a narrowing of disagreement among the consulting parties. Even if that exploration quickly shows or confirms that further discussion would be fruitless, the attempt is fundamental to the concept of consultation as envisioned by these standards and guidelines. Finally, we believe that the agency's ability to end consultation without reaching agreement is sufficiently clear that procedural challenges should not be a problem.

One commenter sought the inclusion of specific time limits for consultation, so as to minimize delays and avoid efforts to thwart agency projects through endless consultation. We disagree. These standards and guidelines are intended to speak more broadly to the concepts and ideas that define meaningful consultation for federal agency historic preservation programs, so that trying to determine specific time periods for consultation is not appropriate here. In a regulatory setting, deadlines for response may well be critical to doing orderly business. However, even in the section 106 process there is no ultimate time limit within which all consultation must be completed, since such a deadline would ultimately compromise the purposes of that consultation.

Similarly, one commenter asked for more specific guidance on what constitutes a “reasonable effort” under guideline (h) to consult with those groups that do not customarily participate in traditional governmental means of consultation. As noted above, these guidelines are not the appropriate place to spell out specific solutions for such cases. The guideline means in general that, where an agency is dealing with interested parties who are unaccustomed to the agency's standard consultation procedures, the agency should to the extent feasible given its own needs make some adjustments in its standard procedures to allow those interested parties a reasonable opportunity to participate in consultation with the agency. The specific adjustments in each case will depend on a fair balancing of the needs of the agency and the needs of the specific interested party.

Finally, one agency asked for additional guidance in guideline (f) for how to provide the public with sufficient information to participate and still be consistent with the requirements of Section 304 of the Act, which calls for withholding information in cases where disclosure would put resources at risk, invade privacy, or impede traditional religious use of a site. Guideline (f) is not intended to be an instruction for how to balance these competing goals. The point of guideline (f) is to emphasize the primacy of Section 304's specific requirements for withholding information. An agency's efforts to involve the public, while important, do not take precedence over the requirements of Section 304. In any instance where an agency, in consultation with the Secretary, determines that disclosure of certain information would lead to one or more of the results listed in Section 304, the agency is required to withhold that information.

Standard 6

One commenter requested the insertion of a reference to Section 106 in the language of the standard, itself. We believe that the standard is and should be a stronger, more all-encompassing message than would be the case if a reference to Section 106 were added. Consequently, we have left the standard unchanged. However, compliance with Section 106 is clearly a critical component of an agency's efforts to meet the standard. Specific references to Section 106 appear in four of the eight guidelines for this standard.

Another commenter requested more guidance on the appropriate treatment of cultural landscape features when disturbance is unavoidable. NPS has developed formal guidelines for applying the Secretary's “Standards for the Treatment of Historic Properties” to cultural landscapes. We have added a reference to those guidelines here in guideline (a) of Standard 6.

Three commenters indicated that guideline (c)'s call for limiting archeological excavation to the footprint of the area that will be otherwise disturbed is inappropriate. We agree. The original intent had been to emphasize the need to minimize excavation, but the result was an arbitrary limit that ignored the need for excavation according to a research design that would allow for meaningful evaluation of the material that is excavated. We have amended the guideline accordingly.

One commenter argued with reference to guideline (c) that calling on agencies to adhere to the Secretary's Standards for the Treatment of Historic Properties when modifying historic properties is unduly stringent and unrealistic. We disagree. We acknowledge that there may be cases where meeting those standards will not be feasible, but we believe that meeting the standards should be the goal toward which the agency strives when modifying historic property. Where meeting that goal is not feasible, we believe the agency is obliged to explain why not. As a technical matter, both because this specific guideline uses the verb "should" and not "shall," and because these standards and guidelines are not regulatory, these standards and guidelines do not impose any specific requirement that federal agencies must always adhere to the Treatment Standards noted above.

Standard 7

One commenter asked with reference to guideline (f) whether federally recognized Indian tribes can be recipients of historic properties under the Historic Surplus Property Program. We have added language to make clear that tribes can receive such property.

One commenter suggested that, pursuant to Section 110(h) there should be guidance concerning preservation awards programs that can be established by federal agencies. While it is certainly true that federal agencies can create ***20499** their own awards programs, Section 110(h) of the Act addresses only an awards program to be established by the Secretary of the Interior to recognize officers and employees of Federal, State, and local governments. Consequently, we have included no guidance for awards programs that other agencies may wish to create.

Definitions

Two commenters suggested the addition of a definition for the federal agency Preservation Officer. We agree and have added that definition.

One commenter pointed out that, while a traditional cultural property may be determined to be eligible for the National Register of Historic Places, not every traditional cultural property is by definition eligible for the Register.

We agree and have amended the definitions of "historic property" and "traditional cultural property" accordingly.

Dated: February 2, 1998.

de Teel Patterson Tiller,

Chief, Heritage Preservation Services Division, National Center for Cultural Resource Stewardship and Partnerships Programs, National Park Service.

The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act

Introduction

Section 110 of the National Historic Preservation Act (16 U.S.C. 470). Section 110 of the National Historic Preservation Act (hereinafter referred to as NHPA or the Act) sets out the broad historic preservation responsibilities of Federal agencies and is intended to ensure that historic preservation is fully integrated into the ongoing programs of all Federal agencies. This intent was first put forth in the preamble to the National Historic Preservation Act upon its initial adoption in 1966. When the Act was amended in 1980, section 110 was added to expand and make more explicit the statute's statement of Federal agency responsibility for identifying and protecting historic properties and avoiding unnecessary

damage to them. Section 110 also charges each Federal agency with the affirmative responsibility for considering projects and programs that further the purposes of the NHPA, and it declares that the costs of preservation activities are eligible project costs in all undertakings conducted or assisted by a Federal agency.

The 1992 amendments to the Act further strengthened the provisions of section 110. Under the law, the head of each Federal agency must do several things. First, he or she must assume responsibility for the preservation of historic properties owned or controlled by the agency. Each Federal agency must establish a preservation program for the identification, evaluation, nomination to the National Register, and protection of historic properties. Each Federal agency must consult with the Secretary of the Interior (acting through the Director of the National Park Service) in establishing its preservation programs. Each Federal agency must, to the maximum extent feasible, use historic properties available to it in carrying out its responsibilities. The 1992 additions to section 110 also set out some specific benchmarks for Federal agency preservation programs, including: (a) Historic properties under the jurisdiction or control of the agency are to be managed and maintained in a way that considers the preservation of their historic, archeological, architectural, and cultural values;

(b) Historic properties not under agency jurisdiction or control but potentially affected by agency actions are to be fully considered in agency planning;

(c) Agency preservation-related activities are to be carried out in consultation with other Federal, State, and local agencies, Indian tribes, Native Hawaiian organizations, and the private sector;

(d) Agency procedures for compliance with section 106 of the Act are to be consistent with regulations issued by the Advisory Council on Historic Preservation; and

(e) An agency may not grant assistance or a license or permit to an applicant who damages or destroys historic property with the intent of avoiding the requirements of section 106, unless specific circumstances warrant such assistance.

The complete text of section 110 is included as Appendix A to these Guidelines. Also included as Appendix B are sections 1 and 2 of the NHPA that set out the purposes and policies of that Act. Anyone unfamiliar with the purposes of the Act or with the specific provisions of section 110 as amended in 1992 should refer to those texts in addition to the revised Guidelines.

Section 110 Guidelines—Background and Format

The Section 110 Guidelines were first published in the Federal Register on February 17, 1988 (53 FR 4727-46). This second edition has been revised to incorporate the 1992 amendments to the Act and to make the Guidelines easier to use.

These Guidelines neither replace nor incorporate other statutory authorities, regulations, or The Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation. These Guidelines show how Federal agencies should address these various other requirements and guidelines in carrying out their responsibilities under the Act. The head of each Federal agency, acting through its Preservation Officer, should become familiar with all the statutes, regulations, and guidelines that bear upon the agency historic preservation program required by section 110.

This second edition of the Section 110 Guidelines follows a format significantly different from that of its predecessor. The first edition followed the sequence of the statute and provided detailed guidance for each subsection of section 110. The current edition instead takes the form of standards and guidelines that will assist each Federal agency in establishing a preservation program that meets the various requirements of section 110.

Agency Use of These Standards and Guidelines for Evaluating Their Programs

The preservation and use of historic properties and their careful consideration in agency planning and decisionmaking are in the public interest, are consistent with the declaration of policy set forth in the NHPA, and must be a fundamental part of the mission of any Federal agency. These standards and guidelines are intended to assist Federal agency personnel and the agency head in carrying out their policies, programs, and projects in a manner consistent with the requirements and purposes of section 110 of the NHPA, related statutory authorities, and existing regulations and guidance.

An agency should use these standards and guidelines, and consultation with the Secretary and others, to ensure that the basic individual components of a preservation program called for in section 110 are in place. The preservation program should also be fully integrated into both the general and specific operating procedures of the agency. The agency's preservation program should interact with the agency's management systems to ensure that historic preservation issues are considered in decisionmaking. The program should try to ensure that the agency's officials, employees, contractors, and other responsible parties have sufficient budgetary and ***20500** personnel resources needed to identify, evaluate, nominate, manage, and use the historic properties under agency care or affected by agency actions.

Consultation and Technical Assistance

Section 110(a)(2) requires that agency preservation programs be established "in consultation with the Secretary." Federal agencies seeking such consultation should contact the Associate Director, Cultural Resource Stewardship and Partnerships, National Park Service, Department of the Interior, 1849 C Street, NW, Washington, DC 20240. Consultation with the Secretary regarding an agency's program will be based upon the degree to which that program is consistent with the Act and with the standards and guidelines that follow. Upon request, the Secretary will also provide informal technical assistance to any agency on questions concerning the establishment or improvement of the agency's historic preservation program. Requests for technical assistance should also be addressed to the Associate Director, Cultural Resources Stewardship and Partnerships, National Park Service.

Section 202(a)(6) of the Act provides that the Advisory Council may review Federal agency preservation programs and recommend improvements to such agencies. Where the Council carries out such a review, it will base any recommendations on its own regulations and policy statements, and on the standards and guidelines that follow.

The Secretary of the Interior's Standards for Federal Agency Historic Preservation Programs

Standard 1. Each Federal agency establishes and maintains a historic preservation program that is coordinated by a qualified Preservation Officer, and that is consistent with and seeks to advance the purposes of the National Historic Preservation Act. The head of each Federal agency is responsible for the preservation of historic properties owned or controlled by the agency. (Sec. 110(a)(1), sec. 110(a)(2), sec. 110(c), and sec. 110(d)).

Standard 2. An agency provides for the timely identification and evaluation of historic properties under agency jurisdiction or control and/or subject to effect by agency actions. (Sec. 110(a)(2)(A), and sec. 112)

Standard 3. An agency nominates historic properties under the agency's jurisdiction or control to the National Register of Historic Places. (Sec. 110(a)(2)(A)).

Standard 4. An agency gives historic properties full consideration when planning or considering approval of any action that might affect such properties. (Sec.110(a)(2)((B), (C), and (E), Sec. 110(f) and Sec. 402(16 U.S.C. 470a-2))

Standard 5. An agency consults with knowledgeable and concerned parties outside the agency about its historic preservation related activities. (Sec. 110(a)(2)(D)).

Standard 6. An agency manages and maintains historic properties under its jurisdiction or control in a manner that considers the preservation of their historic, architectural, archeological, and cultural values. (Sec. 110(a)(1), sec. 110 (a)(2)(B), sec. 110(b)).

Standard 7. An agency gives priority to the use of historic properties to carry out agency missions. (Sec. 110(a)(1)).

For a cross-reference of each standard to the parts of 110 see Appendix A.

The Secretary's Standards and Guidelines for Federal Agency Historic Preservation Programs

These guidelines have no regulatory effect. Instead, they are the Secretary's formal guidance to each Federal agency on meeting the requirements of section 110 of the Act.

The following guidelines provide information on the steps an agency must take to establish and maintain a preservation program that meets each of the applicable Secretary's Standards.

Standard 1. Each Federal agency establishes and maintains a historic preservation program that is coordinated by a qualified Preservation Officer, and that is consistent with and seeks to advance the purposes of the National Historic Preservation Act. The head of each Federal agency is responsible for the preservation of historic properties owned or controlled by the agency. (Sec. 110(a)(1), sec. 110(a)(2), sec. 110(c), and sec. 110(d)).

Guidelines

Agency Programs

(a) An agency historic preservation program must include specific provisions to ensure, to the extent feasible given the agency's mission and mandates, the full consideration and appropriate preservation of historic properties under the agency's jurisdiction or control and of other historic properties affected by the agency's actions. (Sec. 110(a)(2)(B))

(b) An agency historic preservation program is embodied in agency-wide policies, procedures, and activities. An agency historic preservation program is the vehicle for ensuring that the agency's mission-driven activities are carried out in a manner consistent with the purposes of National Historic Preservation Act. The program is not an activity carried out separate and apart from the activities mandated by the agency mission.

(c) The identification, evaluation, and preservation of historic properties must be the fundamental goal of any Federal agency preservation program. (Sec. 110(a)(2)). However, an agency's ability to achieve this goal is affected by its own mission and by whether it owns and manages historic property:

(1) In those cases where historic property is under the jurisdiction and control of the agency, the agency has an affirmative responsibility to manage and maintain such property in a manner that takes into account the property's historic significance. In addition, the Federal agency has an affirmative responsibility to seek and use historic properties to the maximum extent feasible in carrying out its activities. (Sec. 110(a)(1) and sec. 110(a)(2)(B))

(2) Where an agency carries out its mission through the award of grant funds for specific activities, and where those activities will inevitably affect historic properties, the agency should, to the maximum extent feasible, design its programs to encourage grantees to retain and make appropriate use of historic properties in carrying out grant-funded activities.

(3) Where an agency's historic preservation activities are limited to considering the impact of federally licensed, or permitted activities initiated by non-federal entities on non-federally owned historic properties, the agency's preservation

responsibility may be more narrowly cast as seeking to avoid or minimize any adverse effects to such properties that might otherwise occur as a result of such activities.

(d) An agency historic preservation program must be established in consultation with the Secretary of the Interior. (Sec. 110(a)(2)). Consultation with the Secretary regarding an agency's historic preservation program will be based on these Standards and Guidelines.

(e) The agency historic preservation program must be an effective and efficient vehicle through which the agency head can meet his or her statutory responsibilities for the preservation of historic properties. (Sec. 110(a)(2)). Compliance with responsibilities pursuant to section 106 of the Act is an integral part of an agency's overall historic preservation program. That program, however, is not simply intended to meet agency section 106 responsibilities to "take into account" the effects of its undertakings on historic properties. The program described in section 110(a)(2) is an ***20501** agency-wide approach to achieving the goals set forth in the NHPA. It should be fully integrated into both the general and specific operating procedures of the agency.

(f) The preservation program should interact with the agency's budgetary and financial management systems to:

(1) Ensure that historic preservation issues are considered before budgetary decisions are made that foreclose historic preservation options, and

(2) Ensure that the historic preservation program itself is adequately funded to enable it to perform its functions.

(g) To avoid needless duplication of effort and increased workload in developing and implementing its program, the agency should carefully review and consider using those existing policies, procedures, approaches and standards that are government-wide, i.e., applicable to all preservation programs, and develop only those that need to be agency-specific. Preservation programs can be expected to differ based on the extent to which:

(1) Agencies manage, own, or exercise control over historic properties;

(2) Historic properties play a significant role in agency activities through active use (e.g., for recreation, interpretation, public access/use, transportation, office space);

(3) Agencies are engaged in public education/interpretation, or multiple-use resource management; or,

(4) Agencies are in a position to influence actions affecting historic properties.

(h) Agency funding decisions for historic preservation work should be based on a determination of the prudent level of investment for a specific undertaking. That determination, in turn, should acknowledge that preservation costs are eligible project costs on an equal footing with other planning, design, construction, environmental protection, and mitigation needs and requirements. Similarly, the cost of caring for, documenting, and otherwise preserving artifacts, records, and remains related to historic properties is an eligible project cost. (Sec. 110(g)). The agency may contract with a State Historic Preservation Officer (SHPO), another Federal agency, or other public or private organization as appropriate to assist it in carrying out the agency's historic preservation work.

(i) Where preservation activity is a condition of obtaining a Federal license or permit, or Federal approval, or is subject to a delegation of authority by a Federal agency, the recipient may be expected to incur reasonable costs. (Sec. 110(g)). Because it is difficult to establish fair standards that would be applicable in all cases, "reasonable costs" should not be determined using inflexible criteria, such as a flat fee or a standard percentage of a budget, but rather should be determined on a case-by-case basis.

(j) An efficient preservation program should allow the agency to do more than simply meet its section 110 and 106 responsibilities. In order to eliminate duplicative effort and assist in agency planning, the preservation program should be coordinated with actions the agency takes to meet the requirements of other relevant and related Federal statutes (e.g., NAGPRA, the Archaeological Resources Protection Act (ARPA), the American Indian Religious Freedom Act (AIRFA), and the National Environmental Policy Act (NEPA)) in a comprehensive, anticipatory manner.

Preservation Officer

(k) The agency position responsible for coordinating the preservation program is the Preservation Officer required of all agencies by section 110(c) of the NHPA (unless specifically exempted under section 214 of the NHPA). A Preservation Officer may have other agency duties in addition to historic preservation coordination, depending on the magnitude and degree of the agency's historic preservation activities and responsibilities. (Sec. 110(c)).

(l) Agency officials designated as Preservation Officers should have substantial experience administering Federal historic preservation activities and/or specifically assigned staff under their supervision who have such experience. Section 112 of the NHPA requires that agency personnel or contractors responsible for historic resources, meet qualification standards established by the Office of Personnel Management in consultation with the Secretary.

(m) Each Preservation Officer should have sufficient agency-wide authority, staff, and other resources to carry out section 110 responsibilities effectively. Agency administrative systems should ensure that the Preservation Officer can review and comment meaningfully on all agency programs and activities and interact with the agency's planning and project management systems in such a way as to influence decisions potentially affecting historic resources. The Preservation Officer should have sufficient authority and the agency should have sufficient control systems to ensure that decisions made pursuant to section 106 and section 110 about the treatment of such resources are in fact carried out.

(n) In agencies where significant preservation responsibilities are delegated to regional or field offices, or Federal facilities or installations, the agency head should also appoint qualified preservation officials at those levels. Such officials should ensure that their actions and conduct of historic preservation activities are coordinated with, and consistent with, those of the central office Preservation Officer for that agency.

(o) The agency should ensure that its personnel management system identifies those personnel with preservation responsibilities, includes such responsibilities in their position descriptions and performance elements and standards, and appropriately rewards high-quality performance. In addition, the agency should provide for ongoing training in historic preservation for all agency personnel with preservation responsibilities.

Standard 2. An agency provides for the timely identification and evaluation of historic properties under agency jurisdiction or control and/or subject to effect by agency actions. (Sec. 110(a)(2)(A) and sec. 112).

Guidelines

(a) Identification and evaluation of historic properties are critical steps in their long-term management, as well as in project-specific planning by Federal agencies. Normally, an agency must identify the full range of historic properties that may be affected by an agency program or activity, including, but not limited to, historic buildings and structures, archaeological sites, traditional cultural properties, designed and other cultural landscapes, historic linear features such as roads and trails, historic objects such as signs and street furniture, and historic districts comprising cohesive groups of such properties. (Sec. 110(a)(2)(A)). Effective management of historic properties requires that they first be identified and evaluated. The level of identification needed can vary depending on the nature of the property or property type, the nature of the agency's management authority, and the nature of the agency's possible effects on the property.

(b) The Secretary of the Interior has issued standards and guidelines for identification and evaluation of historic properties (in The Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (48 FR 44720-44726)), which should be used to ensure that the preservation program's identification and evaluation ***20502** procedures will be adequate and appropriate. Identification and evaluation of historic properties must be conducted by professionally qualified individuals. (Sec. 101(g), sec. 101(h), and sec. 112)

(c) Agency efforts to identify and evaluate historic properties should include early consultation with the State Historic Preservation Officer, or the Tribal Preservation Officer as appropriate, to ensure that such efforts benefit from and build effectively upon any relevant data already included in the State's or Tribe's inventory. For information on consulting with an Indian tribe that has assumed State Historic Preservation Officer functions pursuant to section 101(d)(2) of the Act, see Standard 6, Guideline 7(b). Agencies are encouraged to share with the appropriate SHPO and Tribal Preservation Officer, information about historic properties gathered through their identification and evaluation activities.

(d) Where an agency is planning an action that is not aimed at specific land areas (for example, a nationwide program of assistance to local governments, farmers, or low-income homeowners), and the identification of specific historic properties subject to effect is not feasible, the agency should nevertheless consider what types of historic properties may be affected directly or indirectly, and consider strategies that will minimize adverse effect and maximize beneficial effect on those properties. Such consideration must be carried out in consultation with SHPOs, Tribal Preservation Officers, local governments, Indian tribes, Native Hawaiian organizations, and the interested public as appropriate (110(a)(2)(E)(ii)).

(e) Where an agency is planning an action that could affect historic properties directly or indirectly (e.g., a land-use or construction project; a project that could change the way land or buildings are used or developed, or alter the social, cultural, or economic character of a community; and any program of assistance to or the issuance of a license for such activities), identification and evaluation should take place at the earliest possible stage of planning, and be coordinated with the earliest phases of any environmental review carried out under the National Environmental Policy Act and/or related authorities. Identification and evaluation efforts must be carried out in consultation with SHPOs, Tribal Preservation Officers, local governments, Indian tribes, Native Hawaiian organizations, and the interested public as appropriate (110(a)(2)(E)(ii).

(f) Where identification and evaluation are carried out as a part of long-term planning, it may be appropriate to conduct background studies to develop a “predictive model” of historic property distributions that can be used in evaluating the likely effects of particular land management projects as the program proceeds. In some cases, depending on management needs for a particular project or activity, it may not be necessary to identify exhaustively every historic property or historic property type. It may also be appropriate and cost-effective to carry out the work in phases organized around particular property types or other such coherent units. For example, if historic architecture is of greater immediate concern than Native American traditional properties or archeological sites, a survey of architecture alone may be appropriate during a particular budget year, with archeological survey and ethnographic studies deferred until later. However, identification is not complete until all historic properties have been identified. Such work should be developed in consultation with SHPOs, Tribal Preservation Officers, local governments, Indian tribes and Native Hawaiian organizations as appropriate, and other parties that may have knowledge of, or interest in, such properties.

(g) Identification of historic properties is an ongoing process. As time passes, events occur, or scholarly and public thinking about historical significance changes. Therefore, even when an area has been completely surveyed for historic properties of all types it may require re-investigation if many years have passed since the survey was completed. Such follow-up studies should be based upon previously obtained information, may focus upon filling information gaps, and should consider re-evaluation of properties based upon new information or changed historical understanding.

Standard 3. An agency nominates historic properties under the agency's jurisdiction or control to the National Register of Historic Places. (Sec. 110(a)(2)(A)).

Guidelines

(a) The first step in designing a program for the nomination of historic properties is to determine what role nomination will play in the agency's overall preservation program. For example:

(1) An agency that controls relatively few historic properties may find it realistic to nominate them all to the National Register, and then manage them accordingly. An agency with a great many historic properties will need to establish explicit priorities for identifying, nominating, and preserving properties.

(2) Placement on the National Register may help justify budgeting funds for preservation or management of a historic property, so agencies may want to give priority to nominating properties as a first step in upgrading their maintenance and providing for their continued active service in carrying out agency programs. Further, development of National Register-level documentation provides information on the property that will assist the agency in its subsequent property management decisions.

(3) An agency with an excellent internal program for identifying and preserving historic properties may find that other determinants, such as whether a property is to be managed and interpreted as a site of public interest, are more useful in establishing nomination priorities.

(4) An agency that regularly transfers property out of Federal ownership may find it useful to give higher priority to nominating properties to be transferred, at the expense of other properties, in those cases where placement on the National Register may make preservation more likely once a property is no longer under Federal management.

(b) Beyond serving the agency's own internal management needs, the National Register is the nation's formal repository of information on historic properties. To the extent that the National Register is incomplete, its usefulness as a planning and educational tool is diminished. Consequently, an agency should generally strive to nominate the historic properties under its jurisdiction or control to the National Register.

(c) The Secretary of the Interior already has in place Standards and Guidelines for registration of historic properties (in The Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (48 FR 44726-44728) that details the process that should be followed in formally recognizing historic properties as significant. These Standards and Guidelines, along with the National Register Bulletin #16, Guidelines for Completing National Register Forms, provide guidance on completing National Register nomination forms. National Register regulations (36 CFR part 60) set forth the nomination process. ***20503**

Standard 4. An agency gives historic properties full consideration when planning or considering approval of any action that might affect such properties. (Sec. 110(a)(2)(B),(C), and (E), and sec. 402 (16 U.S.C. 470a-2)).

Guidelines

All Historic Properties

(a) Each Federal agency has an affirmative responsibility under section 110 of the National Historic Preservation Act to consider its activities' effects on our nation's historic properties. This responsibility extends to a systematic consideration of properties not under the jurisdiction or control of the agency, but potentially affected by agency actions. (Sec. 110(a)(2)(C)).

(b) Full consideration of historic properties includes assessment of the widest range of preservation alternatives early in program or project planning, coordinated to the extent feasible with other kinds of required planning and environmental review.

(c) Full consideration of historic properties includes consideration of all kinds of effects on those properties: direct effects, indirect or secondary effects, and cumulative effects. Effects may be visual, audible, or atmospheric. Beyond the effects from physical alteration of the resource, itself, effects on historic properties may result from changes in such things as local or regional traffic patterns, land use, and living patterns.

(d) Full consideration of historic properties includes an obligation to solicit and consider the views of others in planning and carrying out agency preservation activities (See Standard 5 on Consultation). (Sec. 110(a)(2)(D)).

(e) Full consideration of historic properties must include development of and adherence to agency procedures for section 106 review that are consistent with the regulations of the Advisory Council on Historic Preservation, and, as necessary, with certain provisions of the Native American Graves Protection and Repatriation Act. (Sec. 110(a)(2)(E)(i), (ii), and (iii)).

(f) The term consistent with the regulations issued by the Council as used in the NHPA means that an agency's procedures provide for the identification and evaluation of historic properties, the assessment of project and program effects on them, and consultation (specifically including consultation with the State Historic Preservation Officer, Tribal Preservation Officer or other Native American groups where appropriate, and other affected parties) to determine appropriate treatment or mitigation. Such procedures must either adhere to and expand upon the process set out in 36 CFR part 800, or include modifications or alternatives to that process that have been reviewed and approved by the Council. Implementation of procedures consistent with the Council's regulations means that those procedures are carried out in a manner consistent with the Guidelines for Standard 1 above.

(g) Full consideration of historic properties includes development of procedures to identify, discourage, and guard against "anticipatory demolition" of a historic property by applicants for Federal assistance or license. Agency procedures should include a system for early warning to applicants and potential applicants that anticipatory demolition of a historic property may result in the loss of Federal assistance, license or permit, or approval for a proposed undertaking. When an historic property is destroyed or irreparably harmed with the express purpose of circumventing or preordaining the outcome of section 106 review (e.g., demolition or removal of all or part of the property) prior to application for Federal funding, a Federal license, permit, or loan guarantee, the agency considering that application is required by section 110(k) to withhold the assistance sought, unless the agency, after consultation with the Council, determines and documents that "circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant." (Sec. 110(k)).

(h) Agency preservation procedures for section 106 compliance must provide for the disposition of Native American, Alaskan, and Hawaiian human remains and cultural items from Federal or tribal land consistent with section 3(c) of the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA). (Sec. 110(2)(E)(iii)). The applicable NAGPRA sections on disposition (sections 3(c)(3) and 3(a) & (b)) vest "ownership and right of control" according to a hierarchy of relationships to the cultural items. See NAGPRA (25 U.S.C. 3002(c)) and the Department of Interior's regulations implementing this Act (43 CFR part 10) for detailed information.

(i) In those cases where consultation pursuant to section 106 does not produce a Memorandum of Agreement (MOA) governing how an agency will "take into account" the adverse effects of its undertaking on historic properties, section 110(l) requires that the final decision(s), reached after consideration of the Council's comments, be made by the agency head and not by any subordinate official, that it be explicit and informed, and that it be a part of the public record available for review. (Sec. 110(l)).

National Historic Landmarks

(j) National Historic Landmarks (NHL) are designated by the Secretary under the authority of the Historic Sites Act of 1935, which authorizes the Secretary to identify historic and archaeological sites, buildings, and objects which "possess exceptional value as commemorating or illustrating the history of the United States." Section 110(f) of the NHPA requires that Federal agencies exercise a higher standard of care when considering undertakings that may directly and adversely affect NHLs. The law requires that agencies, "to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark." In those cases when an agency's undertaking directly and adversely affects an NHL, or when Federal permits, licenses, grants, and other programs and projects under its jurisdiction or carried out by a state or local government pursuant to a Federal delegation or approval so affect an NHL, the agency should consider all prudent and feasible alternatives to avoid an adverse effect on the NHL. (Sec. 110(a)(2)(B) and sec. 110(f)).

(k) Where such alternatives appear to require undue cost or to compromise the undertaking's goals and objectives, the agency must balance those goals and objectives with the intent of section 110(f). In doing so, the agency should consider:

(1) The magnitude of the undertaking's harm to the historical, archaeological and cultural qualities of the NHL;

(2) The public interest in the NHL and in the undertaking as proposed, and,

(3) The effect a mitigation action would have on meeting the goals and objectives of the undertaking.

(l) The Advisory Council's regulations implementing section 106 include specific provisions that also implement section 110(f). These regulations require that the Council must be included in any consultation following a determination by the Federal agency that a Federal or federally assisted undertaking will have an adverse effect on an NHL. The Council must notify the Secretary and may request the Secretary to provide a report to the Council detailing the significance of the affected NHL under section 213 of the NHPA and recommending measures to avoid, minimize or mitigate adverse effects. The Council shall report the outcome of ***20504** the section 106 process to the Secretary and the head of the agency responsible for the undertaking.

Foreign Historic Properties

(m) In accordance with section 402 of the National Historic Preservation Act Amendments of 1980 (Pub. L. 96-515) and with Executive Order 12114 (issued January 4, 1979), the agency's preservation program should ensure that, when carrying out work in other countries, the agency will consider the effects of such actions on historic properties, including World Heritage Sites and properties that are eligible for inclusion in the host country's equivalent of the National Register.

(n) The agency's preservation program should ensure that those agency officials, contractors, and other parties responsible for implementing section 402 of the NHPA (16 U.S.C. 470a-z) and Executive Order 12114 have access to personnel with appropriate levels and kinds of professional expertise in historic preservation to identify and assist in the management of such properties.

(o) Efforts to identify and consider effects on historic properties in other countries should be carried out in consultation with the host country's historic preservation authorities, with affected communities and groups, and with relevant professional organizations.

Standard 5. An agency consults with knowledgeable and concerned parties outside the agency about its historic preservation related activities. (Sec. 110(a)(2)(D) and (E)(ii)).

Guidelines

Consultation General Principles

(a) Consultation means the process of seeking, discussing, and considering the views of others, and, where feasible, seeking agreement with them on how historic properties should be identified, considered, and managed. Consultation is built upon the exchange of ideas, not simply providing information. Whether consulting on a specific project or on broader agency programs, the agency should:

(1) Make its interests and constraints clear at the beginning;

(2) Make clear any rules, processes, or schedules applicable to the consultation;

(3) Acknowledge others' interests and seek to understand them;

(4) Develop and consider a full range of options; and,

(5) Try to identify solutions that will leave all parties satisfied.

(b) Consultation should include broad efforts to maintain ongoing communication with all those public and private entities that are interested in or affected by the agency's activities and should not be limited to the consideration of specific projects.

(c) Consultation should be undertaken early in the planning stage of any Federal action that might affect historic properties. Although time limits may be necessary on specific transactions carried out in the course of consultation (e.g., the time allowed to respond to an inquiry), there should be no hard-and-fast time limit on consultation overall. Consultation on a specific undertaking should proceed until agreement is reached or until it becomes clear to the agency that agreement cannot be reached.

(d) While specific consultation requirements and procedures will vary among agencies depending on their missions and programs, the nature of historic properties that might be affected, and other factors, consultation should always include all affected parties. Section 110(a)(2)(D) specifies that an agency's preservation-related activities be carried out in consultation with other Federal, State, and local agencies, Indian tribes, Native Hawaiian organizations, and the private sector. Section 110(a)(2)(E)(ii) requires an agency's procedures for compliance with section 106 to provide a process for the identification and evaluation of historic properties and the development and implementation of agreements, in consultation with SHPOs, local governments, Indian tribes, Native Hawaiian organizations, and the interested public, as appropriate. In addition to having a formal role under the Act, SHPOs and Tribal Preservation Officers can assist in identifying other parties with interests, as well as sources of information.

(e) The agency needs to inform other agencies, organizations, and the public in a timely manner about its projects and programs, and about the possibility of impacts on historic resources of interest to them. However, the agency cannot force a group to express its views, or participate in the consultation. These groups also bear a responsibility, once they have been made aware that a Federal agency is interested in their views, to provide them in a suitable format and in a timely fashion.

(f) Agency efforts to inform the public about its projects and programs and about the possibility of impacts on historic resources must be carried out in a manner consistent with the provisions of section 304 of the Act, which calls for withholding from disclosure to the public information on the location, character, or ownership of a historic resource where such disclosure may:

(1) Cause a significant invasion of privacy;

(2) Risk harm to the historic resource; or,

(3) Impede the use of a traditional religious site by practitioners.

Consultation with Native Americans

(g) Inclusion of Indian tribes and Native Hawaiian organizations in the consultation process is imperative and is specifically mandated by the Act (Sec. 110(a)(2)(D)):

(1) Properties with traditional religious and cultural importance to Native American and Native Hawaiian groups may be eligible for the National Register; such properties must be considered, and the appropriate Native American and/or Native Hawaiian groups must be consulted in project and program planning through the section 106 review process (see NHPA Sec. 101(d)(6)(A&B);

(2) Section 101(d)(2) of the Act provides that Indian tribes may assume State Historic Preservation Officer responsibilities on tribal lands, when approved to do so by the Secretary of the Interior. In those cases where a tribe has assumed such responsibilities on tribal lands, a Federal agency must consult with the tribe instead of the SHPO, in order to meet agency responsibilities for consultation pursuant to the Act;

(3) The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) establishes consultation requirements (43 CFR part 10) that may affect or be affected by consultation pursuant to section 106 of the NHPA concerning activities on Federal and Tribal lands that could affect human remains and cultural items. The Archeological Resources Protection Act of 1979 and its uniform regulations also require consultation with tribes and provide a formal process of notification (16 U.S.C. 470cc-dd);

(4) Section 110 requires that an agency's efforts to comply with section 106 must also be consistent with the requirements of section 3(c) of NAGPRA concerning the disposition of human remains and Native American cultural items from Federal and tribal lands.

(h) Where those consulted do not routinely or customarily participate in traditional governmental means of consultation (e.g., through public meetings, exchanges of correspondence), reasonable efforts should be made to accommodate their cultural values and modes of communication. ***20505**

Standard 6. An agency manages and maintains historic properties under its jurisdiction or control in a manner that considers the preservation of their historic, architectural, archeological, and cultural values. (Sec. 110(a)(1), sec. 110(a)(2)(B), sec. 110(b)).

Guidelines

(a) Historic properties include any prehistoric or historic districts, sites, buildings, structures, or objects listed in, or eligible for inclusion in, the National Register of Historic Places, including artifacts, records, and material remains related to such properties. To the extent feasible, as part of its property management program, the agency should endeavor to retain historic buildings and structures in their traditional uses and to maintain significant archeological sites and landscapes in their undisturbed condition. (See Secretary of the Interior's Standards for the Treatment of Historic Properties (36 CFR part 68), and Guidelines for Preserving, Rehabilitating, Restoring & Reconstructing Historic Buildings and Guidelines for the Treatment of Historic Landscapes.)

(b) Where it is no longer feasible to continue the traditional use of a historic structure or to maintain a significant archeological site or cultural landscape in undisturbed condition, the agency should consider an adaptive use that is compatible with the historic property. Adaptive use proposals must be reviewed in accordance with section 106 of the Act. The agency should consider as wide a range of adaptive use options as is feasible given its own management needs, cost factors, and the needs of preservation. A use that severely damages or destroys a historic property is not consistent with the section 110(a)(1) requirement to preserve historic properties in accordance with the professional standards established pursuant to section 101(g) of the Act.

(c) Where modification of a historic property is required to allow it to meet contemporary needs and requirements, the agency should ensure that The Secretary of the Interior's Standards for the Treatment of Historic Properties and its accompanying guidelines are followed. Agencies are authorized and directed by section 110(a)(1) to carry out (or cause a lessee or concessioner to carry out) whatever preservation work is necessary (e.g., rehabilitation or documentation) in preparation for use. Proposals to modify historic properties must be reviewed in accordance with section 106 of the Act. When such modification requires disturbance of the earth, and it is not feasible to avoid and protect significant archeological resources, the archeological resources should be excavated and the data recovered. Excavations should focus on areas that will be disturbed during the project, but overall excavation efforts should be governed by a research design intended to recover significant data contained in the site. Doing so may require excavation of adjacent deposits of the site. All archeological work should conform to the Secretary's "Standards for Archeological Documentation." Under sections 101(a)(7)(A) and 110, agencies are also responsible for ensuring that prehistoric and historic material remains and associated records recovered in conjunction with projects and programs are deposited in repositories capable of proving adequate long-term curatorial services (see 36 CFR part 79). Additional requirements for the management and ongoing care of archeological resources may be found in the Antiquities Act (16 USC 431-433) and the Archeological Resource Protection Act (16 USC 470aa-mm), and their attendant regulations.

(d) Until and unless decisions are made to manage them in some other manner, historic properties, and properties not yet formally evaluated that may meet the criteria for inclusion in the National Register, should be maintained so that their preservation is ensured through adherence to The Secretary of the Interior's Standards for the Treatment of Historic Properties.

(e) The relative cost of various management strategies for a historic structure, ranging from full restoration, to rehabilitation and adaptive use to demolition and replacement with a modern building, should be carefully and objectively considered, with reference to the pertinent requirements of Executive Order 11912, as amended, to the pertinent criteria established in OMB Circular A-94, and to the pertinent principles and methods set forth in the National Bureau of Standards Life-Cycle Costing Manual (NBS Handbook 135).

(f) Applicable long and short-term costs should be carefully considered as part of any cost analysis. It is often the case that the short-term costs of preserving and rehabilitating a historic structure are balanced by long-term savings in maintenance or replacement; on the other hand, failure to perform needed cyclic maintenance may shorten the life of a building and decrease the value of investment in its rehabilitation.

(g) Where it is not feasible to maintain a historic property, or to rehabilitate it for contemporary use, the agency may elect to modify it in ways that are inconsistent with the Secretary's "Standards for Rehabilitation," allow it to deteriorate, or demolish it. However, the decision to act or not act to preserve and maintain historic properties should be an explicit one, reached following appropriate consultation within the section 106 review process and in relation to other management needs.

(h) Where the agency determines in accordance with section 106 that maintaining or rehabilitating a historic property for contemporary use in accordance with the Secretary's Standards is not feasible, the agency must provide for appropriate

recording of the historic property in accordance with section 110(b) before it is altered, allowed to deteriorate, or demolished.

Standard 7. An agency gives priority to the use of historic properties in carrying out agency missions. (Sec. 110(a)(1)).

Guidelines

(a) For the most part, use of historic properties involves the integration of those properties into the activities directly associated with the agency's mission. However, the agency should also be open to the possibility of other uses, such as the use of traditional sacred sites or plant gathering areas by Native Americans, or use of an archeological site as a public interpretive facility.

(b) An agency with historic properties under its jurisdiction and control should maintain an inventory of those properties that notes the current use and condition of each property. The agency should provide for regular inspection of the properties and an adequate budget for their appropriate maintenance.

(c) Section 110(a)(1) applies not only to historic properties under an agency's ownership or control, but to other historic properties available to an agency. An agency that requires the use of non-federal property is required to give priority to the use of historic properties. In such cases the agency should notify potential private-sector offerors of this priority and, if feasible, offer incentives to help ensure that historic properties will be offered.

(d) Where an agency carries out its mission through the award of grant funds for specific activities, and where those activities will inevitably affect historic properties, the agency should, to the extent feasible, design its grants programs so as to encourage grantees to retain and make appropriate use of historic properties in carrying out grant-funded activities.

(e) As provided for in section 111 of the Act, the agency should consider ***20506** leases, exchanges, and management agreements with other parties as means of providing for the continuing or adaptive use of historic properties.

(f) Surplus properties that are listed in or have been formally determined eligible for the National Register can be transferred to State, tribal, and local governments for historic preservation purposes through the Historic Surplus Property Program. Additionally, properties or portions of surplus properties may be made available to States or local agencies at no cost for parks and recreation through application to the Federal Lands-to-Parks Program. Contact the NPS' Heritage Preservation Services Division or its Recreation Resources Assistance Division in Washington, D.C., for more information on these programs.

(g) The use of historic properties is not mandated where it can be demonstrated to be economically infeasible, or where historic properties will not serve the agency's requirements. The agency's responsibility is to balance the needs of the agency mission, the public interest in protecting historic properties, the costs of preservation, and other relevant public interest factors in making such decisions.

Definitions

(a) The Act or NHPA means the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470 et seq.

(b) Advisory Council or Council means the agency, fully titled the Advisory Council on Historic Preservation, established pursuant to section 201 of Title II of the NHPA, that is to be afforded a reasonable opportunity under sections 106 and 110(f) of the NHPA to comment with regard to proposed undertakings, as defined in section 301(7) of the NHPA; that reviews Federal programs pursuant to section 202(a)(6) of the NHPA; and with whose regulations outlining the procedures for complying with the requirements of section 106 of the NHPA ("Protection of Historic Properties," found

at 36 CFR part 800) in accordance with section 110(a)(2)(E)(i), other Federal agencies procedures for compliance with section 106 must be consistent.

(c) Agency Head means the individual Departmental Secretary, Executive Director or Administrator of an agency, as defined in the Council's regulations (36 CFR part 800).

(d) Cultural items is defined in the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA, 25 U.S.C 3002(c)). It includes human remains; associated and unassociated funerary objects (consisting of items intentionally placed with the body in a grave, including those not in possession of a Federal agency); sacred objects, ceremonial objects important to the practice of Native American traditional religions; and objects of cultural patrimony, those items having historical, traditional, or cultural importance to Indian tribes themselves. For a complete definition see section 2(3)(A)-(D) of NAGPRA, and the Department of Interior's regulations implementing the provisions of the Act at 43 CFR part 10.

(e) Historic property or historic resource is defined at section 301 of the NHPA and means any prehistoric or historic district, site, building, structure, landscape or object included in, or eligible for inclusion in the National Register, including artifacts, records, and material remains related to such a property or resource. Section 101(d)(6)(A) of the National Historic Preservation Act provides that "properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register."

(f) Historic resource (see definition for "historic property").

(g) Indian tribe or tribe is defined at section 301(4) of the NHPA and means an Indian tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. The Secretary of the Interior is responsible for determining an Indian tribe's eligibility for those special programs and services.

(h) Memorandum of Agreement means the document that records the terms and conditions which have been agreed upon to resolve the adverse effects of an undertaking upon historic properties.

(i) National Register is defined at Section 301(6) of the NHPA and means the list of districts, sites, buildings, structures and objects significant in American history, architecture, archeology, engineering, and culture established under section 101 of the NHPA and maintained by the Secretary of the Interior and fully titled the "National Register of Historic Places."

(j) Native Hawaiian is defined in the NHPA at section 301(17) and means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(k) Native Hawaiian organization as defined at section 301(18) of the NHPA means any organization which

(1) Serves and represents the interests of Native Hawaiians;

(2) Has as a primary and stated purpose the provision of services to Native Hawaiians; and,

(3) Has demonstrated expertise in aspects of historic preservation that are culturally significant to Native Hawaiians.

The term includes, but is not limited to, the Office of Hawaiian Affairs of the State of Hawaii and Hui Malama I Na Kapuna O Hawai'i Nei, an organization incorporated under the laws of the State of Hawaii.

(l) Preservation or historic preservation as defined in the NHPA at section 301(8) includes identification, evaluation, recordation, documentation, curation, acquisition, protection, management, rehabilitation, restoration, stabilization, maintenance, research, interpretation, conservation, and education and training regarding the foregoing activities or any combination of the foregoing activities.

(m) Preservation Officer means the individual in the agency responsible for managing the agency's historic preservation program and coordinating all preservation activities. All federal agencies are required to appoint a Preservation Officer under section 110(c) of the National Historic Preservation Act (unless specifically exempted under section 214 of the NHPA). The Preservation Officer and the Agency Head are not necessarily one and the same individual.

(n) Secretary is defined at section 301(11) of the NHPA and means the Secretary of the Interior acting through the Director of the National Park Service, except where otherwise specified.

(o) Secretary's Standards means the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (available from the National Park Service), the project and program standards and guidelines for implementing the NHPA. They are technical guidance concerning archeological and historic preservation activities and methods. The complete Secretary's Standards currently address each of the following activities: Preservation Planning, Identification, Evaluation, Registration, Historical Documentation, Architectural and Engineering Documentation, Archeological Documentation, Treatment of Historic Properties ***20507** (including Rehabilitation), and Professional Qualifications.

(p) State Historic Preservation Officer (SHPO) means the official appointed or designated pursuant to section 101(b)(1) of the NHPA to administer the State historic preservation program or a representative designated to act for the SHPO.

(q) Traditional Cultural Property is defined as a property that is associated with cultural practices or beliefs of a living community that (1) are rooted in that community's history, and (2) are important in maintaining the continuing cultural identity of the community. Readers should refer to National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties (available from the National Park Service) for more information.

(r) Tribal Preservation Officer or Tribal Historic Preservation Officer means the official appointed or designated by the Tribe to carry out the historic preservation program responsibilities that the Tribe has assumed pursuant to section 101(d) of the NHPA.

(s) Tribal lands is defined at section 301(14) of the NHPA and means

(1) All lands within the exterior boundaries of any Indian reservation; and

(2) All dependent Indian communities.

(t) Undertaking as defined in the NHPA at section 301(7) means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including

(1) Those carried out by or on behalf of the agency;

(2) Those carried out with Federal financial assistance;

(3) Those requiring a Federal permit, license, or approval; and

(4) Those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

Appendix A

Section 110 of the National Historic Preservation Act (16 U.S.C. 470h-2):

(a)(1) The heads of all Federal agencies shall assume responsibility for the preservation of historic properties which are owned or controlled by such agency. Prior to acquiring, constructing, or leasing buildings for purposes of carrying out agency responsibilities, each Federal agency shall use, to the maximum extent feasible, historic properties available to the agency. Each agency shall undertake, consistent with the preservation of such properties and the mission of the agency and the professional standards established pursuant to section 101(g), any preservation, as may be necessary to carry out this section. (Standards 1, 6 and 7.)

(2) Each Federal agency shall establish (unless exempted pursuant to section 214), in consultation with the Secretary [of the Interior], a preservation program for the identification, evaluation, and nomination to the National Register of Historic Places, and protection of historic properties. (Standard 1.) Such program shall ensure

(A) That historic properties under the jurisdiction or control of the agency are identified, evaluated, and nominated to the National Register (Standards 2 and 3);

(B) That such properties under the jurisdiction or control of the agency as are listed in or may be eligible for the National Register are managed and maintained in a way that considers the preservation of their historic, archeological, architectural, and cultural values in compliance with section 106 and gives special consideration to the preservation of such values in the case of properties designated as having national significance (Standard 4);

(C) That the preservation of properties not under the jurisdiction or control of the agency, but subject to be potentially affected by agency actions are given full consideration in planning (Standards 4 and 6);

(D) That the agency's preservation-related activities are carried out in consultation with other Federal, State, and local agencies, Indian tribes, Native Hawaiian organizations carrying out historic preservation planning activities, and with the private sector (Standard 5); and

(E) That the agency's procedures for compliance with section 106

(i) Are consistent with regulations issued by the (Advisory) Council (on Historic Preservation) pursuant to section 211 (Standard 4);

(ii) Provide a process for the identification and evaluation of historic properties for listing in the National Register and the development and implementation of agreements, in consultation with State Historic Preservation Officers, local governments, Indian tribes, Native Hawaiian organizations, and the interested public, as appropriate, regarding the means by which adverse effects on such properties will be considered (Standard 4); and

(iii) Provide for the disposition of Native American cultural items from Federal or tribal land in a manner consistent with section 3(c) of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3002(c)) (Standard 4).

(b) Each Federal agency shall initiate measures to assure that where, as a result of Federal action or assistance carried out by such agency, a historic property is to be substantially altered or demolished, timely steps are taken to make or have made appropriate records, and that such records then be deposited, in accordance with section 101(a), in the Library

of Congress or with such other appropriate agency as may be designated by the Secretary, for future use and reference (Standard 6).

(c) The head of each Federal agency shall, unless exempted under section 214, designate a qualified official to be known as the agency's "preservation officer" who shall be responsible for coordinating that agency's activities under this Act. Each Preservation Officer may, in order to be considered qualified, satisfactorily complete an appropriate training program established by the Secretary under section 101(h) (Standard 1).

(d) Consistent with the agency's mission and mandates, all Federal agencies shall carry out agency programs and projects (including those under which any Federal assistance is provided or any Federal license, permit, or other approval is required) in accordance with the purposes of this Act and, give consideration to programs and projects which will further the purposes of this Act (Standard 1).

(e) The Secretary shall review and approve the plans of transferees of surplus federally owned historic properties not later than ninety days after his receipt of such plans to ensure that the prehistorical, historical, architectural, or culturally significant values will be preserved or enhanced (Standard 7).

(f) Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking (Standard 4).

(g) Each Federal agency may include the costs of preservation activities of such agency under this Act as eligible project costs in all undertakings of such agency or assisted by such agency. The eligible project costs may also include amounts paid by a Federal agency to any State to be used in carrying out such preservation responsibilities of the Federal agency under this Act, and reasonable costs may be charged to Federal licensees and permittees as a condition to the issuance of such license or permit (Standard 1).

(h) The Secretary shall establish an annual preservation awards program under which he may make monetary awards in amounts not to exceed $1,000 and provide citations for special achievement to officers and employees of Federal, State, and certified local governments in recognition of their outstanding contributions to the preservation of historic resources. Such program may include the issuance of annual awards by the president of the United States to any citizen of the United States recommended for such award by the Secretary.

(i) Nothing in this Act shall be construed to require the preparation of an environmental impact statement where such statement would not otherwise be required under the National Environmental Policy Act of 1969, and nothing in this Act shall be construed to provide any exemption from any requirement respecting the preparation of such a statement under such Act.

(j) The Secretary shall promulgate regulations under which the requirements of this section may be waived in whole or in part in the event of a major natural disaster or an imminent threat to the national security. ***20508**

(k) Each Federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant who, with intent to avoid the requirements of section 106, has intentionally significantly adversely affected a historic property to which the grant would relate, or having the legal power to prevent it, allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant (Standard 4).

(l) With respect to any undertaking subject to section 106 which adversely affects any property included in or eligible for inclusion in the National Register, and for which a Federal agency has not entered into an agreement with the Council, the head of such agency shall document any decision made pursuant to section 106. The head of such agency may not delegate his or her responsibilities pursuant to such section. Where a section 106 memorandum of agreement has been executed with respect to an undertaking, such memorandum shall govern the undertaking and all of its parts (Standard 4).

Appendix B

Purposes of the National Historic Preservation Act

Section 110(d) of the National Historic Preservation Act (the Act) calls on all Federal agencies, consistent with their mission and mandates, to carry out their activities in accordance with the purposes of the Act and to consider programs and projects that will further the purposes of the Act. The purposes of the Act are set forth in sections 1 and 2. These sections are directly germane to all Federal preservation programs:

Section 1 (b) The Congress finds and declares that

(1) The spirit and direction of the Nation are founded upon and reflected in its historic heritage;

(2) The historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;

(3) Historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency;

(4) The preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans;

(5) In the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to ensure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation;

(6) The increased knowledge of our historic resources, the establishment of better means of identifying and administering them, and the encouragement of their preservation will improve the planning and execution of federal and federally assisted projects and will assist economic growth and development; and,

(7) Although the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

Section 2: It shall be the policy of the Federal Government, in cooperation with other nations and in partnership with the States, local governments, Indian tribes, and private organizations and individuals to

(1) Use measures, including financial and technical assistance, to foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations;

(2) Provide leadership in the preservation of the prehistoric and historic resources of the United States and of the international community of nations and in the administration of the national preservation program in partnership with the States, Indian tribes, Native Hawaiians, and local governments;

(3) Administer federally owned, administered, or controlled prehistoric and historic resources in a spirit of stewardship for the inspiration and benefit of present and future generations;

(4) Contribute to the preservation of nonfederally owned prehistoric and historic resources and give maximum encouragement to organizations and individuals undertaking preservation by private means;

(5) Encourage the public and private preservation and utilization of all usable elements of the Nation's historic built environment; and

(6) Assist State and local governments, Indian tribes and Native Hawaiian organizations and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

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Code of Federal Regulations
Title 36. Parks, Forests, and Public Property
Chapter VIII. Advisory Council on Historic Preservation
Part 800. Protection of Historic Properties (Refs & Annos)
Subpart A. Purposes and Participants

36 C.F.R. § 800.1

§ 800.1 Purposes.

Currentness

(a) Purposes of the section 106 process. Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings. The procedures in this part define how Federal agencies meet these statutory responsibilities. The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.

(b) Relation to other provisions of the act. Section 106 is related to other provisions of the act designed to further the national policy of historic preservation. References to those provisions are included in this part to identify circumstances where they may affect actions taken to meet section 106 requirements. Such provisions may have their own implementing regulations or guidelines and are not intended to be implemented by the procedures in this part except insofar as they relate to the section 106 process. Guidelines, policies, and procedures issued by other agencies, including the Secretary, have been cited in this part for ease of access and are not incorporated by reference.

(c) Timing. The agency official must complete the section 106 process "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license." This does not prohibit agency official from conducting or authorizing nondestructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties. The agency official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.

AUTHORITY: 16 U.S.C. 470s.

Notes of Decisions (82)

Current through Dec. 13, 2018; 83 FR 64222.

End of Document

Code of Federal Regulations
Title 36. Parks, Forests, and Public Property
Chapter VIII. Advisory Council on Historic Preservation
Part 800. Protection of Historic Properties (Refs & Annos)
Subpart A. Purposes and Participants

36 C.F.R. § 800.2

§ 800.2 Participants in the Section 106 process.

Currentness

(a) Agency official. It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part. The agency official has approval authority for the undertaking and can commit the Federal agency to take appropriate action for a specific undertaking as a result of section 106 compliance. For the purposes of subpart C of this part, the agency official has the authority to commit the Federal agency to any obligation it may assume in the implementation of a program alternative. The agency official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law.

(1) Professional standards. Section 112(a)(1)(A) of the act requires each Federal agency responsible for the protection of historic resources, including archeological resources, to ensure that all actions taken by employees or contractors of the agency shall meet professional standards under regulations developed by the Secretary.

(2) Lead Federal agency. If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under section 106. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part.

(3) Use of contractors. Consistent with applicable conflict of interest laws, the agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines.

(4) Consultation. The agency official shall involve the consulting parties described in paragraph (c) of this section in findings and determinations made during the section 106 process. The agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes, as applicable, such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation. The Council encourages the agency official to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part.

(b) Council. The Council issues regulations to implement section 106, provides guidance and advice on the application of the procedures in this part, and generally oversees the operation of the section 106 process. The Council also consults with and comments to agency officials on individual undertakings and programs that affect historic properties.

(1) Council entry into the section 106 process. When the Council determines that its involvement is necessary to ensure that the purposes of section 106 and the act are met, the Council may enter the section 106 process. Criteria guiding Council decisions to enter the section 106 process are found in appendix A to this part. The Council will document that the criteria have been met and notify the parties to the section 106 process as required by this part.

(2) Council assistance. Participants in the section 106 process may seek advice, guidance and assistance from the Council on the application of this part to specific undertakings, including the resolution of disagreements, whether or not the Council is formally involved in the review of the undertaking. If questions arise regarding the conduct of the section 106 process, participants are encouraged to obtain the Council's advice on completing the process.

(c) Consulting parties. The following parties have consultative roles in the section 106 process.

(1) State historic preservation officer.

(i) The State historic preservation officer (SHPO) reflects the interests of the State and its citizens in the preservation of their cultural heritage. In accordance with section 101(b)(3) of the act, the SHPO advises and assists Federal agencies in carrying out their section 106 responsibilities and cooperates with such agencies, local governments and organizations and individuals to ensure that historic properties are taking into consideration at all levels of planning and development.

(ii) If an Indian tribe has assumed the functions of the SHPO in the section 106 process for undertakings on tribal lands, the SHPO shall participate as a consulting party if the undertaking takes place on tribal lands but affects historic properties off tribal lands, if requested in accordance with § 800.3(c)(1), or if the Indian tribe agrees to include the SHPO pursuant to § 800.3(f)(3).

(2) Indian tribes and Native Hawaiian organizations.

(i) Consultation on tribal lands.

(A) Tribal historic preservation officer. For a tribe that has assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the tribal historic preservation officer (THPO) appointed or designated in accordance with the act is the official representative for the purposes of section 106. The agency official shall consult with the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands.

(B) Tribes that have not assumed SHPO functions. When an Indian tribe has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the agency official shall consult with

a representative designated by such Indian tribe in addition to the SHPO regarding undertakings occurring on or affecting historic properties on its tribal lands. Such Indian tribes have the same rights of consultation and concurrence that the THPOs are given throughout subpart B of this part, except that such consultations shall be in addition to and on the same basis as consultation with the SHPO.

(ii) Consultation on historic properties of significance to Indian tribes and Native Hawaiian organizations. Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party.

(A) The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects. It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted in the section 106 process. Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties.

(B) The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. Nothing in this part alters, amends, repeals, interprets, or modifies tribal sovereignty, any treaty rights, or other rights of an Indian tribe, or preempts, modifies, or limits the exercise of any such rights.

(C) Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. The agency official shall consult with representatives designated or identified by the tribal government or the governing body of a Native Hawaiian organization. Consultation with Indian tribes and Native Hawaiian organizations should be conducted in a manner sensitive to the concerns and needs of the Indian tribe or Native Hawaiian organization.

(D) When Indian tribes and Native Hawaiian organizations attach religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the act requires Federal agencies to consult with such Indian tribes and Native Hawaiian organizations in the section 106 process. Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes and Native Hawaiian organizations and should consider that when complying with the procedures in this part.

(E) An Indian tribe or a Native Hawaiian organization may enter into an agreement with an agency official that specifies how they will carry out responsibilities under this part, including concerns over the confidentiality of information. An agreement may cover all aspects of tribal participation in the section 106 process, provided that no modification may be made in the roles of other parties to the section 106 process without their consent. An agreement may grant the Indian tribe or Native Hawaiian organization additional rights to participate or

concur in agency decisions in the section 106 process beyond those specified in subpart B of this part. The agency official shall provide a copy of any such agreement to the Council and the appropriate SHPOs.

(F) An Indian tribe that has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act may notify the agency official in writing that it is waiving its rights under § 800.6(c)(1) to execute a memorandum of agreement.

(3) Representatives of local governments. A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party. Under other provisions of Federal law, the local government may be authorized to act as the agency official for purposes of section 106.

(4) Applicants for Federal assistance, permits, licenses, and other approvals. An applicant for Federal assistance or for a Federal permit, license, or other approval is entitled to participate as a consulting party as defined in this part. The agency official may authorize an applicant or group of applicants to initiate consultation with the SHPO/THPO and others, but remains legally responsible for all findings and determinations charged to the agency official. The agency official shall notify the SHPO/THPO when an applicant or group of applicants is so authorized. A Federal agency may authorize all applicants in a specific program pursuant to this section by providing notice to all SHPO/THPOs. Federal agencies that provide authorizations to applicants remain responsible for their government-to-government relationships with Indian tribes.

(5) Additional consulting parties. Certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties.

(d) The public

(1) Nature of involvement. The views of the public are essential to informed Federal decisionmaking in the section 106 process. The agency official shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking.

(2) Providing notice and information. The agency official must, except where appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking and its effects on historic properties and seek public comment and input. Members of the public may also provide views on their own initiative for the agency official to consider in decisionmaking.

(3) Use of agency procedures. The agency official may use the agency's procedures for public involvement under the National Environmental Policy Act or other program requirements in lieu of public involvement requirements in subpart B of this part, if they provide adequate opportunities for public involvement consistent with this subpart.

AUTHORITY: 16 U.S.C. 470s.

Notes of Decisions (89)

Current through Dec. 13, 2018; 83 FR 64222.

End of Document

36 C.F.R. § 800.5

§ 800.5 Assessment of adverse effects.

Currentness

(a) Apply criteria of adverse effect. In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified historic properties, the agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects. The agency official shall consider any views concerning such effects which have been provided by consulting parties and the public.

(1) Criteria of adverse effect. An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

(2) Examples of adverse effects. Adverse effects on historic properties include, but are not limited to:

(i) Physical destruction of or damage to all or part of the property;

(ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation, and provision of handicapped access, that is not consistent with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines;

(iii) Removal of the property from its historic location;

(iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;

(v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;

(vi) Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and

(vii) Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.

(3) Phased application of criteria. Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to § 800.4(b)(2).

(b) Finding of no adverse effect. The agency official, in consultation with the SHPO/THPO, may propose a finding of no adverse effect when the undertaking's effects do not meet the criteria of paragraph (a)(1) of this section or the undertaking is modified or conditions are imposed, such as the subsequent review of plans for rehabilitation by the SHPO/THPO to ensure consistency with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines, to avoid adverse effects.

(c) Consulting party review. If the agency official proposes a finding of no adverse effect, the agency official shall notify all consulting parties of the finding and provide them with the documentation specified in § 800.11(e). The SHPO/THPO shall have 30 days from receipt to review the finding.

(1) Agreement with, or no objection to, finding. Unless the Council is reviewing the finding pursuant to papagraph (c)(3) of this section, the agency official may proceed after the close of the 30 day review period if the SHPO/THPO has agreed with the finding or has not provided a response, and no consulting party has objected. The agency official shall then carry out the undertaking in accordance with paragraph (d)(1) of this section.

(2) Disagreement with finding.

(i) If within the 30 day review period the SHPO/THPO or any consulting party notifies the agency official in writing that it disagrees with the finding and specifies the reasons for the disagreement in the notification, the agency official shall either consult with the party to resolve the disagreement, or request the Council to review the finding pursuant to paragraphs (c)(3)(i) and (c)(3)(ii) of this section. The agency official shall include with such request the documentation specified in § 800.11(e). The agency official shall also concurrently notify all consulting parties that such a submission has been made and make the submission documentation available to the public.

(ii) If within the 30 day review period the Council provides the agency official and, if the Council determines the issue warrants it, the head of the agency, with a written opinion objecting to the finding, the agency shall then proceed according to paragraph (c)(3)(ii) of this section. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part.

(iii) The agency official should seek the concurrence of any Indian tribe or Native Hawaiian organization that has made known to the agency official that it attaches religious and cultural significance to a historic property subject to the finding. If such Indian tribe or Native Hawaiian organization disagrees with the finding, it may within the 30

day review period specify the reasons for disagreeing with the finding and request the Council to review and object to the finding pursuant to paragraph (c)(2)(ii) of this section.

(3) Council review of findings.

(i) When a finding is submitted to the Council pursuant to paragraph (c)(2)(i) of this section, the Council shall review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with its opinion as to whether the adverse effect criteria have been correctly applied. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The Council will provide its opinion within 15 days of receiving the documented finding from the agency official. The Council at its discretion may extend that time period for 15 days, in which case it shall notify the agency of such extension prior to the end of the initial 15 day period. If the Council does not respond within the applicable time period, the agency official's responsibilities under section 106 are fulfilled.

(ii)(A) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion in reaching a final decision on the finding.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial finding of no adverse effect, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.

(C) The Council shall retain a record of agency responses to Council opinions on their findings of no adverse effects. The Council shall make this information available to the public.

(d) Results of assessment

(1) No adverse effect. The agency official shall maintain a record of the finding and provide information on the finding to the public on request, consistent with the confidentiality provisions of § 800.11(c). Implementation of the undertaking in accordance with the finding as documented fulfills the agency official's responsibilities under section 106 and this part. If the agency official will not conduct the undertaking as proposed in the finding, the agency official shall reopen consultation under paragraph (a) of this section.

(2) Adverse effect. If an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to § 800.6.

Credits
[69 FR 40553, July 6, 2004]

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Notes of Decisions (87)

Current through Dec. 13, 2018; 83 FR 64222.

End of Document

Code of Federal Regulations
Title 36. Parks, Forests, and Public Property
Chapter VIII. Advisory Council on Historic Preservation
Part 800. Protection of Historic Properties (Refs & Annos)
Subpart B. The Section 106 Process

36 C.F.R. § 800.6

§ 800.6 Resolution of adverse effects.

Currentness

(a) Continue consultation. The agency official shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.

(1) Notify the Council and determine Council participation. The agency official shall notify the Council of the adverse effect finding by providing the documentation specified in § 800.11(e).

(i) The notice shall invite the Council to participate in the consultation when:

(A) The agency official wants the Council to participate;

(B) The undertaking has an adverse effect upon a National Historic Landmark; or

(C) A programmatic agreement under § 800.14(b) will be prepared;

(ii) The SHPO/THPO, an Indian tribe or Native Hawaiian organization, or any other consulting party may at any time independently request the Council to participate in the consultation.

(iii) The Council shall advise the agency official and all consulting parties whether it will participate within 15 days of receipt of notice or other request. Prior to entering the process, the Council shall provide written notice to the agency official and the consulting parties that its decision to participate meets the criteria set forth in appendix A to this part. The Council shall also advise the head of the agency of its decision to enter the process. Consultation with Council participation is conducted in accordance with paragraph (b)(2) of this section.

(iv) If the Council does not join the consultation, the agency official shall proceed with consultation in accordance with paragraph (b)(1) of this section.

(2) Involve consulting parties. In addition to the consulting parties identified under § 800.3(f), the agency official, the SHPO/THPO and the Council, if participating, may agree to invite other individuals or organizations to become

consulting parties. The agency official shall invite any individual or organization that will assume a specific role or responsibility in a memorandum of agreement to participate as a consulting party.

(3) Provide documentation. The agency official shall provide to all consulting parties the documentation specified in § 800.11(e), subject to the confidentiality provisions of § 800.11(c), and such other documentation as may be developed during the consultation to resolve adverse effects.

(4) Involve the public. The agency official shall make information available to the public, including the documentation specified in § 800.11(e), subject to the confidentiality provisions of § 800.11(c). The agency official shall provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking. The agency official should use appropriate mechanisms, taking into account the magnitude of the undertaking and the nature of its effects upon historic properties, the likely effects on historic properties, and the relationship of the Federal involvement to the undertaking to ensure that the public's views are considered in the consultation. The agency official should also consider the extent of notice and information concerning historic preservation issues afforded the public at earlier steps in the section 106 process to determine the appropriate level of public involvement when resolving adverse effects so that the standards of § 800.2(d) are met.

(5) Restrictions on disclosure of information. Section 304 of the act and other authorities may limit the disclosure of information under paragraphs (a)(3) and (a)(4) of this section. If an Indian tribe or Native Hawaiian organization objects to the disclosure of information or if the agency official believes that there are other reasons to withhold information, the agency official shall comply with § 800.11(c) regarding the disclosure of such information.

(b) Resolve adverse effects

(1) Resolution without the Council.

(i) The agency official shall consult with the SHPO/THPO and other consulting parties to seek ways to avoid, minimize or mitigate the adverse effects.

(ii) The agency official may use standard treatments established by the Council under § 800.14(d) as a basis for a memorandum of agreement.

(iii) If the Council decides to join the consultation, the agency official shall follow paragraph (b)(2) of this section.

(iv) If the agency official and the SHPO/THPO agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement. The agency official must submit a copy of the executed memorandum of agreement, along with the documentation specified in § 800.11(f), to the Council prior to approving the undertaking in order to meet the requirements of section 106 and this subpart.

(v) If the agency official, and the SHPO/THPO fail to agree on the terms of a memorandum of agreement, the agency official shall request the Council to join the consultation and provide the Council with the documentation set forth in § 800.11(g). If the Council decides to join the consultation, the agency official shall proceed in accordance

with paragraph (b)(2) of this section. If the Council decides not to join the consultation, the Council will notify the agency and proceed to comment in accordance with § 800.7(c).

(2) Resolution with Council participation. If the Council decides to participate in the consultation, the agency official shall consult with the SHPO/THPO, the Council, and other consulting parties, including Indian tribes and Native Hawaiian organizations under § 800.2(c)(3), to seek ways to avoid, minimize or mitigate the adverse effects. If the agency official, the SHPO/THPO, and the Council agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement.

(c) Memorandum of agreement. A memorandum of agreement executed and implemented pursuant to this section evidences the agency official's compliance with section 106 and this part and shall govern the undertaking and all of its parts. The agency official shall ensure that the undertaking is carried out in accordance with the memorandum of agreement.

(1) Signatories. The signatories have sole authority to execute, amend or terminate the agreement in accordance with this subpart.

(i) The agency official and the SHPO/THPO are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(1) of this section.

(ii) The agency official, the SHPO/THPO, and the Council are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(2) of this section.

(iii) The agency official and the Council are signatories to a memorandum of agreement executed pursuant to § 800.7(a)(2).

(2) Invited signatories.

(i) The agency official may invite additional parties to be signatories to a memorandum of agreement. Any such party that signs the memorandum of agreement shall have the same rights with regard to seeking amendment or termination of the memorandum of agreement as other signatories.

(ii) The agency official may invite an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties located off tribal lands to be a signatory to a memorandum of agreement concerning such properties.

(iii) The agency official should invite any party that assumes a responsibility under a memorandum of agreement to be a signatory.

(iv) The refusal of any party invited to become a signatory to a memorandum of agreement pursuant to paragraph (c)(2) of this section does not invalidate the memorandum of agreement.

(3) Concurrence by others. The agency official may invite all consulting parties to concur in the memorandum of agreement. The signatories may agree to invite others to concur. The refusal of any party invited to concur in the memorandum of agreement does not invalidate the memorandum of agreement.

(4) Reports on implementation. Where the signatories agree it is appropriate, a memorandum of agreement shall include a provision for monitoring and reporting on its implementation.

(5) Duration. A memorandum of agreement shall include provisions for termination and for reconsideration of terms if the undertaking has not been implemented within a specified time.

(6) Discoveries. Where the signatories agree it is appropriate, a memorandum of agreement shall include provisions to deal with the subsequent discovery or identification of additional historic properties affected by the undertaking.

(7) Amendments. The signatories to a memorandum of agreement may amend it. If the Council was not a signatory to the original agreement and the signatories execute an amended agreement, the agency official shall file it with the Council.

(8) Termination. If any signatory determines that the terms of a memorandum of agreement cannot be or are not being carried out, the signatories shall consult to seek amendment of the agreement. If the agreement is not amended, any signatory may terminate it. The agency official shall either execute a memorandum of agreement with signatories under paragraph (c)(1) of this section or request the comments of the Council under § 800.7(a).

(9) Copies. The agency official shall provide each consulting party with a copy of any memorandum of agreement executed pursuant to this subpart.

AUTHORITY: 16 U.S.C. 470s.

Notes of Decisions (45)

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