



THE SECRETARY OF THE INTERIOR
WASHINGTON

ORDER NO. 3389

Subject: Coordinating and Clarifying National Historic Preservation Act Section 106 Reviews

Sec. 1 Purpose. The purpose of this Order is to coordinate and clarify reviews under Section 106 of the National Historic Preservation Act (NHPA), 54 U.S.C. § 306108, by more fully coordinating the Section 106 process and the review process under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*, and reduce reliance on mitigation measures that do not lessen the adverse effects of the undertaking on historic properties, such as offsite compensatory mitigation.

Sec. 2 Authorities. This Order is issued under the authority of section 2 of Reorganization Plan No. 3 of 1950 (64 Stat. 1262), as amended.

Sec. 3 Background.

a. Integrating Section 106 and NEPA Reviews. Section 106 of the NHPA and NEPA both serve a similar purpose: helping Federal decision-makers understand the potential consequences of their proposed actions to make informed choices. “Like NEPA, ‘[s]ection 106 of NHPA is a stop, look, and listen provision that requires each Federal agency to consider the effects of its programs.’” *Te-Moak Tribe of Western Shoshone of Nevada*, 608 F.3d 592, 607 (9th Cir. 2010) (quoting *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 805 (9th Cir. 1999)).

Both the Council on Environmental Quality (CEQ), which oversees regulations implementing NEPA, and the Advisory Council on Historic Preservation (ACHP), which oversees regulations implementing Section 106 of the NHPA, have adopted regulations encouraging agencies to integrate NEPA and Section 106 reviews, respectively, with other planning processes. See 40 C.F.R. §§ 1502.24, 1506.4; 36 C.F.R. § 800.8. For example, as part of the first comprehensive update to its NEPA regulations in more than 40 years, the CEQ continued to encourage agencies to combine the NEPA process with other agency documents, including Section 106 compliance. See 40 C.F.R. § 1506.4; CEQ, *Update to Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 Fed. Reg. 43304 (July 16, 2020) (noting that the CEQ modified § 1506.4 to encourage agencies to combine environmental documents to the fullest extent practicable with other agency documents, and noting that agencies may use their NEPA documents to satisfy compliance with Section 106). Similarly, ACHP regulations provide procedures for both coordinating Section 106 and NEPA reviews, 36 C.F.R. § 800.8(a), and for substituting the NEPA review for a separate Section 106 review, 36 C.F.R. § 800.8(c). The CEQ and the ACHP are updating jointly issued guidance for integrating Section 106 and NEPA reviews. See generally CEQ & ACHP, *NEPA and NHPA: A Handbook for Integrating NEPA and Section 106* (March 2013). At the Department of the Interior (Department or Interior), some Bureaus/Offices have sought to encourage the integration of NEPA and Section 106 processes. See, e.g., Bureau of Land Management (BLM), Instruction Memorandum 2012-108, *Coordinating National Historic*

Preservation Act and National Environmental Policy Act Compliance (April 27, 2012); BLM, Information Bulletin 2013-061: *NEPA and NHPA: A Handbook for Integrating NEPA and Section 106* (April 25, 2013).

In spite of these efforts, the integration of NEPA and Section 106 processes has been uneven. In many cases, NEPA reviews have proceeded along a separate track, guided by streamlining directives such as:

(1) Executive Order 13807 of August 15, 2017, “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects.”

(2) Secretary’s Order 3355 of August 31, 2017, “Streamlining National Environmental Policy Act Reviews and Implementation of Executive Order 13807 of August 15, 2017, ‘Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects.’”

These separate tracks have periodically resulted in Section 106 consultations continuing long after the NEPA review has concluded. Recognizing that most projects cannot meaningfully begin until the requirements of both NEPA and Section 106 are satisfied, this Order is intended to facilitate concurrent NEPA and Section 106 processes that provide timely answers to project proponents.

b. Offsite Compensatory Mitigation. As described above, Section 106 is a procedural provision that requires a Federal agency to consider the effects of a Federal undertaking on historic properties before acting. “The requirements of Section 106 . . . do not require [a Federal agency] to engage in any particular preservation activities.” *Davis v. Latschar*, 202 F.3d 359, 370 (D.C. Cir. 2000). Rather, like with NEPA, once an agency has satisfied the procedural requirements of Section 106, “the Federal agency authorizing the undertaking has the ultimate authority to decide whether or not to proceed with the undertaking,” *Committee to Save Cleveland’s Huletts v. U.S. Army Corps of Engineers*, 163 F. Supp.2d 776, 788 (N.D. Ohio 2001), even when doing so may adversely impact a historic property. *See generally Safeguarding the Historic Hanscom Area’s Irreplaceable Resources, Inc. v. Fed. Aviation Admin.*, 651 F.3d 202 (1st Cir. 2011) (holding that proposed demolition of a hanger eligible for inclusion on the National Register of Historic Places did not violate the NHPA); *but see generally* 54 U.S.C. § 306107 (Federal agencies’ heads “shall to the maximum extent possible undertake such planning and actions as may be necessary to minimize harm” to any National Historic Landmark). Accordingly, it does not add to (or subtract from) an agency’s underlying substantive authority to authorize or place conditions on a particular undertaking, or require an agency to obtain a “net preservation benefit” or “net public benefit.”

Since Section 106 does not require a net preservation benefit or net public benefit, it does not serve as an independent authority to require offsite compensatory mitigation. Offsite compensatory mitigation refers to a project proponent’s activities, monetary payments, or in-kind contributions to conduct offsite actions that are intended to offset adverse effects of a proposed undertaking onsite. *See* Bureau of Land Management Instruction Memorandum 2019-018, *Compensatory Mitigation* (Dec. 6, 2018). Since offsite compensatory mitigation is not required by Section 106 and does not lessen the adverse effects to the characteristics qualifying an historic property to the National

Register of Historic Places that are caused by the undertaking that is the subject of consultation, it is generally disfavored as a matter of policy.

Sec. 4 Policy. It is the policy of the Department that:

- a. The Section 106 compliance process should be conducted in a thorough and expeditious manner.
- b. Section 106 and NEPA compliance should be integrated as much as possible and prudent.
- c. Section 106 and NEPA reviews should begin and conclude at the same time. A Record of Decision or Finding of No Significant Impact under NEPA should not be the start of a Section 106 consultation.
- d. The Section 106 process allows decision-makers to make informed decisions; it requires decision-makers to consider alternatives to avoid, minimize, or mitigate adverse effects, but does not require that all such effects be avoided, minimized, or mitigated.
- e. Decision-makers have authority and an obligation to weigh historic preservation values alongside other policy objectives.
- f. Preference should be given to adopting measures that avoid, minimize, or mitigate the undertaking's adverse effects to historic properties on site. Requirements that do not lessen the adverse effects to the characteristics qualifying an historic property to the National Register of Historic Places that are caused by the undertaking that is the subject of consultation, such as offsite compensatory mitigation, are disfavored.

Sec. 5 Directives.

a. Use of the NEPA Process for Section 106 Purposes.

(1) For any undertaking in which a Bureau/Office of the Department is the lead Federal agency and that corresponds with a Federal action for which the Bureau/Office has determined that an Environmental Impact Statement (EIS) is necessary to satisfy the requirements of NEPA, the Bureau/Office shall use the substitution procedures set forth at 36 C.F.R. § 800.8(c) to comply with Section 106, unless:

(i) The lead decision maker responsible for the NEPA review determines in writing that appropriate Section 106 consultation can be completed under an existing programmatic alternative prior to the target date for publication of a draft Final EIS. Such written determination will also include a timeline for completing appropriate Section 106 consultation. Any determination pursuant to this subsection shall be provided to the project proponent, if any, and included in the public record of NEPA and Section 106 compliance documents.

(ii) The contemplated Bureau/Office undertaking is not an activity with the potential to cause effects on historic properties, assuming historic properties were present, as described in 36 C.F.R. § 800.3(a)(1); or

(iii) The responsible Assistant Secretary determines in writing that declining to use the substitution procedures at § 800.8(c) will not result in undue or excessive delay and will better serve the public interest. Any determination pursuant to this subsection shall be provided to the project proponent, if any, and included in the public record of NEPA and Section 106 compliance documents.

(2) EISs prepared pursuant to this Section shall be prepared within the time limits set forth in CEQ regulations at 40 C.F.R. § 1501.10 or applicable Departmental regulation, guidance, or direction, whichever is shorter.

(3) EISs prepared pursuant to this Section shall include Section 106 compliance documentation in an appendix.

(4) The Record of Decision for NEPA reviews prepared pursuant to this Section should include all binding conditions or explanations necessary to complete the NEPA review and Section 106 consultation.

(5) For any review in which a Bureau/Office of the Department is the lead Federal agency and is preparing an Environmental Assessment to comply with NEPA, the Bureau/Office shall closely integrate NEPA and Section 106 compliance, including, where appropriate, through the use of the substitution procedures set forth at 36 C.F.R. § 800.8(c).

(6) For any Section 106 process for a Bureau/Office undertaking that relies upon an Environmental Assessment or Categorical Exclusion to satisfy NEPA, the applicable Bureau/Office shall have a target to complete applicable Section 106 compliance in 180 days or less. Timelines exceeding the target by more than 3 months must be approved by the Assistant Secretary with responsibility for the matter. In instances where Bureaus/Offices are serving as co-leads, each responsible Assistant Secretary must approve deviations from this policy.

(7) On a quarterly basis, each Assistant Secretary shall provide a written report to the Deputy Secretary listing all Section 106 processes within their purview that will be completed 3 or more months after the target deadline, detailing the current status of such processes, and providing a brief plan to complete the review in a timely manner.

b. Offsite Compensatory Mitigation.

(1) Offsite compensatory mitigation is not required by Section 106 of the NHPA and is disfavored as a matter of policy. Except as otherwise required by State or other Federal law or when offered voluntarily by a project proponent, any programmatic agreement, Memorandum of Agreement, Record of Decision, or other instrument for which a Bureau/Office of the Department is the lead Federal agency requiring offsite compensatory mitigation shall be subject to approval by the appropriate Bureau/Office head.

(2) For purposes of this Order, the term “offsite compensatory mitigation” means a project proponent’s activities, monetary payments, or in-kind contributions to conduct offsite actions that are intended to offset adverse impacts or effects of a proposed action onsite.

(i) Reasonable funding for the creation of appropriate records to document an historic property that is to be substantially altered or demolished, including costs directly associated with and attributable to the excavation, transportation, curation, and storage of appropriate records and materials, is not considered offsite compensatory mitigation.

(ii) Requirements to make monetary or in-kind payments to support broad-based archaeological studies, educational programs, or institutions that serve as a repository for historical documentation in excess of reasonable curation and storage costs directly attributable to the documentation of a specific historic property that is to be substantially altered or destroyed is considered offsite compensatory mitigation.

(iii) Compensatory mitigation is offered voluntarily when a project proponent’s activities, payments, or in-kind contributions to conduct offsite actions to compensate for the impacts of a proposed action are free of coercion or duress, including the agency’s withholding of authorization for otherwise lawful activity, or the suggestion that a favorable outcome is contingent upon adopting a compensatory mitigation program.

c. Bureau of Land Management Programmatic Agreements. The Director of the Bureau of Land Management shall:

(1) Within 30 days of the date of this Order, submit to the *Federal Register* a Notice of Intent to Revise the 2012 National Programmatic Agreement with the Advisory Council on Historic Preservation and the National Conference of State Historic Preservation Officers that solicits public comment on actions or categories of actions that may be exempted from Section 106 compliance, as well as other issues relating to the 2012 National Programmatic Agreement, as appropriate.

(2) Within 30 days of the date of this Order, review each state-level programmatic agreement or protocol to determine if they are in conformance with the policies set forth in this Order, including, but not limited to:

(i) BLM IM No. 2019-018, “Compensatory Mitigation”
(Dec. 6, 2018).

(ii) The timelines are consistent with those set forth in Sec. 5
of this Order.

d. Bureau/Office Manuals and Policies.

(1) Within 30 days of the date of this Order, each Assistant Secretary shall prepare and submit a report to the Deputy Secretary and the Counselor to the Secretary identifying

each policy, manual, guidance document, or programmatic agreement applicable to multiple projects describing how each relevant Bureau/Office complies with Section 106.

(2) Within 30 days of the date of this Order, each Bureau/Office head shall update policies, manuals, and guidance documents, as appropriate and consistent with applicable law, to be consistent with the policy set forth in this Order.

(3) Within 30 days of the date of this Order, each Bureau/Office head, in consultation with the appropriate Assistant Secretary and the Deputy Secretary, shall determine whether to initiate a process to renegotiate or amend any programmatic agreement identified in Sec. 5(c) that is inconsistent with the policy set forth in this Order.

(4) Within 30 days of this Order, each Bureau/Office head shall work with the Office of the Chief Information Officer to establish a publicly accessible "Section 106 Consultation" webpage that is linked to each Bureau/Office homepage and, to the extent permitted by law, post a link on the Section 106 Consultation webpage to each document identified in Sec. 5(d)(1). The webpage shall be updated periodically, and new or revised policy, manual, guidance document, or programmatic agreement applicable to multiple projects describing how each relevant Bureau/Office complies with Section 106 shall be posted within 15 days of their adoption.

Sec. 6 Implementation. The Deputy Secretary is responsible for implementing all aspects of this Order, in coordination with the Solicitor and the Assistant Secretaries. The directive in Sec. 5(a) applies to undertakings for which a Bureau/Office has not initiated the Section 106 process as of the date this Order is in effect, but it does not apply to undertakings for which a Bureau/Office has already initiated the Section 106 process. The directive in Sec. 5(b) applies to all applicable agreements entered into after the date of this Order.

Sec. 7 Effect of this Order. This Order is intended to improve the internal management of the Department. This Order and any resulting report or recommendations are not intended to, and do not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, instrumentalities or entities, its officer or employees, or any other person. To the extent there is any inconsistency between the provisions of this Order and any Federal laws or regulations, the laws or regulations will control.

Sec. 8 Expiration Date. This Order is effective immediately and will remain in effect until it is amended, superseded, or revoked, whichever occurs first.



Secretary of the Interior

Date: December 22, 2020