

**WORKING WITH  
SECTION 106**

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**PREPARING  
AGREEMENT DOCUMENTS:**

**How to Write Determinations of No Adverse Effect,  
Memoranda of Agreement, and Programmatic Agreements  
Under 36 CFR Part 800**

ISSUED BY

**Advisory Council on Historic Preservation**

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This publication is issued by the Advisory Council on Historic Preservation. The Council is an independent Federal agency established by the National Historic Preservation Act of 1966. The Council reviews Federal actions and projects that affect historic properties and works with other Federal agencies to avoid or reduce harm to those properties and also advises the President and Congress about preservation matters. Council membership consists of eight private citizens (including the chairman), four Federal agency heads, a governor and a mayor, all appointed by the President; the Secretaries of the Interior and Agriculture; the Architect of the Capitol; the chairman of the National Trust for Historic Preservation and president of the National Conference of State Historic Preservation Officers. The Council is headquartered at 1100 Pennsylvania Avenue NW., Suite 809, Washington DC 20004, telephone 202-786-0503.



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**I. Introduction**

Section 106 of the National Historic Preservation Act (NHPA) directs Federal agencies to take into account the effects of their undertakings, including those they assist or license, on historic properties. It also directs agencies to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on such undertakings. Sections 110(f) and 111 of NHPA establish related requirements.

The Council has issued regulations to guide agencies in implementing Section 106 and related authorities. [36 CFR Part 800] For further information on how to comply with the regulations see the Council's publication, *Section 106, Step-by-Step*.

The regulations provide for consultation among responsible agencies, the State Historic Preservation Officer (SHPO), other interested persons, and sometimes the Council. This consultation is aimed at reaching agreement on ways to avoid or reduce adverse effects on historic properties.

Where it is possible to avoid adverse effects, a determination of no adverse effect (NAE) may be made. Often such a determination is made on the basis of agreement among the responsible agency, the SHPO, and others on measures that will be employed to ensure that adverse effects do not occur. These measures must be implemented in order for the determination to be valid with reference to the agency's Section 106 responsibilities.

If avoidance of adverse effects is not feasible, agreement is usually reached on measures that wholly or in part mitigate the adverse effects. Once agreed upon, such measures are embodied in a Memorandum of Agreement (MOA) and implemented.

In some cases, consultation may occur with respect to a whole agency program, rather than with respect to a particular project, and result in agreement on **procedures** that the agency will use, with respect to the program, to ensure that adverse effects are avoided or mitigated. Such procedures are set forth in Programmatic Agreements (PA).

In this publication, NAE determinations, MOAs, and PAs will be referred to collectively as "agreement documents." Where only a

particular type of agreement document is the subject of a discussion, the type will be identified.

During the Council's 20 years of experience under Section 106, certain avoidance and mitigation measures have been refined almost to the point of standardization. Formats for MOAs and certain recurrent kinds of PAs have also been standardized. In order to simplify the preparation of NAE determinations, MOAs, and PAs, the standard formats and descriptions of avoidance and mitigation measures have been compiled into this publication, together with background information and suggestions about when and how various formats and approaches can be used.

*Preparing Agreement Documents* is divided into eight parts. After this introduction (Part I), Part II addresses basic, often-asked questions about agreement documents. Part III offers pointers about how to write effective agreement documents. Parts IV, V, and VI offer standard formats for NAE determinations, MOAs, and PAs respectively. Part VII presents standard language for various kinds of conditions and stipulations that are commonly used in agreement documents. Part VIII provides several complete hypothetical agreement documents.

Use of the basic formats presented here will help ensure that NAE determinations, MOAs, and PAs are legally sufficient, while use of the standard language for commonly used conditions and stipulations should free agency officials, SHPOs, and other parties to focus their attention on innovative solutions to substantive preservation problems.

This publication is not intended to discourage creativity in devising unique solutions to preservation problems, nor to encourage consulting parties to adopt stock solutions without first considering all feasible and prudent alternatives. The purpose of this publication is to make standard language and formats readily available to those preparing agreement documents, so that they can be used where applicable. It is also designed to encourage the clear representation of agreements arrived at, thus reducing the likelihood of repetitive redrafts or debates over meaning.

Each undertaking reviewed under Section 106 presents its own substantive issues, however. Participants in review are encouraged to explore possible new solutions to preservation problems, and to give full consideration to alternatives before settling on any particular approach, whether described in this publication or not.

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## II. Questions and answers about agreement document preparation

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### What are agreement documents?

The term "agreement document" is used in this publication to cover three kinds of documents that conclude the process of review under Section 106 and represent some form of agreement between an agency and an SHPO, or among an agency, the SHPO, the Council, and sometimes other parties.

"No Adverse Effect" (NAE) determinations are made by agencies in consultation with SHPOs under 36 CFR § 800.5(d). Often in making such a determination, an agency, an SHPO, and sometimes other parties agree on project changes or conditions to prevent adverse effects to historic properties. Agencies provide NAE determinations, with supporting documentation, to the Council for review.

Memoranda of Agreement (MOA) are executed under 36 CFR § 800.5(e)(4). In an MOA an agency, an SHPO, the Council, and sometimes other parties agree on measures to avoid, reduce, or mitigate adverse effects on historic properties, or to accept each effect in the public interest.

Programmatic Agreements (PA) are executed under 36 CFR § 800.13. In a PA an agency, the Council, and other parties agree on a process for considering historic properties with respect to an entire agency program.

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### How is the decision to prepare an agreement document reached?

The process leading to an agreement document depends on the nature of the undertaking and its effects.

**NAE determinations.** Under the regulations, the responsible Federal agency official applies the Council's Criteria of Effect and Adverse Effect [36 CFR § 800.9] to historic properties within an undertaking's area of potential effects, in consultation with the SHPO. If the agency determines that the undertaking will have no adverse effect, the agency so advises the Council, usually in a letter to the Council with supporting documentation. The extent of the documentation required depends on whether the SHPO has formally concurred in the determination and on the nature of the undertaking's effects.

If the fact that the undertaking will have no adverse effect is obvious, reaching the determination should be easy and involve only simple, routine consultation between the agency and SHPO. If there are questions to be resolved about the nature of the undertaking's effects, however, substantial consultation may go into reaching the determination, involving onsite reviews, study of documents, weighing of alternatives, perhaps making alterations in project plans, and the development

of conditions which, once agreed upon, will ensure, within reason, that adverse effects will be avoided.

**MOAs.** If the agency's application of the Criteria of Adverse Effect indicates that the undertaking will have adverse effects, achieving agreement normally requires more formal consultation, often involving a wider range of parties than is typical of an NAE determination. Still, however, the nature of the consultation process is determined by the extent of the undertaking and its effects. It may be obvious that there is no reasonable alternative to the action causing adverse effects, and the measures that can be adopted to reduce or mitigate such adverse effects may be equally obvious. In such a case an MOA can usually be developed promptly. Where an undertaking presents more complex issues, consultation involves careful discussion of the undertaking's various effects, examination of alternatives to avoid or mitigate those effects, and a careful weighing of the public interest, often in the context of public meetings, onsite inspections, the conduct of appropriate studies, and the participation of diverse groups of people. The result is usually an MOA representing the best compromise solution agreeable to all the consulting parties.

**PA.** A PA is usually developed because an agency finds that its actions under a given program, within a large and complex project, or with respect to a given class of undertakings will require many individual requests for Council comment under 36 CFR §§ 800.4 through 800.6, and that making such requests will be inefficient or otherwise inconsistent with effective program management. Under such circumstances the agency suggests to the Council, or to an SHPO, that a PA be developed prescribing a review process tailored to its particular program, to stand in place of the normal Section 106 review process. Alternatively, the Council, an SHPO, or some other party may suggest to an agency that a PA is appropriate, and the agency may agree. The parties then notify the potentially concerned public and consult to reach agreement. The responsible agency and the Council are always consulting parties on a PA, together with one or more SHPOs or the National Conference of SHPOs (NCSHPO). Other parties participate in consultation and sign the PA depending on the nature of the program and its effects. The process of consultation toward a PA under 36 CFR § 800.13 is extremely flexible--to accommodate the diversity of Federal programs, the regulations avoid prescribing a particular procedure. Once agreement is reached, the consulting parties execute the PA, which then goes into effect, superseding the terms of 36 CFR §§ 800.4 through 800.6 with respect to actions under the program the PA covers.

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### Who prepares an agreement document?

**NAE determinations.** Under 36 CFR § 800.5(d), the Federal agency official is responsible for making an NAE determination, and therefore is responsible for documenting it. A document memorializing an agreement on which an NAE determination is based may, however, be developed by another party. For example, if an SHPO writes to an agency saying that in his or her opinion an undertaking will have no adverse



effect if specified conditions are carried out, the agency can then write to the Council committing itself to carry out the conditions, appending the SHPO's letter with whatever supporting documentation is necessary for the Council's review, and making its NAE determination. In some cases the Council, too, may draft conditions upon which an NAE determination can be based.

**MOAs.** The regulations at 36 CFR § 800.5(e) permit agencies and SHPOs to develop MOAs without Council participation, provided the responsible agency notifies the Council when it initiates consultation with the SHPO. This notification affords the Council the opportunity to participate if it chooses. MOAs developed without Council participation are submitted by the agency to the Council for review; acceptance of such an MOA by the Council concludes the Section 106 review process. Such MOAs are commonly called two-party MOAs because a minimum of two parties (the agency official and the SHPO) sign them before they are sent to the Council. Other parties may sign as concurring parties.

The regulations also permit the Council to participate formally in the consultation process. In such an event, the Council is a formal signatory to the MOA along with the agency official, the SHPO, and any other parties. Such an MOA is commonly referred to as a three-party MOA because it has a minimum of three signatories (agency official, SHPO, and Council). Three-party MOAs are often prepared by the Council, but can be prepared by any of the other consulting parties, once the parties have reached agreement on its content.

The Council can also participate informally in the consultation process, so an agency official or SHPO can ask the Council to provide a draft two-party MOA that the consulting parties can then finalize and send to the Council for review and acceptance. The Council will help develop such drafts to the extent that time and personnel limitations permit.

**PAs.** PAs are usually prepared in final form by the Council, though they are often prepared in draft by an agency official or an SHPO or group of SHPOs, or by others. The Council must be consulted in the development of a PA. [36 CFR § 800.13] Certain kinds of frequently used PAs, covering the programs of local governments using Community Development Block Grants (CDBG) and related program funds, are commonly prepared by SHPOs or local governments with minimum Council participation, however.

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### **When should two-party MOAs and three-party MOAs be used?**

Three-party MOAs are created as the result of consultation under 36 CFR § 800.5(e), in which the Council elects to participate in consultation, or is invited to consult by the agency or SHPO.

The regulations do not specify the conditions under which the Council should be invited to participate, except that 36 CFR § 800.10 requires that the Council participate in consultation concerning direct and

adverse effects on National Historic Landmarks. It is recommended, however, that agency officials and SHPOs invite the Council to participate when the undertaking under review is complicated or potentially controversial, when there is substantial public interest in the historic preservation issues involved, when the undertaking presents issues about which Council policy is not established, or when the national perspective the Council can bring to bear on preservation issues is required or may be useful.

Conversely, the Council need not be invited to participate in consultation where the undertaking under review is relatively simple, noncontroversial, and routine. In such cases two-party MOAs are most appropriate. However, 36 CFR § 800.5(e) requires that the responsible Federal agency notify the Council when an adverse effect on historic properties is found and consultation begins toward a two-party agreement. Upon receiving such notification, or upon otherwise learning about the undertaking, the Council may elect to participate formally in the consultation.

It should also be remembered that the Council can be consulted informally during a two-party consultation. This may be particularly appropriate if the consulting parties want to avail themselves of the expedited 30-day Council review that is provided for two-party MOAs under 36 CFR § 800.6(a)(1) with respect to a generally routine undertaking with a few unusual elements, or if the consulting parties are unfamiliar with the mechanics of MOA preparation.

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### Who signs an agreement document?

**NAE determinations.** NAE determinations are usually memorialized in letters signed by the relevant agency official, sometimes with attached conditions or exhibits, and are sent to the Council with appropriate supporting documentation. SHPOs may concur in NAE determinations in the same letter that is signed by the agency official, or in a separate letter. Other parties may concur in NAE determinations. Unless an agency has legal authority to delegate its Section 106 responsibilities to another party, the agency official's signature on the NAE document is mandatory. NAE determinations are shown at Figures 1 and 2 of this publication.

**MOAs.** At minimum, two parties sign every MOA. Normally the two parties are the Federal agency official responsible for the undertaking and the SHPO. If the SHPO declines to sign the MOA, or fails to respond within 30 days after receiving an agency request for his or her signature, the agency official can ask the Council to sign the MOA in lieu of the SHPO. [36 CFR § 800.1(c)(1)(ii)]

When a two-party MOA is accepted by the Council, the Council's authorized representative signs it on an acceptance line. The Council's representative signs three-party MOAs in the same manner as the agency officials and SHPOs. MOAs are shown at Figures 3 and 4 of this publication.

A Federal agency official may only delegate MOA signature authority to a representative of a State or local government if the agency has legal authority to delegate its Section 106 responsibilities.

Where multiple Federal agencies are involved in an undertaking, all may sign the MOA, or signature authority may be formally delegated to a lead agency.

Where the undertaking will affect the lands of an Indian tribe, the tribe must be invited to concur in any agreement document. With respect to two-party and three-party MOAs, other parties who have participated in consultation may be invited to concur. For example a local preservation organization may be invited to concur in an MOA if the agency and SHPO (and the Council, if it is a participant) agree to do so.

**PAs.** PAs are signed by the representative of the responsible agency or local government and by the Council. They are also usually signed by an SHPO, several SHPOs, or the president of NCSHPO, depending on the nature of the program they cover. Other parties may concur in a PA.

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### **What is the meaning of an agreement document?**

Execution and implementation of an agreement document, whether it be an NAE determination, an MOA, or a PA, evidences a Federal agency's fulfillment of its responsibilities under Section 106. In other words, agreement documents indicate both that the agency has taken the effects of the undertaking into account, and that the agency has afforded the Council a reasonable opportunity to comment.

An agreement document obligates the parties to carry out its terms. If the terms cannot be carried out the document must be amended, or further comments of the Council must be sought in accordance with the regulations.

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### **Under what circumstances are agreement documents revised?**

Agreement documents are normally revised if the nature of the undertaking changes. For example, the locations where effects will occur or the nature of those effects may be altered, or unanticipated effects may be identified after the agreement document is concluded. Revisions also are made if the measures originally agreed upon become insufficient to address the preservation problems involved, or if they are unduly expensive or otherwise infeasible. Revisions are sometimes made to accommodate a change in approach occasioned by professional concerns, such as a change in the research questions addressed in an archeological data recovery program. Finally, revisions may be necessary if a considerable amount of time passes between execution of the agreement document and implementation of its terms, during which time concepts of historic significance and how to deal with various kinds of historic properties may change.

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### How can an agreement document's terms be revised?

If after executing an MOA an agency determines that it will be unable to carry out the MOA's terms, the agency should request an amendment in accordance with 36 CFR § 800.5(e)(5). Any other party to an agreement document may request an amendment--for example, a party may request an amendment if that party believes a change has occurred in the undertaking, which creates new preservation problems that must be addressed. Amendments are negotiated in the same manner as original agreements. Although the regulations do not specify a process for amending agreements associated with NAE determinations, or for amending PAs, these documents too should be revised, where necessary, through consultation among the original participants.

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### What if an agreement document's terms are not carried out?

Since implementation of an agreement document evidences fulfillment of an agency's Section 106 responsibilities, it follows that failure to implement its terms evidences that the agency's Section 106 responsibilities have not been fulfilled.

**NAE determinations.** Agencies are required by the regulations to carry out the measures they agree to in reaching NAE determinations. [36 CFR § 800.5(d)(2)] If an agency fails to do so it has not complied with Section 106 and must resubmit the undertaking for review.

**MOAs.** Failure to carry out an MOA's terms requires that the agency resubmit the undertaking to which the MOA pertains for Council comment, by preparing a new MOA or amending the existing MOA. If consultation to prepare a new MOA or amendments proves unproductive, the agency is required to seek Council comment in accordance with 36 CFR § 800.6(b). [36 CFR § 800.6(c)(1)]

**PAs.** Failure to carry out a PA's terms requires that the responsible agency comply with the regulations on a case-by-case basis with respect to individual undertakings that would otherwise be covered by the PA. [36 CFR § 800.13(g)]

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### III. Suggestions for good agreement document writing

Since an agreement document binds its parties to do or refrain from specified actions, it is vital that the document be clear, consistent, understandable, and subject to as little misinterpretation as possible. The following suggestions are offered to help preparers of such documents avoid ambiguities that may cause problems in implementation.

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#### Be sure to identify the undertaking clearly

The undertaking that is the subject of the agreement document should be clearly identified in the document, in a manner consistent with the way the undertaking is identified in the supporting documentation submitted to the Council. In an MOA, the undertaking is usually identified in the first "Whereas" clause, as shown in Figures 3 and 4 in Part V of this publication, "Standard Memorandum of Agreement Formats."

In a letter making an NAE determination, the undertaking is usually identified in the text of the letter with reference to accompanying documentation. The identification is usually similar to the following text:

**We have determined that our installation rehabilitation program, described in the enclosed Installation Rehabilitation Program Plan dated March 29, 1992, will have no adverse effect . . . .**

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#### Identify the responsible agency

Since the Federal agency responsible for the undertaking is also responsible for ensuring that the terms of the agreement document are carried out, it is vital for that agency to be identified clearly in the document. Where an agency's regional office or field office is the responsible party, and therefore signs the agreement document, this should be clearly indicated. For example:

**WHEREAS, the Rhode Island State Office of the Bureau of Land Management has determined . . . .**

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#### Assign duties only to signatory or concurring parties

An agreement document cannot impose obligations on parties that do not sign it. Therefore, if an agreement document says that "Party X will carry out action Y," Party X must sign the document as a consulting or concurring party. Where Party X is the applicant for or recipient of Federal assistance, permit, or license, and is not a signatory, the agreement document must bind the Federal agency responsible for the assistance, permit, or license to ensure that Party X carries out the duties assigned it. For example:

**The Corps of Engineers will require the applicant to carry out the following:**

Or

**The Corps of Engineers will ensure that the following measures are carried out:**

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### **Beware the use of passive voice**

An example of the use of passive voice is the statement: "Building X will be rehabilitated in accordance with the *Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings*." The statement gives no indication as to who will rehabilitate the building. It indicates only that somehow, mysteriously, the building will be rehabilitated. No one is assigned responsibility, and the party who actually has responsibility could, if so inclined, deny that such responsibility had legally been assigned to him or her.

There are two ways to remedy this problem. The first, naturally, is to use the active voice and say: "Agency A will rehabilitate Building X in accordance with suchandso standards." The alternative is to specify that "Agency A will ensure that the following [conditions or stipulations] are carried out," and then say "Building X will be rehabilitated . . ." The former approach is desirable when it is certain who will actually carry out the specified activity. The latter is preferable when the party ultimately responsible for the activity is known, but the party who will actually do it--for example, one of several applicants for Federal assistance or a contractor not yet selected--is not known.

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### **Include all agreed-upon provisions**

An agreement document should be comprehensive, including all the items agreed to by the parties involved in its preparation, either in the text of the document or by reference. The fact that an agency has stated that it will do something in a context other than the agreement document may be found later to have little force if the commitment is not referenced in the document itself. For example, if an agency says in an Environmental Impact Statement that it will take (or will not take) particular actions with respect to a historic property, this statement should be reiterated or referenced in the relevant Section 106 agreement document.

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### **Remember the "cold" reader**

An agreement document should be clear to the "cold" (outside) reader. It should always be remembered that an agreement document may be scrutinized by a court of law, and must be able to withstand such scrutiny. Each sentence should be straightforward and to the point, and

written in language that can be easily understood. If specialized terms are used they should be defined. Terms that are meaningful only to the parties preparing the agreement should be avoided or rephrased to be meaningful to others.

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### Identify shorthand references

The full name of each entity involved in an agreement document should be spelled out the first time the entity is referred to, with the acronym or other shorthand referent (Council, SHPO, Bureau, etc.) placed in parentheses or brackets immediately following the name. Thereafter the acronym or other shorthand can be used throughout the document. For example:

**The Bureau of Land Management (BLM) has consulted with the Rhode Island State Historic Preservation Officer (SHPO) . . . .**

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### Structure the document logically

An agreement document should be organized in a clear, structured form. For example, if several historic properties are being dealt with in different ways, the conditions or stipulations addressing each should be grouped together, rather than scattered throughout the document. Similarly, if activities that have been agreed upon will occur in sequence, that sequence should be reflected in the document. For example, if a building will be documented, then moved, and then rehabilitated, a condition or stipulation providing for documentation should come before one for moving, which should precede one for rehabilitation.

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### Identify properties clearly and completely

In the case of a PA, it is likely that the historic properties actually subject to effect will not be known, so they cannot be identified in the document itself. In an NAE determination or MOA, however, the properties to which the document refers should be clearly identified.

If the document does not cover all historic properties subject to effect by the undertaking, it should specify which such properties are not covered. In the latter instance, documentation accompanying the agreement document should specify why all historic properties are not covered, and how Section 106 has been or will be complied with in respect to those properties not covered by the document.

The properties to which an MOA applies are usually specified in the "Whereas" clauses. For example:

**WHEREAS, Agency A has determined that its Installation Y rehabilitation project will have an effect upon Building X . . . .**

Properties are usually similarly specified in letters making determinations of NAE:

**Agency A has determined that, subject to the following conditions, its Installation Y rehabilitation project will have no adverse effect on Building X.**

Where multiple properties are involved, the agreement document should make clear which conditions or stipulations refer to which properties. For example:

**Agency A will rehabilitate Building X in accordance with suchandso standards.**

Or

**Agency A will ensure that archeological site 53BB782 is excavated and reported in accordance with the attached "Research A Design for the Excavation of Archeological Site 53BB782" . . . .**

In some cases an MOA may address both known historic properties and some that have not yet been identified. For example, an MOA might address rehabilitation of a historic building, but also provide for monitoring ground disturbance in the event a suspected but unverified archeological site existed under the building. Similarly, an MOA covering a highway construction project might cover both identified historic properties subject to effect by the construction itself, and not-yet fully identified properties in larger areas where the presence of the highway would be likely to stimulate growth.

In such a case stipulations establishing a process for identifying and treating properties not yet fully identified should be included. (For further discussion and examples of such stipulations see page 49, "Monitoring disturbance of archeological sites"; page 50, "Archeological survey"; and page 59, "Archeological plan implementation." The fact that unidentified historic properties might be affected should be acknowledged in the "Whereas" clauses, for example:

**WHEREAS, Agency A has determined that its Installation Y rehabilitation project will have an effect upon Building X and possibly on other historic properties . . . .**

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### **Cover the whole undertaking**

Each agreement document should cover all the effects of the subject undertaking on all historic properties, so that compliance with Section 106



is unambiguously attained for the entire undertaking. Consulting parties should try to avoid using multiple agreement documents for different aspects of the same undertaking, or for different types or groups of properties affected by the same undertaking.

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### Provide complete citations

Plans, standards, and guidelines to be used in carrying out activities under an agreement should be clearly and accurately identified in the agreement document, with full legal citations. For example:

**Agency A will rehabilitate Building X in accordance with the "Plan for the Rehabilitation of Building X" by Roger A. Rehab, dated March 29, 1993, and attached hereto as Appendix D.**

Or

**Agency A will rehabilitate Building X in accordance with the recommended treatments in the *Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings*, U.S. Department of the Interior, National Park Service, 1983.**

If an agency anticipates that a guideline to be cited may be revised before the agreement document is implemented, and the agency wants the revised guideline to be followed, this can be stated in the following form:

**Agency A will rehabilitate Building X in accordance with the recommended treatments in the *Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings*, U.S. Department of the Interior, National Park Service, 1983 (*Standards and Guidelines*), subject to any pertinent revisions that the Secretary of the Interior may make in the *Standards and Guidelines* prior to finalization of rehabilitation plans.**

A similar form may be used if an agency refers to draft guidelines, but the agency anticipates that the guidelines will become final before the agreement is implemented and desires that the final, rather than the draft, guidelines be followed. For example:

**Agency A will rehabilitate Building X in accordance with the *Standards for Rehabilitating Historic X-Type Buildings in the State of Rhode Island*, Rhode Island SHPO, draft dated March 29, 1992 (*Standards for Rehabilitation*), subject to any pertinent revisions that the Rhode Island SHPO may make in the *Standards for Rehabilitation* prior to finalization of rehabilitation plans.**

---

### **Use consistent terminology**

Decide at the outset what terms to use for things, and use them consistently throughout. For example, don't refer to something as an "undertaking" in one paragraph and a "project" in another, or to the Bureau of Land Management as the "Bureau" in one place and "BLM" in another, or to something as a "historic property" in one place and a "historic site" in another.

---

### **Use terms that are consistent with statutory definitions where applicable**

Where statutory definitions exist, their use is preferred. For example, "historic property" is defined at Section 301(5) of NHPA, and unless there is some very good reason to do otherwise, that definition should be used in preference to such alternatives as "historic site" or "cultural resource."

---

### **Define terms**

Unusual or specialized terms should be defined, as should terms that have a particular meaning with reference to the undertaking covered by the agreement document. For example, if the document provides for something to be done throughout an undertaking's area of potential effects [see 36 CFR § 800.2(c)], that area should be clearly defined, with an appropriate map attached or referenced in the document.

In the standard MOA formats shown as Figures 3 and 4 in Part V, an optional "Whereas" clause is provided, which refers to appended definitions. Of course, if no terms are used that need to be defined, no such appendix or clause need be included. In NAE determinations, definitions can be contained in the body of a letter, in appendices, or in other documentation provided.

---

### **Think ahead**

An agreement document is prospective: it describes actions that an agency agrees to perform in the future. No one can anticipate everything that may happen in the course of an undertaking's future implementation, but the drafter should think about possibilities and try to provide for them in the document. Especially if the undertaking will take a long time to begin or complete, the agreement document should provide for periodic review and possible revision in the event conditions change before the agreement is fully implemented. In the context of such an undertaking changes are also likely in personnel, so it is particularly important that the agreement document be clear, complete, and comprehensible to an unfamiliar reader who may have to implement or interpret it years after it was executed.

---

### **Include all statutory authorities**

One purpose of an agreement document is to show unambiguously that the Federal agency involved has met its pertinent historic preservation responsibilities, in the event of litigation or other challenge. Accordingly, it is important not to leave any relevant statutory authorities out of the agreement document. For example, if the property involved is a National Historic Landmark (NHL), the agreement document should make it plain that by carrying out the agreement's terms, the agency is complying with Section 110(f) of NHPA, as well as with Section 106. Similarly, if the agency proposes leasing or exchanging a historic property, or entering into a contract for its management, the agreement document should refer to Section 111 of NHPA as well as to Section 106.



#### IV. Example format for "No Adverse Effect" determination

The Council has no single standard format for use in making NAE determinations, but two possible examples are offered in this section for reference and use where applicable.

In these examples, and in the MOA and PA formats in the following sections, **boldface** is used to indicate language that is almost always appropriate, while items that always or often vary from case to case are shown in standard typeface and bracketed when they appear within a sentence.

#### NAE determination submitted with full documentation

The NAE determination example provided in Figure 1 assumes that the agency is complying with 36 CFR § 800.5(d)(1)(ii), which requires the agency to submit its determination to the Council with full documentation and to notify the SHPO. This option is usually employed where the SHPO has not concurred in the agency's determination or where the determination is complicated or controversial.

**Figure 1. No Adverse Effect (NAE) determination submitted with full documentation**

[Name]  
 Director, [Eastern/Western] Office of Project Review  
 Advisory Council on Historic Preservation  
 [Address of Washington DC or Golden, CO office]

Dear [name]:

The [name of agency] is [planning/considering/other appropriate term] the [name of undertaking], [name of State]. **In consultation with the [name of State] State Historic Preservation Officer (SHPO), we have applied the Criteria of Effect and Adverse Effect found in 36 CFR § 800.9 of your regulations to this undertaking and determined that it will have no adverse effect on historic properties. The following documentation is attached for your review:**

- **A description of the [name of undertaking], including [specify maps, photographs, etc.];**
- **A description of the historic [property/properties] that [will/may] be affected, including [specify National Register forms or other descriptive documents, photographs, etc.]**
- **A description of the efforts we made to identify historic properties in the undertaking's area of potential effects, including [specify survey report, etc.] ;**

- A description of how we applied the Criteria of Adverse Effect, and why we found each criterion to be inapplicable to this undertaking; and
- A description of the means we used to solicit the views of the SHPO and [specify affected local governments, Indian tribes, Federal agencies, elements of the public, if any.] together with [identify written comments or other documentation of views provided, if any].

[Use one or more of the following paragraphs only if relevant.]

Since our determination that this undertaking will have no adverse effect is based on the special exception set forth in 36 CFR § 800.9(c) [specify subsection (1), (2), or (3)], we are also enclosing [specify research design or scope of work for data recovery under subsection (1), plan for rehabilitation under subsection (2), or covenant or other restriction under subsection (3)].

In making our determination, we have agreed with the SHPO to carry out the following actions to ensure that adverse effect will be avoided:

[List actions agreed to.]

By copy of this letter we are notifying the SHPO of our determination. Please review the material enclosed and contact [name and telephone number of contact person] if you have any questions. If we do not hear from you within 30 days after your receipt of this letter, we will assume that you do not object to our determination, and will proceed with [the undertaking/our planning process/our review of the application/etc.], subject to [the agreement noted above and] the provisions for treating historic properties discovered during implementation of an undertaking contained in 36 CFR § 800.11.

Sincerely,

[name of agency official]

### NAE determination with summary documentation

The NAE determination example provided in Figure 2 assumes compliance with 36 CFR § 800.5(d)(1)(i), where an agency obtains the SHPO's concurrence in its determination and simply notifies the Council with summary documentation.

**Figure 2. No Adverse Effect (NAE) determination submitted with summary documentation**

[Name]  
 Director, [Eastern/Western] Office of Project Review  
 Advisory Council on Historic Preservation  
 [Address of Washington DC or Golden, CO office]

Dear [name]:

The [name of agency] is [planning/considering/other appropriate term] the [name of undertaking]. In consultation with the [name of State] State Historic Preservation Officer (SHPO), we have applied the Criteria of Effect and Adverse Effect found in 36 CFR § 800.9 of your regulations to this undertaking and determined that it will have no adverse effect on historic properties. As indicated by [his/her signature below/the attached letter], the SHPO has concurred in our determination. The following summary documentation\* is attached for your review:

- A description of the [name of undertaking];
- A [map or other documentation] showing the area of potential effect;
- A summary description of the historic [property/properties] subject to effect;
- Our reasons for believing that the undertaking will have no adverse effect on historic properties;
- A copy of the SHPO's letter of [date] indicating concurrence in our determination [or have SHPO sign concurrence line on letter]; and
- [Copies/A summary] of the views of [specify interested persons who have submitted comments, if any].

[Use one or more of the following paragraphs only if relevant.]

Since our determination that this undertaking will have no adverse effect is based on the special exception set forth in 36 CFR § 800.9(c) [specify subsection (1), (2), (3)], we are also enclosing [specify research design or scope of work for data recovery under subsection (1), plan for rehabilitation under subsection (2), or covenant or other restriction under subsection (3)].

In making our determination, we have agreed with the SHPO to carry out the following actions to ensure that adverse effect will be avoided:

[List actions agreed to.]

Please review the material enclosed and contact [name and telephone number of contact person] if you have any questions. If we do not hear from you within 30 days after your receipt of this letter, we will assume that you do not object to our determination, and will proceed with [the undertaking/our planning process/our review of the application/etc.], subject

to [the agreement noted above and] the provisions for treating historic properties discovered during implementation of an undertaking contained in 36 CFR § 800.11.

Sincerely,

[name of agency official]

\* The regulations do not specify the content of summary documentation. The list provided represents material that is desirable to include in summary documentation to promote efficient Council review.



## V. Standard Memorandum of Agreement formats

In the formats that follow, language that is almost always appropriate is shown in **boldface**, while items that always or often vary from case to case (e.g., agency designation), options, and instructions are in standard typeface.

### Two-party MOA format

The Council's regulations provide for Council review and approval of MOAs developed by Federal agencies and SHPOs without formal Council participation. [36 CFR § 800.6(a)] The example in Figure 3 is the preferred format for such MOAs.

Figure 3. Two-party Memorandum of Agreement (MOA)

**MEMORANDUM OF AGREEMENT  
SUBMITTED TO THE ADVISORY COUNCIL ON HISTORIC PRESERVATION  
PURSUANT TO 36 CFR § 800.6(a)**

**WHEREAS**, the [name of agency] **has determined that** [name of undertaking] **will have an effect upon** [name of property or properties], [a property/properties] [included in/eligible for inclusion in] **the National Register of Historic Places, and has consulted with the** [name of State] **State Historic Preservation Officer (SHPO) pursuant to 36 CFR Part 800, regulations implementing Section 106 of the National Historic Preservation Act (16 U.S.C. 470f); and**

**WHEREAS**, [names of other consulting parties, if any] **participated in the consultation** [and has/have been invited to concur in this Memorandum of Agreement]; **and**

**WHEREAS**, the definitions given in Appendix \_\_\_ are applicable throughout this Memorandum of Agreement;

**NOW, THEREFORE**, [name of agency] **and the** [name of State] **SHPO agree that the undertaking shall be implemented in accordance with the following stipulations in order to take into account the effect of the undertaking on historic properties.**

**Stipulations**

[Name of agency] **will ensure that the following measures are carried out:**

[Insert stipulations here.]

**Execution of this Memorandum of Agreement by** [name of agency] **and the** [name of State] **SHPO, its subsequent acceptance by the Council, and implementation of its terms,**

evidence that [name of agency] has afforded the Council an opportunity to comment on the [name of undertaking] and its effects on historic properties, and that [name of agency] has taken into account the effects of the undertaking on historic properties.

[NAME OF AGENCY]

By: \_\_\_\_\_ Date: \_\_\_\_\_  
[Name and title of signer]

[NAME OF STATE] STATE HISTORIC PRESERVATION OFFICER

By: \_\_\_\_\_ Date: \_\_\_\_\_  
[Name and title of signer]

Concur:\*

[NAME(S) OF CONCURRING PARTY/PARTIES]

By: \_\_\_\_\_ Date: \_\_\_\_\_  
[Name and title of signer]

ACCEPTED for the Advisory Council on Historic Preservation

By: \_\_\_\_\_ Date: \_\_\_\_\_  
[Name and title of signer, provided by Council]

\* Optional: for use where other parties concur in MOA

### Three-party MOA format

Where the Council has formally participated as a consulting party in the development of an MOA, the format shown in Figure 4 is preferred.

Figure 4. Three-party Memorandum of Agreement (MOA)

#### MEMORANDUM OF AGREEMENT

WHEREAS, the [name of agency] has determined that [name of undertaking] will have an effect upon [name of property or properties], [a property/properties] [included in/eligible for inclusion in] the National Register of Historic Places, and has consulted with the [name of State] State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (Council) pursuant to 36 CFR Part 800, regulations implementing Section 106 of the National Historic Preservation Act (16 U.S.C. 470f); [and Section 110(f) of the same Act (16 U.S.C. 470h- 2(f))] and

**WHEREAS**, [names of other consulting parties, if any] participated in the consultation [and has/have been invited to concur in this Memorandum of Agreement]; and

**WHEREAS**, the definitions given in Appendix \_\_\_ are applicable throughout this Memorandum of Agreement;

**NOW, THEREFORE**, [name of agency], the [name of State] SHPO, and the Council agree that the undertaking shall be implemented in accordance with the following stipulations in order to take into account the effect of the undertaking on historic properties.

**Stipulations**

[Name of agency] will ensure that the following measures are carried out:

[Insert stipulations here.]

Execution of this Memorandum of Agreement and implementation of its terms evidence that [name of agency] has afforded the Council an opportunity to comment on the [name of undertaking] and its effects on historic properties, and that [name of agency] has taken into account the effects of the undertaking on historic properties.

**ADVISORY COUNCIL ON HISTORIC PRESERVATION**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
[Name and title of signer]

[NAME OF AGENCY]

By: \_\_\_\_\_ Date: \_\_\_\_\_  
[Name and title of signer]

**[NAME OF STATE] STATE HISTORIC PRESERVATION OFFICER**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
[Name and title of signer]

[Note: Signature blocks listed above can be in any order.]

**Concur: \***

[NAMES(S) OF CONCURRING PARTY/PARTIES]

By: \_\_\_\_\_ Date: \_\_\_\_\_  
[Name and title of signer]

\* Optional: For use where other parties concur in MOA.

## VI. Standard Programmatic Agreement formats

### PAs in general

The format shown at Figure 5 is preferred for PAs in general. This format is quite flexible and is designed for application to a wide range of programs.

**Figure 5. Programmatic Agreement (PA)**

**PROGRAMMATIC AGREEMENT  
AMONG  
THE [NAME OF AGENCY],  
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION,  
[AND] THE [designate SHPO, SHPOs, National Conference of SHPOs,  
other parties] REGARDING IMPLEMENTATION OF THE [identify program, etc.]**

**WHEREAS, the [name of agency] proposes to administer the [name of program or project] authorized by [cite statutory authority]; and**

**WHEREAS, the [name of agency] has determined that the [program/project] may have an effect upon properties included in or eligible for inclusion in the National Register of Historic Places and has consulted with the Advisory Council on Historic Preservation (Council) and the {[name of State] State Historic Preservation Officer (SHPO)/National Conference of State Historic Preservation Officers (NCSHPO)/others} pursuant to Section 800.13 of the regulations (36 CFR Part 800) implementing Section 106 of the National Historic Preservation Act; (16 U.S.C. 470f), [and Section 110(f) of the same Act (16 U.S.C. 470h-2(f))] and**

**WHEREAS, [names of other consulting party/parties, if any] participated in the consultation and [has/have] been invited to [execute/concur in] this Programmatic Agreement; and**

**WHEREAS, the definitions given in Appendix \_\_\_ are applicable throughout this Programmatic Agreement;**

**NOW, THEREFORE, [name of agency], the Council, and the [SHPO/ NCSHPO/other] agree that the [program/project] shall be administered in accordance with the following stipulations to satisfy [name of agency]'s Section 106 responsibility for all individual [undertakings of the program/aspects of the project].**

#### Stipulations

[Name of agency] will ensure that the following measures are carried out:

[Insert stipulations here.]



( ) The Council and the [SHPO/NCSHPO/other] may monitor activities carried out pursuant to this Programmatic Agreement, and the Council will review such activities if so requested. The [name of agency] will cooperate with the Council and the [SHPO/NCSHPO/other] in carrying out their monitoring and review responsibilities.

( ) Any party to this Programmatic Agreement may request that it be amended, whereupon the parties will consult in accordance with 36 CFR § 800.13 to consider such amendment.

( ) Any party to this Programmatic Agreement may terminate it by providing thirty (30) days notice to the other parties, provided that the parties will consult during the period prior to termination to seek agreement on amendments or other actions that would avoid termination. In the event of termination, the [name of agency] will comply with 36 CFR §§ 800.4 through 800.6 with regard to individual undertakings covered by this Programmatic Agreement.

( ) In the event the [name of agency] does not carry out the terms of this Programmatic Agreement, the [name of agency] will comply with 36 CFR §§ 800.4 through 800.6 with regard to individual undertakings covered by this Programmatic Agreement.\*

Execution and implementation of this Programmatic Agreement evidences that [name of agency] has satisfied its Section 106 responsibilities for all individual undertakings of the program.

**ADVISORY COUNCIL ON HISTORIC PRESERVATION**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
[Name and title of signer]

[NAME OF AGENCY]

By: \_\_\_\_\_ Date: \_\_\_\_\_  
[Name and title of signer]

[NAME OF STATE] HISTORIC PRESERVATION OFFICER\*\*

By: \_\_\_\_\_ Date: \_\_\_\_\_  
[Name and title of signer]

[OTHER SIGNATORIES, IF ANY]

[Note: Signature blocks listed above can be in any order.]

**Concur: \*\*\***

[NAME(S) OF CONCURRING PARTY/PARTIES]

**By:** \_\_\_\_\_ **Date:** \_\_\_\_\_  
 [Name and title of signer]

\* Although this language merely repeats the requirement of 36 CFR 800.13(g), it is sometimes useful.

\*\* Where multiple SHPOs are involved, include a signature line for each. Where NCSHPO is consulting party, provide for its representative's signature rather than that of an individual SHPO, in the same format as shown.

\*\*\* Optional: for use where other parties concur in PA.

### PA with local government

The format for PAs with local governments, shown at Figure 6, is more specific and is for use by local governments with reference to Community Development Block Grants (CDBGs) and other programs.

The Department of Housing and Urban Development (HUD) is authorized by law to delegate its Section 106 responsibilities to local government recipients of CDBGs and certain other grants. Many local governments use such grants to support programs of rehabilitation and neighborhood revitalization for which Programmatic Agreements are appropriate.

Note that other HUD programs for which HUD is not authorized by law to delegate Section 106 responsibilities (e.g., Section 202 Housing for the Elderly) can be included under a PA of this kind if HUD is a signatory to the PA.

**Figure 6. Programmatic Agreement (PA) with local government**

**PROGRAMMATIC AGREEMENT  
 CITY OF [NAME OF CITY]  
 [COMMUNITY DEVELOPMENT BLOCK GRANT/OTHER NAME] PROGRAM\***

**WHEREAS, the city of [name of city] (City), State of [name of State], proposes to administer its Community Development Block Grant (CDBG) program with funds from the Department of Housing and Urban Development under Title I of the Housing and Community Development Act of 1974, [or identify the range of programs/program elements and authorities involved besides CDBG, e.g., rental rehabilitation, etc.]; and**

**WHEREAS, for the purposes of this Agreement, the City's (CDBG/ other name) program (Program) encompasses the following activities:**

[List activities included, e.g., rehabilitation, street improvements, etc.]; and

**WHEREAS, the City has determined that the administration of its program may have an effect on properties included in or eligible for inclusion in the National Register of Historic Places and has consulted with the [name of State] State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (Council) pursuant to 36 CFR § 800.13 of the regulations implementing Section 106 of the National Historic Preservation Act (16 U.S.C. 470f), [and Section 110(f) of the same Act (16 U.S.C. 470h-2(f))]; and**

**WHEREAS, [names of other consulting party/parties, if any] participated in the consultation and [has/have] been invited to [execute/concur in] this Programmatic Agreement,]; and**

**WHEREAS, the definitions given in Appendix \_\_\_ are applicable throughout this Programmatic Agreement;**

**NOW, THEREFORE, the City, the SHPO, and the Council agree that the program shall be administered in accordance with the following stipulations to satisfy the City's Section 106 responsibilities for all individual undertakings of the program.**

#### **Stipulations**

**The City will ensure that the following measures are carried out:**

[Insert stipulations here.]

- ( ) The Council and the SHPO may monitor activities carried out pursuant to this Programmatic Agreement, and the Council will review such activities if so requested. The City will cooperate with the Council and the SHPO in carrying out their monitoring and review responsibilities.**
- ( ) This Programmatic Agreement will continue in full force and effect until [specify month and year: usually coincides with end of annual grant cycle]. At any time in the six-month period prior to this date, the City may request the Council and SHPO in writing to review the City's program and consider an extension or modification of this Programmatic Agreement. No extension or modification will be effective unless all parties to the Programmatic Agreement have agreed to it in writing.**
- ( ) Any party to this Programmatic Agreement may request that it be amended, whereupon the parties will consult in accordance with 36 CFR § 800.13 to consider such amendment.**
- ( ) Any party to this Programmatic Agreement may terminate it by providing thirty (30) days notice to the other parties, provided that the parties will consult during the period prior to termination to seek agreement on amendments or other actions that would avoid termination. In the event of termination, the City will comply with 36 CFR §§ 800.4 through 800.6 with regard to individual undertakings covered by this Programmatic Agreement.**

( ) In the event the City does not carry out the terms of this Programmatic Agreement, the City will comply with 36 CFR §§ 800.4 through 800.6 with regard to individual undertakings covered by this Programmatic Agreement.\*\*

Execution and implementation of this Programmatic Agreement evidences that the City has afforded the Council a reasonable opportunity to comment on the program and that the City has taken into account the effects of the program on historic properties.

**ADVISORY COUNCIL ON HISTORIC PRESERVATION**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
[Name and title of signer]

[NAME OF CITY]

By: \_\_\_\_\_ Date: \_\_\_\_\_  
[Name and title of signer]

**[NAME OF STATE] STATE HISTORIC PRESERVATION OFFICER**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
[Name and title of signer]

**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT \*\*\***

By: \_\_\_\_\_ Date: \_\_\_\_\_  
[Name and title of signer]

[OTHER SIGNATORIES, IF ANY]

[Note: Signature blocks listed above can be in any order.]

Concur: \*\*\*\*

[NAME(S) OF CONCURRING PARTY/PARTIES]

By: \_\_\_\_\_ Date: \_\_\_\_\_  
[Name and title of signer]

\* Where other programs besides CDBG are included, these should be recited in the title, or a name should be assigned that incorporates all programs covered, and defined in the "Whereas" clauses. The terminology of the PA model must then be adjusted throughout. If programs that HUD cannot delegate to the city are included, HUD must be a signatory to the PA, and HUD's role in PA implementation should be identified within the body of the agreement.

\*\* Although this language merely repeats the requirement of 36 CFR § 800.13(g), it is sometimes useful.

\*\*\* Optional: for use where programs are included for which HUD cannot delegate Section 106 responsibilities.

\*\*\*\* Optional: for use where other parties concur in MOA.



## VII. Standard conditions or stipulations

The following section provides examples of standard language for use in the substantive parts of agreement documents, where the actual measures agreed upon are described.

Some of the provisions described below are specific to NAE determinations, while others are appropriate only for MOAs or PAs. Others are appropriate for all kinds of agreement documents. As a convention, provisions appropriate in NAE determinations will be referred to as conditions while those appropriate in MOAs and/or PAs will be referred to as stipulations. The applicability of each provision will be indicated in the section heading.

The examples of language provided here should be used as guidelines, and adapted to the particular circumstances of the case, not used in a rigid way. In all cases, the objective is to make the agreement document clear as to the intent and the responsibilities of each party. The consulting parties should keep in mind that the document is a legal instrument that must be understandable to all who follow or review its terms, and should be sure that the terms of the document are clear and unambiguous. Although it is desirable that the document be concise, clarity and completeness should not be sacrificed in the interests of brevity.

Most of the model provisions given below are grouped with reference to the kinds of resources (e.g., individual buildings and structures, archeological sites, etc.) to which they relate. One group includes stipulations that are specifically appropriate in PAs. The final group, covering procedural matters, contains stipulations that are applicable to a wide range of agreement document types.

As in the previous sections, in the following model provisions language that is almost always appropriate is shown in **boldface**, while items that always or often vary from case to case, options, and instructions are in standard typeface.

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### Provisions applicable to all types of historic properties

The model provisions that follow may be appropriate for use as NAE conditions or MOA or PA stipulations with respect to a wide range of historic property types (e.g., historic buildings, landscapes, archeological sites).

---

### Conveyance of historic properties to non-Federal parties

**General discussion.** Transfer, lease, or sale of a historic property to a non-Federal party may be considered to have no adverse effect on the property under 36 CFR § 800.9(c)(3) where "adequate restrictions or conditions are included [in the transfer instrument] to ensure preservation of the property's significant historic features." If such restrictions or

conditions are not included, or if the reviewing parties cannot be sure that the restrictions or conditions included will ensure preservation, the transfer, lease, or sale should be treated as having an adverse effect and made the subject of an MOA or PA.

It is not possible to present widely applicable models for restrictions and conditions because of the wide variety of transfer arrangements, the variety of historic property types and values subject to effect as a result of transfer, and the variety that exists in applicable State laws under which a property may be administered and conveyed after it passes out of Federal ownership. Figure 7 presents a sample covenant that may be useful as a starting point, but this model should be discussed in detail with knowledgeable counsel and adjusted to comport with the legal requirements of the State in which the conveyance takes place and the circumstances of the transaction..

**Figure 7. Sample covenant**

[Use only after legal review to ensure applicability and enforceability under State law.]

**SAMPLE PRESERVATION COVENANT**

In consideration of the conveyance of certain [improved] real property, hereinafter referred to as [name of property], located in the [City of \_\_\_\_\_] County of \_\_\_\_\_, State of \_\_\_\_\_, which is more fully described as:

[Insert legal description.]

[Name of property recipient] hereby covenants on behalf of [himself/herself/itself], [his/her/its] heirs, successors, and assigns at all times to [specify: Federal agency transferring the property, or SHPO, or other] to maintain and preserve [name all those exterior and interior features that qualify the property for inclusion in the National Register; these may be named within the body of the paragraph or included as an attachment] as follows:

1. [Name of recipient] shall preserve and maintain [name of property] in accordance with the recommended approaches in the *Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings* (National Park Service, 1983) [or specify other relevant standard, management plan, archeological treatment plan, etc., with full citation] in order to preserve and enhance those qualities that make [name of property] eligible for inclusion in the National Register of Historic Places.

2. No [construction, alteration, remodeling/disturbance of the ground surface] or any other thing shall be undertaken or permitted to be undertaken on [name or property] which would affect the [structural] integrity or the [appearance/cultural use/archeological value] of [name of property] without the express prior written permission of [Federal agency transferring the property, or SHPO, or other] signed by a fully authorized representative thereof.

3. The [Federal agency transferring the property, or SHPO, or other] shall be permitted at all reasonable times to inspect [name of property] in order to ascertain if the above conditions are being observed.

4. In the event of a violation of this covenant, and in addition to any remedy now or hereafter provided by law, [Federal agency transferring the property, or SHPO, or other] may, following reasonable notice to [name of recipient], institute suit to enjoin said violation or to require the restoration of [name of property]. The successful party shall be entitled to recover all costs or expenses incurred in connection with such a suit, including all court costs and attorney's fees.

5. [Name of recipient] agrees that [Federal agency transferring the property, or SHPO, or other] may at its discretion, without prior notice to [name of recipient], convey and assign all or part of its rights and responsibilities contained herein to a third party.

6. This covenant is binding on [name of recipient], [his/her/its] heirs, successors, and assigns [in perpetuity/for X years from the date of this instrument]. Restrictions, stipulations, and covenants contained herein shall be inserted by [name of recipient] verbatim or by express reference in any deed or other legal instrument by which [he/she/it] divests [himself/herself/itself] of either the fee simple title or any other lesser estate in [name of property] or any part thereof.

7. The failure of [Federal agency transferring the property, or SHPO, or other] to exercise any right or remedy granted under this instrument shall not have the effect of waiving or limiting the exercise of any other right or remedy or the use of such right or remedy at any other time.

The covenant shall be a binding servitude upon [name of property] and shall be deemed to run with the land. Execution of this covenant shall constitute conclusive evidence that [name of recipient] agrees to be bound by the foregoing conditions and restrictions and to perform to obligations herein set forth.

In addition to conditions or stipulations referring to restrictions and conditions, agreement documents that provide for transfer of a property also usually provide for its documentation through photographs, drawings, and written descriptions. This facilitates monitoring compliance with the restrictions or conditions that have been imposed. (See page 40, "Recording historic buildings or structures.")

**NAE determinations.** Generally speaking, a restriction or condition may be viewed as adequate to ensure preservation, and therefore may serve as the basis for an NAE determination, where that restriction or condition

- encumbers title to the property with a clear and enforceable preservation easement or other covenant,

- is applicable to those aspects of the property that make it eligible for inclusion in the National Register,
- designates a person who has agreed to hold the covenant (covenantee), and
- is in perpetuity.

**MOAs and PAs.** If the restrictions or conditions do not constitute an enforceable covenant in perpetuity, or if a covenantee has not been identified, preservation is not ensured, and the matter should be handled under an MOA or PA rather than under an NAE determination.

**NAE condition/MOA or PA stipulation: language for transfer, exchange, lease, or sale**

A proposed covenant or other restriction/condition should be attached to the NAE determination, MOA, or PA covering the property transfer involved, and referred to as follows:

The [covenant/restriction/condition] attached hereto as Appendix \_\_\_\_ will be included in the [transfer instrument] and recorded in the real estate records of \_\_\_\_ County, State of \_\_\_\_, for the [transfer/exchange/lease/sale] of [property].

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### Section 111 leases, exchanges, and management contracts

**General discussion.** Section 111 of NHPA gives special authority to Federal agencies to lease historic properties to non-Federal parties, to exchange such properties, and to enter into contracts for the management of such properties. Federal agencies may perform these transactions after consultation with the Council, provided the lease, exchange, or management contract is designed to ensure the preservation of the property involved. Such transactions are of course also reviewed under Section 106, and may be the subjects of NAE determinations, MOAs, or PAs. Special language should be included in the agreement document to make it clear that the document evidences the agency's compliance with Section 111 as well as with Section 106.

**NAE determination language: Section 111 transaction**

**Pursuant to Section 111 of the National Historic Preservation Act, the [name of agency] requests the Council's consultation and concurrence in the [agency's] decision to [lease/exchange/enter into a contract for the management of] [name of property]. Pursuant to 36 CFR § 800.5(d), we have determined that this undertaking will have no adverse effect on the [name of property]. The proposed terms of the [lease/exchange/management contract] are included in the attached documentation.**

**MOA or PA special "Whereas" clause: Section 111 transaction**

**WHEREAS the [name of agency] has consulted with the Council in accordance with Section 111 of the National Historic Preservation Act, and sought the comments of the Council in accordance with Section 106 of the same Act;**

**MOA or PA stipulation: inclusion of Section 111 lease or exchange**

**The [name of agency] will ensure that the [covenant/restriction/condition] attached hereto as Appendix \_\_\_\_ will be included in the [specify transfer instrument] [and recorded in the real estate records of \_\_\_\_ County, State of \_\_\_\_] for [lease/exchange] of [name of property] in order to ensure preservation of [name of property].**

**MOA or PA stipulation: inclusion of Section 111 management contract**

**The [name of contractor] shall be required to adhere to the terms of the contract attached hereto as Appendix \_\_\_\_.**

The management contract should specify how the contractor will adhere to the relevant recommended approaches in the *Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings*, and/or to other applicable professional standards and guidelines.

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**Marketing a historic property**

**General discussion.** Often, where a Federal agency no longer needs a historic property and cannot maintain it, but where a recipient for the property has not been identified, an MOA may be executed, which provides for the property to be marketed. A provision for the relocation of a historic property may also be included in a marketing plan. Such provisions are not appropriate as the bases for NAE determinations, and are seldom included in PAs, but might be included under unusual circumstances.

The marketing provision is designed to bring any existing economic forces in the community favoring preservation into play on behalf of the property involved. A legitimate marketing attempt that fails to elicit an acceptable proposal for use of the property is often taken as evidence that the property cannot be preserved; thus it provides a rationale for demolition.

**MOA or PA stipulation: marketing**

**In consultation with the SHPO, the [name of agency] shall prepare a marketing plan for the [name of property], which shall include the following elements:**

**1. An information package about the property, including but not limited to:**

- **photographs of the property;**
- **a parcel map;**
- **information on the property's historic significance;**
- **information on the property's cost; information on [identify any Federal assistance that may be available to purchasers; for example, applying the cost of demolition to the purchase price or to the cost of rehabilitation];**
- **information on Federal [and other] tax benefits for rehabilitation of historic structures;**
- **notification that the purchaser will be required to [rehabilitate/maintain] the property in accordance with the recommended approaches in the *Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings* (U.S. Department of the Interior, National Park Service, 1983); and**
- **notification of any requirement for inclusion of a restrictive covenant in the transfer document.**

**2. A distribution list of potential purchasers or transferees.**

**3. An advertising plan and schedule.**

**4. A schedule for receiving and reviewing offers.**

**Upon the SHPO's agreement with the marketing plan, the [name of agency] shall implement the plan.**

**The [name of agency] shall review all offers in consultation with the SHPO prior to acceptance. The [name of agency] shall ensure that transfer of the property incorporates the covenant attached hereto as Appendix \_\_\_\_.**

**If there is no acceptable offer that will conform to the requirements of rehabilitation and maintenance, the [name of agency], with the approval of the SHPO, may transfer the [property] without preservation covenants. In that event, the property shall be recorded prior to transfer in accordance with stipulation [cite separate stipulation providing for recordation of the property].**

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## **Moving a historic property**

**General discussion.** Where a property is to be moved from its existing site, the SHPO should be afforded an opportunity to review and approve the new site. When reviewing potential sites the agency official should look for similarity of surrounding architecture, topography, land use, and

vegetation. Obviously, a site closely resembling the original site is preferable.

At the same time, however, the site should be one at which the property can be effectively used for modern purposes. Historic bridges, for example, are often moved to local parks and incorporated into pedestrian, equestrian, and bicycle transportation systems.

The property should be documented in its original location, following the relevant portions of the *Secretary of the Interior's Standards and Guidelines for Documentation*. [48 FR 44728-37] The property should be moved in accordance with the recommended approaches in *Moving Historic Buildings* (John Obed Curtis, 1979, American Association for State and Local History), and, in consultation with the SHPO, by a professional mover who has the capability to move historic structures properly. The SHPO or local preservation groups may be able to suggest names of qualified movers. If the building will stand vacant for a period of time before, during, or after the move, provision should be made for it to be adequately secured and protected during that time.

Within a definite period shortly after the move, provision should be made for the SHPO to re-evaluate the property on its new site and, if the property is included in the National Register, to make a recommendation to the Secretary of the Interior as to its continued inclusion.

If title to the property will pass to a non-Federal party after the move, subject to a restriction such as a preservation easement, an interim contract should be prepared and executed prior to the move to ensure that the new owner will accept the restriction once the property has been relocated, and a stipulation providing for the restriction should be included in the MOA. (See page 29, "Conveyance of historic properties to non-Federal parties," above for example.)

If the property owner or developer seeks historic preservation tax credits with respect to the property, the agency official should work with the applicant to coordinate the independent reviews by the Department of the Interior for tax certification with those required under Section 106 by the Council.

**NAE determinations.** An NAE determination may be appropriate where a historic property that is movable by nature (e.g., a ship, a train, an airplane) will be moved in advance of an undertaking. An adverse effect might occur, however, if the property's use would be affected, if its structural integrity might be compromised, if its new location would make it vulnerable to deterioration or damage, or if its new location is a historic property.

**MOAs and PAs.** Moving properties that are not inherently movable (e.g., buildings, structures such as bridges and walls, objects such as prehistoric rock art boulders) obviously almost always has adverse effects on them; moving such properties, where necessary, should be the subject of an MOA or PA.

**NAE condition/MOA or PA stipulation: moving properties [NAE for inherently movable properties with no other adverse effects; MOA or PA in other cases]**

**The [name of agency] shall ensure that the SHPO is afforded 30 days to review and comment on the new site for [name of property]. The [name of agency] shall take the SHPO's comments into account in reaching a final decision about moving the property. Before the [name of property] is moved, the [name of agency] shall document the property in its original setting and context in accordance with the documentation plan attached hereto as Appendix \_\_\_\_\_. The agency official shall ensure that the property is moved in accordance with the approaches recommended in *Moving Historic Buildings* (John Obed Curtis, 1979, American Association for State and Local History), in consultation with the SHPO, by a professional mover who has the capability to move historic structures properly.**

**The [name of agency] shall ensure that the [name of property] is properly secured and protected from [vandalism/weather damage/etc.] during the period it is unoccupied.**

**Prior to moving the [name of property], the [name of agency] will execute a contract with [name of recipient] ensuring that after the [name of property] is relocated the [name of recipient] will accept title to the [name of property] subject to the covenant referenced in Stipulation \_\_\_\_\_.**

**Within 90 days of the move, the [name of agency] shall afford the SHPO the opportunity to re-evaluate the property on its new site [and make a recommendation to the Secretary of the Interior as to its continued inclusion in the National Register].**

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### **Landscaping on or around a historic property**

**General discussion.** Landscaping is often used to avoid or reduce adverse effects on historic properties. For example, landscaping can be used to screen incompatible neighboring structures or activities from the immediate surroundings of a historic building or neighborhood, to reduce noise, or to protect an archeological site from vandalism. Provision for landscaping may be included in all kinds of agreement documents under Section 106.

Landscaping plans should be prepared in consultation with the SHPO and attached to NAE determinations, MOAs, or PAs. Alternatively, they may be developed as conditions of an NAE determination, MOA, or PA and approved by the SHPO.



**NAE conditions/MOA or PA stipulations: landscaping**

The [name of agency] shall ensure that the [name of property] is landscaped in accordance with the landscaping plan entitled [full citation including date] and attached hereto as Appendix \_\_\_\_\_.

Or

The [name of agency] shall ensure that the [name of property] is landscaped in accordance with a landscaping plan designed in consultation with and approved by the SHPO to [outline what the plan is intended to do].

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**Interim protection of a historic property**

**General discussion.** Sometimes a considerable amount of time passes between the time an agreement document is concluded and the time its terms are carried out. During this time, the historic properties that are the subjects of the agreement may experience deterioration, vandalism, or other destructive impacts. Accordingly, it is often useful to include a condition or stipulation in an agreement document that provides for protection of the relevant properties until the actions specified in the agreement document can be implemented.

**NAE condition/MOA stipulation: interim protection**

The [name of agency] shall ensure that the [name of property] is immediately secured and protected against damage until the measures agreed upon in [this agreement/or cite specific paragraph of NAE document or specific stipulations in MOA] are implemented.

**PA stipulation: interim protection**

The [name of agency] shall ensure that historic properties scheduled for treatment in accordance with [cite stipulations] are protected against damage until the applicable treatment measures are implemented.

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**Provisions specific to historic buildings or structures, or to historic districts made up of buildings or structures**

The following provisions are for reference specifically in preparing conditions or stipulations providing for rehabilitating, adding to, documenting, and salvaging historic buildings or structures.

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## Rehabilitating historic buildings or structures

**General discussion.** The principal concern in Section 106 review of a rehabilitation project is to ensure that the project's design respects the historically significant architectural, social, natural, and aesthetic characteristics of the property and its environment. Although they must be adapted to the individual needs of each undertaking, the recommended approaches given in the *Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings* (hereafter *Standards and Guidelines*) are the standards against which a design's success in addressing this concern is measured. Determining the "fit" between the recommendations and a given design requires careful professional review. Therefore, an agreement document for a rehabilitation project should clearly reference plans and specifications that have been prepared with reference to the *Standards and Guidelines* and subjected to professional review. Alternatively, under some circumstances as discussed below, an agreement document can provide for a design review process using the *Standards and Guidelines* and including professional review and approval of plans and specifications.

If the individual who is proposing the project covered by the agreement document is also applying for a historic preservation investment tax credit under the Federal tax code, the development of the agreement document should be coordinated with the National Park Service (NPS), which is responsible for certifying projects for such tax credits.

**NAE determinations.** Under 36 CFR § 800.9(c)(2), if rehabilitation will be carried out in conformance with the *Standards and Guidelines*, this can serve as the basis for an NAE determination. In order to ensure that rehabilitation will be done in conformance with the *Standards and Guidelines*, plans and specifications for the project should be in hand at the time the NAE determination is made.

**MOAs and PAs.** Because Section 106 is to be complied with early in the planning of undertakings, it is not uncommon or inappropriate for agencies to initiate Section 106 review of rehabilitation projects before they are actually designed, or based on designs that are very preliminary in nature--for example, based on a site plan, schematic elevation, or narrative description. Often the agency will agree to involve the SHPO in the further development of the design.

The agreement document in such a case is normally an MOA, or a PA covering, for example, a local government's Community Development Block Grant (CDBG) program. In either case, the document should provide for the detailed project design to be developed in consultation with the SHPO and submitted to the SHPO for approval. Where the SHPO does not approve, the matter should be submitted by the agency to the Council for consultation and resolution of the disagreement. (See page 62, "Dispute resolution," for model dispute resolution provisions.)

Where a local government's historic preservation program has been certified under Section 101(c)(1) of NHPA and carries out design review

using the *Standards and Guidelines*, and provided the SHPO concurs, the Certified Local Government (CLG) may review the detailed plans in lieu of the SHPO. In certain difficult cases, or cases in which the SHPO is unable or unwilling to provide design review assistance, the Council may participate in this activity in addition to or instead of the SHPO.

**NAE condition/MOA or PA stipulation: rehabilitation according to an already-developed plan**

**The rehabilitation of [name of property] will be carried out in accordance with [full citation of specific plans, including date].**

**MOA or PA stipulations: provision for subsequent rehabilitation plan development, review, and implementation**

**The [name of agency] shall ensure that the design of the project is compatible with the historic and architectural qualities of the [name of property] and is consistent with the recommended approaches to rehabilitation set forth in the *Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings* (U.S. Department of the Interior, National Park Service, 1983), and that the design and specifications for the project are developed in consultation with the [SHPO or CLG] and submitted to the [SHPO or CLG] for approval.**

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### **Additions to/new construction within or adjacent to historic buildings or structures**

**General discussion.** Adding exterior elements to historic buildings and structures (e.g., new wings, floors, etc.), and constructing new buildings or structures within historic districts, generally has adverse effects on the historic buildings, structures, or districts involved. Such additions may have effects on archeological resources or on other historically important aspects of the property, just as may any other construction project. Such effects should be addressed in agreement documents using appropriate conditions given elsewhere in this publication.

MOAs and PAs that deal with new construction usually include specific stipulations to promote design compatibility between the new construction and the existing historic properties. The new design should seek compatibility with the adjacent or surrounding historic property in terms of scale, massing, color, and materials, and should be responsive to the recommended approaches to new construction set forth in the *Standards and Guidelines*. Except in certain unusual cases, replication or imitation of historic architectural forms is strongly discouraged. New construction, while sensitive to the setting in which it occurs, should clearly reflect its own time.

As with rehabilitation, if detailed project plans are the subject of consultation, they should be referred to specifically in the resulting agreement

document. If not, provision should be made for use of the *Standards and Guidelines*, and for subsequent review and approval by the SHPO or, where applicable, a CLG.

**NAE determinations.** An NAE determination may be appropriate where new construction is of such a minor nature as to fall within a reasonable definition of rehabilitation, within the meaning of Section 800.9(c)(2) of the regulations, and in some cases where no physical effect on historic properties is involved and the design of the new construction is tightly controlled. In either case it is usually necessary to have detailed plans in hand in order to demonstrate that no adverse effect will occur.

**MOAs and PAs.** Because it is seldom possible to avoid all adverse effects from new construction, new construction is usually best viewed as a subject for an MOA or PA.

**NAE condition/MOA or PA stipulation: reference to specific plans for new construction**

**The construction of [name of project] will be carried out in accordance with [full citation of specific plans, including date].**

**MOA or PA stipulation: requirement for use of *Standards and Guidelines* with further review and approval**

**The [name of agency] shall ensure that the project design for new construction is compatible with the historic and architectural qualities of the [name of property] in terms of scale, massing, color, and materials, and is responsive to the recommended approaches to new construction set forth in the *Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings* (U.S. Department of the Interior, National Park Service, 1983), and that the design and specifications for the project are developed in consultation with the [SHPO or CLG] and submitted to the [SHPO or CLG] for approval.**

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## **Recording historic buildings or structures**

**General discussion.** Where a historic structure or building must be demolished, substantially altered, allowed to deteriorate, or transferred out of Federal ownership or control, its recordation is usually provided for as a result of Section 106 review.

Recordation is required of Federal agencies by Section 110(b) of NHPA whenever an agency action, or an action assisted by a Federal agency, may substantially alter or demolish a historic property. Section 110(b) requires that in such a case appropriate records be made of the property and deposited in the Library of Congress or in another appropriate repository designated by the Secretary of the Interior. In the Department of the Interior's *Guidelines for Federal Agency Responsibilities*

under Section 110 of the National Historic Preservation Act (53 FR 4727-46) the Section 106 review process is identified as the mechanism for determining the level and kind of documentation to be prepared under Section 110(b), and for identifying repositories in lieu of the Library of Congress. In other words, the level and kind of recordation to be carried out, and the repositories where the records will be placed, are established by the parties consulting under Section 106. In some cases, the parties agree that the agency will consult with the Historic American Buildings Survey/Historic American Engineering Record (HABS/HAER) Division of NPS to establish what kind and level of recordation is appropriate, and how to file the resulting documentation with the Library of Congress. *The Section 110 Guidelines* call for this to be done in all cases involving National Historic Landmarks (NHLs); otherwise HABS/HAER consultation occurs at the discretion of the parties consulting under Section 106.

**NAE determinations.** Recordation is sometimes done as part of a rehabilitation project falling under the exception to the Criteria of Adverse Effect set forth in 36 CFR § 800.9(c)(2), or as part of a property transfer project falling under the exception set forth in 36 CFR § 800.9(c)(3). In such a circumstance recordation might be a condition of an NAE determination.

An NAE determination might in theory also be appropriate if the building or structure involved were significant only for the information it contained. If the information could be retrieved through recordation and salvage, the exception set forth in 36 CFR § 800.9(c)(1) might apply. In Council experience, however, this circumstance almost never occurs in practice.

**MOAs and PAs.** Except in the very rare circumstances noted above, where alteration of a historic building or structure will be substantial, or demolition is contemplated, an MOA or PA is the appropriate vehicle for stipulating recordation.

**NAE condition/MOA or PA stipulation: reference to a specific plan for recordation**

The [name of agency] shall ensure that the [name of property] is recorded in accordance with [title of recordation plan or proposal with date] attached hereto as Appendix \_\_\_\_\_, prior to its [demolition/alteration/rehabilitation/transfer].

**NAE condition/MOA or PA stipulation: outline of recordation measures in agreement**

The [name of agency] shall ensure that the following recordation measures are carried out {in consultation with the SHPO/in consultation with [CLG or other party]} prior to its [demolition/alteration/rehabilitation/transfer] of the [name of property].

[List measures.]

**NAE condition/MOA or PA stipulation: provision for HABS/HAER to establish recordation standards**

**Prior to the [demolition/alteration/rehabilitation/transfer] of the [name of property], the [name of agency] shall contact [name and address of appropriate NPS Regional Office HABS/HAER contact] to determine what level and kind of recordation is required for the property. Unless otherwise agreed to by NPS, the [name of agency] shall ensure that all documentation is completed and accepted by HABS/HAER prior to the [demolition/alteration/rehabilitation/transfer], and that copies of this documentation are made available to the SHPO and appropriate local archives designated by the SHPO.**

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### Salvage of architectural elements

**General discussion.** Sometimes the consulting parties agree that a historic building or structure has to be demolished, but that the building or structure contains significant architectural features that might be reused or should be saved for curation. An agreement document may as a result provide that, prior to demolition of the property and after the property has been properly recorded (see page 40, "Recording historic buildings or structures,"), the SHPO or the SHPO's designee, such as a local museum, should be allowed to select architectural elements for curation or use in other projects. These items should then be carefully removed and delivered to the SHPO or the SHPO's designee. In other cases, the document may provide for the agency itself, or the developer of a new project, to use salvaged material in the new construction.

**NAE determinations.** Since architectural salvage is always associated with demolition, it is inappropriate as an NAE condition unless the building or structure involved is significant only for the information it contains and that information can be retrieved through recordation and salvage. In such an event the exception set forth in 36 CFR § 800.9(c)(1) might apply. In Council experience, however, this circumstance is so rare as to be negligible.

**MOAs and PAs.** In most cases, architectural salvage stipulations are included in MOAs; on rare occasions, such a stipulation is included in a PA.

**MOA or PA stipulation: reference to specific salvage plans**

**The [name of agency] will ensure that the plan for salvage and reuse of architectural elements from the [name of property], entitled [full citation with date] and attached hereto as Appendix \_\_\_\_\_ is implemented.**

**MOA or PA stipulation: generic architectural salvage stipulation**

The [name of agency] will ensure that the SHPO or [his/her designee] has the opportunity to select architectural elements for [specify potential use: curation, public education, reuse, incorporation into new construction, etc.]. The [name of agency] shall ensure that the items selected are removed in a manner that minimizes damage and are delivered with legal title to the SHPO or [her/his designee] [or specify recipient].

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**Provisions specific to the treatment of archeological sites**

The following provisions are for reference in developing conditions and stipulations for the treatment of archeological sites.

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**In-place preservation of archeological sites**

**General discussion.** Archeological sites may be preserved in place in the context of an undertaking by designing the undertaking to avoid such sites or by incorporating them into the undertaking in a nondestructive manner (in open space, under fill, under buildings raised on piles or platforms, etc.). Where such preservation is agreed upon it should be carried out in accordance with a plan that takes into account such project- and site-specific factors as the potential for subsidence, erosion, and changes in soil chemistry, the possibility of vandalism during or after the project, the accessibility of the site for future study and public interpretation, etc. Ideally this plan should be prepared during Section 106 review and referenced in the agreement document, but in some cases the parties may agree that it will be prepared subsequently.

**NAE determinations.** In-place preservation may be specified as a condition of an NAE determination if a plan to ensure such preservation is in hand, so that the absence of adverse effect can reasonably be ensured.

**MOAs and PAs.** In-place preservation may be specified as an MOA or PA stipulation if such a plan is in hand or if it will be developed subsequently.

**NAE condition/MOA or PA stipulation: reference to specific in-place preservation plan**

The [name of agency] shall implement the preservation plan entitled [full citation, including date] attached as Appendix \_\_\_\_\_ in order to ensure that [name of property] is preserved in place.

**MOA or PA stipulation: provision for subsequent in-place preservation plan development and review**

The [name of agency] shall ensure that a plan to preserve [name of property] in place is developed in consultation with the SHPO and submitted to the SHPO for review. Unless the SHPO objects within \_\_\_\_ days after receipt of plan, the agency official shall ensure that the plan is implemented. The plan shall take into account:

[List relevant issues.]

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**Data recovery: archeological documentation and archeological salvage**

**General discussion.** Where an archeological property must be destroyed or substantially altered, or transferred out of Federal control without reliable protective restrictions or conditions, agreement is usually reached to conduct archeological research on the property to recover information that would otherwise be lost. As a means of documenting the property, archeological data recovery is required by Section 110(b) of NHPA. The *Section 110 Guidelines: Annotated Guidelines for Federal Agency Responsibilities under Section 110 of the National Historic Preservation Act* (Advisory Council on Historic Preservation and National Park Service 1989; hereafter *Section 110 Guidelines*) discuss this requirement, and identify the Section 106 review process as the mechanism for establishing the level and kind of data recovery to be carried out in satisfaction of the requirement of Section 110(b).

**NAE determinations.** If the property from which data are to be recovered is valuable only for the information it contains, and if the research proposed by the responsible agency is sufficient to preserve such information substantially, then under 36 CFR § 800.9(c)(1) the recovery of data from the property, and its subsequent alteration, destruction, or transfer, may be the subject of an NAE determination.

Where an NAE determination is made, the proposed data recovery plan or research design should be in hand and it, together with the agency's commitment to implement it, should be included in the NAE documentation prepared pursuant to 36 CFR § 800.5(d)(1).

**MOAs and PAs.** If the property proposed for data recovery has historical, cultural, or architectural values other than its potential to produce information, data recovery and the ensuing destruction, alteration, or transfer of the property should be the subjects of an MOA. An MOA should also be used if the data recovery plan or research design is unusually complex, if its implementation may be controversial, or if it has not yet been prepared. If the data recovery plan has not yet been prepared, the MOA should provide for its preparation, review, approval, and implementation.



Provision for data recovery may also be included in PAs, which are particularly appropriate where the agreement document must provide for the subsequent preparation, review, approval, and implementation of a data recovery plan.

**NAE condition/MOA or PA stipulation: reference to data recovery plan**

**The [name of agency] shall ensure that the [data recovery plan/research design/scope of work] entitled [give full reference] is implemented prior to and in coordination with those project activities that could disturb [name of property].**

**NAE condition/MOA or PA stipulation: provision for subsequent data recovery plan development and review**

**The [name of agency] shall ensure that a [data recovery plan/research design/scope of work] is developed in consultation with the SHPO for the recovery of archeological data from [name of property]. The [plan/design/scope] shall be consistent with the *Secretary of the Interior's Standards and Guidelines for Archeological Documentation (48 FR 44734-37)* and take into account the Council's publication, *Treatment of Archeological Properties (Advisory Council on Historic Preservation, (draft) 1980)*, subject to any pertinent revisions the Council may make in the publication prior to completion of the [data recovery plan/research design/scope of work], and [relevant SHPO or other guidance]. It shall specify, at a minimum:**

- the property, properties, or portions of properties where data recovery is to be carried out [if this information is not specified in the agreement document];
- any property, properties, or portions of properties that will be [destroyed/altered/transferred] without data recovery;
- the research questions to be addressed through the data recovery, with an explanation of their relevance and importance;
- the methods to be used, with an explanation of their relevance to the research questions;
- the methods to be used in analysis, data management, and dissemination of data, including a schedule;
- the proposed disposition of recovered materials and records;
- proposed methods for involving the interested public in the data recovery;
- proposed methods for disseminating results of the work to the interested public;

- **proposed methods by which** [specify relevant Indian tribes, local governments, other specific groups] **will be kept informed of the work and afforded the opportunity to participate;**
- **a proposed schedule for the submission of progress reports to the** [agency/SHPO/Council/others]; **and**
- [other provisions specific to the project, property, or situation]

**The [data recovery plan/research design/scope of work] shall be submitted by the [name of agency] to the SHPO [and] the Council [and] [specify other parties] for \_\_\_ days review. Unless the SHPO [or] the Council {or [specify other parties]} object[s] within \_\_\_ days after receipt of the [plan/design], the [name of agency] shall ensure that it is implemented.**

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### **Curation of materials and data from archeological sites**

**General discussion.** Provisions for the curation or other disposition of materials and records from archeological survey or data recovery should be included in the plan or research design that guides the work. If not, however, it is appropriate to include such provisions in the relevant agreement document.

Records of surveys and data recovery should always be retained in an appropriate archive or other curatorial facility and disseminated as appropriate to facilitate research and management without unduly endangering historic properties. Material recovered from survey and data recovery projects, if it is the property of the Federal Government, must be curated in accordance with 36 CFR Part 79. Material that is not the property of the Federal government should be curated by an establishment meeting 36 CFR Part 79 standards unless the owner of the material requires that it be returned. If return is required, the collection should be curated by an establishment meeting 36 CFR Part 79 standards while it is under Federal jurisdiction during analysis and preparation of reports, but the collection may then be returned to its owner, who may be entitled to Federal and State tax benefits for donating such material to an appropriate institution.

In some cases exceptions may be made to the requirement that materials be curated in accordance with CFR Part 79. For example, where the law permits, human remains should be reburied after appropriate analysis rather than curated. In some cases, too, materials may be destroyed in the course of, or subsequent to, analysis. For example, radiocarbon age determination destroys the sample analyzed, and soil samples are often discarded after analysis is completed.

**NAE determinations, MOAs, and PAs.** Conditions or stipulations providing for curation may be included in all types of agreement documents.

**NAE condition/MOA or PA stipulation: provision for curation of a federally owned collection or a nonfederally owned collection whose owner does not require that it be returned**

**The [name of agency] shall ensure that all materials and records resulting from the [survey/data recovery] conducted at [name of property or area] are curated {by [specify facility if possible]} in accordance with 36 CFR Part 79, {provided, however, that [specify exception, if any]}.**

**NAE condition/MOA or PA stipulation: provision for curation of a nonfederally owned collection whose owner requires that it be returned**

**The [name of agency] shall ensure all records resulting from the [survey/data recovery] conducted at [name of property or area] are curated {by [specify facility if possible]} in accordance with 36 CFR Part 79, and that all materials resulting from the [survey/data recovery] are maintained {by [specify facility if possible]} in accordance with 36 CFR Part 79 until their analysis is complete and they are returned to their owner[s], {provided, however, that [specify exceptions]}.**

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### **Reburial of human remains excavated from archeological sites**

**General discussion.** Agreement documents may provide for the reburial of human skeletal remains and grave-associated artifacts recovered during archeological research. Ideally a reburial plan may be included as part of a data recovery plan or research design; if not, a specific stipulation may be appropriate. If a particular group, such as a group of descendants, is concerned about reburial of a given skeletal population, reburial should occur in consultation with such group, or might be delegated to it.

**NAE determinations, MOAs, and PAs.** Because of their cultural and associative significance, graves and the properties in which they are found are seldom if ever significant only for the information they contain. As a result, the excavation and destruction of properties containing graves should be dealt with under an MOA or PA, rather than under an NAE determination employing the exception set forth in 36 CFR § 800.9(c) (1). Accordingly, provision for reburial should usually be included in MOAs and PAs, not in NAE determinations. On occasion, an NAE determination may be acceptable where preliminary investigations indicate a small possibility that human remains will be encountered, but there is no specific evidence of their existence. Such circumstances should be discussed on a case-by-case basis with the Council staff.

**MOA or PA stipulation: provision for reburial where no specific group is involved**

The [name of agency] shall ensure that any human remains [and grave-associated artifacts] excavated during the data recovery at [name of property] are reburied [after analysis as specified in the data recovery plan/research design] within [specify time limit] in a location where their subsequent disturbance is unlikely [or specify location] and in a manner as similar as possible to the manner in which they were originally interred.

**MOA or PA stipulation: provision for reburial in consultation with a specific group**

The [name of agency] shall ensure that any human remains [and grave-associated artifacts] excavated during the data recovery at [name of property] are reburied [after analysis as specified in the data recovery plan/research design] {within [specify time limit]} in consultation with [specify group].

**MOA or PA stipulation: provision for delegation of reburial responsibility**

The [name of agency] shall ensure that any human remains [and grave-associated artifacts] excavated during the data recovery at [name of property] are delivered to [specify group] for reburial [after analysis as specified in the data recovery plan/research design] {within [specify time limit]}.

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### **Controlled grading of archeological sites**

**General discussion.** Mechanized grading or bulldozing of an archeological site under archeological supervision is sometimes specified as a final step in data recovery. Although destructive, such a procedure is less damaging than unsupervised grading and is a useful adjunct to more controlled forms of data recovery where a construction or land use project will totally destroy a site.

**NAE determinations, MOAs, and PAs.** Grading may be specified in an MOA or PA, or in an NAE determination where the exception for data recovery set forth in 36 CFR § 800.9(c)(1) applies.

**NAE condition/MOA or PA stipulation: controlled grading**

After completion of the fieldwork component of the data recovery program provided for in [cite appropriate condition or stipulation], the [name of agency] will ensure that the [name of property] is graded under the supervision of an archeologist meeting the *Secretary of the Interior's Professional*

**Qualifications Standards (48 FR 44738-9) and in accordance with the following procedures:**

[specify procedures--e.g., equipment to be used, depth of cuts, recording methods to be employed, time provided for recovery/recording of features, etc.]

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### **Monitoring disturbance of archeological sites**

**General discussion.** Archeological monitoring means observing the conduct of an excavation or construction project in order to recover archeological information and materials if they are unearthed. Monitoring is never an appropriate substitute for proper identification and consideration of archeological sites during project planning, but agreement documents often provide for monitoring as a safeguard against the loss of archeological data that may have been missed during planning and Section 106 review.

For example, if construction will pass close to, but not actually through, an archeological site, monitoring may be used to ensure that construction stays within specified limits, and that if any archeological materials are encountered they are effectively dealt with. Monitoring may also be used where a site from which a sample has been excavated is being removed, to ensure that any significant features that may have been missed during the controlled excavation are recorded. Finally, monitoring may be used where archeological sites may occur but could not be dealt with in advance of construction, because they were deeply buried or covered by buildings or structures that could not be removed.

**NAE determinations, MOAs, and PAs.** Depending on the circumstances, monitoring may be specified under an NAE determination, an MOA, or a PA. For example, where no adverse effect on an archeological site is expected although construction will occur close to it, an NAE determination might be conditioned on monitoring as a safeguard. An MOA or an NAE determination made with reference to 36 CFR § 800.9(c)(1) might provide for monitoring of destruction after completion of data recovery, and a PA might establish monitoring as a standard practice to be employed by an agency program under specified circumstances. Monitoring to identify deeply buried or otherwise obscured sites is normally provided for in an MOA or PA.

**NAE condition/MOA or PA stipulation: provision for monitoring during nearby construction**

The [name of agency] will ensure that particular care is taken during construction to avoid affecting any archeological remains that may be associated with the [name of property]. Restrictions on construction work and areas will be accomplished by {erection of a temporary fence/flagging/[specify other measures]}. Suitable arrangements for archeological monitoring will be made in consultation with

the SHPO prior to construction in this area. At a minimum, such monitoring will include recording and reporting of major features or artifact concentrations uncovered, and recovery/curation of a sample of uncovered remains where practicable.

**NAE condition/MOA or PA stipulation: provision for monitoring during destruction**

After completion of the fieldwork component of the data recovery program provided for in [cite appropriate condition or stipulation], the [name of agency] will ensure that an archeologist meeting the *Secretary of the Interior's Professional Qualifications Standards (48 FR 44738-9)* monitors removal of the [name of property]. At a minimum, such monitoring will include recording and reporting of major features or artifact concentrations uncovered, and recovery/curation of a sample of uncovered remains where practicable.

**NAE condition/MOA or PA stipulation: provision for monitoring an area where deeply buried or otherwise obscured sites may occur**

The [name of agency] will ensure that the monitoring plan entitled [full citation, including date] and attached hereto as Appendix \_\_\_\_ is implemented during excavation in [specify location or locations].

Or

The [name of agency] will ensure that an archeologist meeting the *Secretary of the Interior's Professional Qualifications Standards (48 FR 44738-9)* monitors excavation in [specify location or locations]. At a minimum, such monitoring will include recording and reporting of major features or artifact concentrations uncovered, and recovery/curation of a sample remains uncovered where practicable.

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## Archeological survey

**General discussion.** Ordinarily, archeological surveys are carried out during the early phases of Section 106 review, and provide one basis for effect determination. Thus, in most cases such surveys will be complete before agreement documents are prepared, and there will be no need to include provisions for survey in the documents themselves. There are instances, however, in which Section 106 review may be conducted before surveys have been done. In such instances the agreement document may need to include provisions for survey, which result in appropriate reports and the evaluation of any discovered properties. If the survey results in the discovery of historic properties, the document should provide for effects on those properties to be further considered under the regulations.

Some agreement documents cross-reference a data recovery stipulation, providing that properties discovered during survey that are important only for the information they contain can be subjected to data recovery while other kinds of properties require further consideration.

**NAE determinations.** The conduct of an archeological survey is rarely a condition of an NAE determination, for the obvious reason that one cannot determine that no adverse effect will occur if one does not yet know what properties may be subject to effect. In rare cases, however, usually where there is little likelihood that the survey will in fact result in the identification of archeological sites, survey may be a condition of an NAE determination whose primary focus is on historic properties that have already been identified.

**MOAs.** For similar reasons, archeological survey is rarely the subject of an MOA. In some cases, however, the need for survey may be recognized late in the process of consultation on an MOA, perhaps because of changes in project design or the recognition of previously unanticipated effects. In some cases, the problem of access to land or the presence of dense vegetation, landscaping, pavement, or recent buildings in a project's area of potential effect may make it necessary to defer a survey for identification of unknown archeological sites while concluding an agreement on known properties.

**PAs.** PAs most commonly provide for archeological survey; a PA, for example, may establish mechanisms for the conduct of archeological surveys with respect to an entire agency program, or a very large project, or all projects in a State or region.

**NAE condition/MOA or PA stipulation: archeological survey**

**The [name of agency] shall ensure that an archeological survey of [specify area to be surveyed] is conducted, in a manner consistent with the *Secretary of the Interior's Standards and Guidelines for Identification (48 FR 44720-23)* and taking into account NPS publication, *The Archeological Survey: Methods and Uses (1978: GPO stock # 024-016-00091)* and [specify relevant guidelines of SHPO, etc.]. The survey shall be conducted in consultation with the SHPO, and a report of the survey, meeting the standards of the SHPO, shall be submitted to the SHPO for review and approval.**

**The [name of agency] shall evaluate properties identified through the survey in accordance with 36 CFR § 800.4(c). If the survey results in the identification of properties that are eligible for the National Register, the [name of agency] shall comply with 36 CFR § 800.5.**

**Alternative NAE condition/MOA or PA stipulation: cross-reference to data recovery stipulation**

The [name of agency] shall evaluate properties identified through the survey in accordance with 36 CFR § 800.4(c) [or specify alternative process designed for program or expected property types]. If the survey results in the identification of a historic property that is valuable solely for the information it may contain, the [name of agency] shall ensure that they are treated in accordance with [cite stipulation dealing with data recovery]. If the survey results in the discovery of a property that is valuable for another reason, the [name of agency] shall comply with CFR § 800.5.

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**Archeological report dissemination**

**General discussion.** Every archeological survey and data recovery project should result in a final report or reports that meet accepted professional standards. At minimum, the report should be provided to signatories of the MOA and to NPS for possible peer review and submission to the National Technical Information Service (NTIS) of the Department of Commerce, Springfield, VA. When release of locational information to the public could jeopardize archeological sites, precise locational data should normally appear in a separate appendix so that it can be withheld from the NTIS publication and other publications in accordance with Section 304 of NHPA.

**NAE determinations, MOAs, and PAs.** Archeological report dissemination provisions may be included in all kinds of agreement documents.

**NAE condition/MOA or PA stipulation: archeological report dissemination**

The [name of agency] shall ensure that all final archeological reports resulting from actions pursuant to this [agreement/determination] will be provided to the SHPO, [the Council], and [specify other parties], and to NPS for possible peer review and submission to the National Technical Information Service (NTIS). The agency official shall ensure that all such reports are responsive to contemporary professional standards, and to the Department of Interior's *Format Standards for Final Reports of Data Recovery Program* (42 FR 5377-79). Precise locational data may be provided only in a separate appendix if it appears that its release could jeopardize archeological sites.

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**Provision of information to database**

**General discussion.** Besides providing for dissemination of data in hard copy, agreement documents may establish provisions for the inclusion of



data electronically in existing databases, such as inventories maintained by SHPOs, local governments, or agencies.

**NAE determinations, MOAs, and PAs.** Provision of information to databases can be a condition or stipulation of any kind of agreement document.

**NAE condition/MOA or PA stipulation: database input**

**The [name of agency] will ensure that information resulting from the archeological [survey/data recovery project] provided for in [cite appropriate condition or stipulation] is provided to the [specify recipient] in a form acceptable to the [specify recipient] for inclusion in the [specify database].**

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## Programmatic provisions

This section presents formats for provisions dealing with agency programs of rehabilitation, planning, and other activities. Such provisions are appropriate for use as stipulations in Programmatic Agreements only.

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### Rehabilitation program implementation

**General discussion.** Where a whole rehabilitation program is the subject of Section 106 review (for example, a program carried out by a local government using CDBG funds), it may well involve not only properties that are known to be historic, but also properties that have not yet been evaluated, or even identified. A PA developed for such a program should provide a systematic process for identification, evaluation, and application of appropriate standards, including the *Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings*, the *Secretary of the Interior's Standards and Guidelines for Identification and Evaluation*, and other relevant standards and guidelines.

Most rehabilitation programmatic agreements provide for systematic coordination with the SHPO with respect to identification, evaluation, and review of plans and specifications. Where a local government's historic preservation program has been certified under Section 101(c)(1) of NHPA, however, and the local government carries out design review in a manner consistent with the *Standards and Guidelines*, the consulting parties may agree that the local historic preservation commission will carry out such activities with little or no SHPO participation.

**PA stipulations: rehabilitation program**

**The [name of agency/City] shall ensure that a survey of the [program target area] is undertaken to identify properties that might meet the criteria for listing in the National Register of Historic Places (36 CFR § 60.4), and shall apply**

the criteria to each identified property in consultation will be the SHPO. The survey shall be conducted in consultation with the SHPO and will take into account the *Secretary of the Interior's Standards and Guidelines for Identification and Evaluation (48 FR 44720-26)* {and [specify other applicable standards and guidelines]}.

Until the survey is completed, properties that may be affected by [agency projects/program components/CDBG project/etc.] will be evaluated by the [name of agency/City], in consultation with the SHPO, against the National Register criteria, in accordance with 36 CFR § 800.4(c).

The [name of agency/City] shall ensure that properties meeting the National Register Criteria are rehabilitated in accordance with the recommended approaches in the *Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings (U.S. Department of the Interior, National Park Service, 1983) (Standards and Guidelines)*.

The [name of agency/City] shall ensure that a plan for each rehabilitation project, including [specify architectural specifications/work write-up/photographs, etc.] is provided to the [SHPO/specify local preservation commission] for review and concurrence before the project begins, and that photographs of the properties taken upon completion of the rehabilitation are provided to the [SHPO/specify local preservation commission]. The [name of agency/City] shall retain documentation of the rehabilitation, including work write-ups and photographs, as part of the permanent project records.

If the recommended approaches in the *Standards and Guidelines* cannot be met, if the [SHPO/specify local preservation commission] does not concur in the rehabilitation plan, or if the project will result in demolition of, or other adverse effect to, a property that meets the National Register criteria, the [name of agency/City] shall comply with 36 CFR § 800.5(e).

Each year the [name of agency/City] will notify the public of its current [specify title, e.g., CDBG] program, and make available for public inspection documentation on the program. Included in this documentation will be information on the type(s) of activities undertaken with program funds during the prior year and activities projected for the current year; information on identified historic properties, and/or areas where historic properties may be present, which might be affected by these activities; the amount of program funds available in the current program year; and how interested persons can receive further information on the program and advise the [name of agency/City], the

[SHPO/specify local preservation commission], and the Council of any concerns they may have about program effects on historic properties.

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### **Historic preservation plan development and implementation**

**General discussion.** Agencies with ongoing responsibilities for the administration of historic properties, of land that is known or thought to contain historic properties, or of buildings, structures, or districts that may be historic in whole or in part, often find it advantageous to develop and adopt historic preservation plans (HPPs). In various contexts, HPPs are also referred to as Historic Properties Management Plans (HPMPs), Historic Resources Management Plans (HRMPs), Cultural Resource Management Plans (CRMPs), and by other terms.

Programmatic Agreements covering the management of historic properties on a Federal installation, on a body of a land under Federal jurisdiction, or in a community often provide for the creation and/or use of an HPP. This can be done in one of two ways:

**Where the HPP has been produced.** Where the HPP has been developed and has been the subject of review under Section 106, if all the consulting parties agree, it can be adopted through the mechanism of a PA and thereafter be used by the agency in lieu of standard review under the regulations.

**Where the HPP has not yet been produced.** Where the HPP has not yet been produced and/or agreed to, the PA may provide for its development, and outline its content. The PA also should spell out how the HPP will be reviewed, adopted, and implemented in lieu of standard review under the regulations.

#### **PA stipulation providing for use of an existing HPP**

**The [name of agency] will implement the [title and other references to identify the HPP precisely] in lieu of compliance with 36 CFR §§ 800.4 through 800.6 [and 36 CFR § 800.11 (if the HPP deals with properties discovered during implementation of undertaking)].**

**The [name of agency] will prepare a report [annually, or specify other time interval] on its implementation of the HPP, and provide this report to the SHPO [and] Council {and [specify others]} for review, comment, and consultation as needed.**

**PA stipulation providing for development and implementation of an HPP**

Within [specify time period], the [name of agency] will develop a Historic Preservation Plan (HPP) for the [installation, land area, district, etc.] in accordance with the standards and guidelines attached as Appendix \_\_\_\_\_. The [name of agency] will ensure that the HPP is developed in consultation with the SHPO {and [specify others]}.

When the HPP is complete in draft form, the [name of agency] will provide copies of the draft to the SHPO [and] the Council {and [specify others]} for review and acceptance. Disagreements or questions about the draft HPP will be resolved through consultation among the parties.

Upon acceptance of the HPP by the SHPO [and] the Council, {and [specify others]}, the [name of agency] will finalize and implement it in lieu of compliance with 36 CFR §§ 800.4 through 800.6 [and 36 CFR § 800.11 (if the HPP deals with properties discovered during implementation of undertakings)].

The [name of agency] will prepare a report [annually, or specify other time interval] on its implementation of the HPP, and provide this report to the SHPO [and] Council {and [specify others]} for review, comment, and consultation as needed.

**PA sample language: appendix establishing scope and content of HPP**

The Historic Preservation Plan (HPP) for [name of installation, land area, district, etc.] shall be prepared in accordance with the following guidelines.

1. The HPP will be prepared by or under the supervision of an individual who meets, or individuals who meet, at a minimum, the "professional qualifications standards" for [specify which one or more of the standards should be met--historian, archeologist, architect, etc.] in the *Secretary of the Interior's Professional Qualifications Standards* (48 FR 44738-9).

[Alternative qualifications standards may be specified if the consulting parties agree--e.g., the standards of a relevant professional organization, or standards adopted by an SHPO, an Indian tribe, etc.]

2. The HPP will be prepared with reference to:

[Here specify applicable guidance material, such as the *Secretary of the Interior's Standards and Guidelines for Preservation Planning* (48 FR 44716-20); the *Section 110 Guidelines*

(53 FR 4727-46); regulations, guidelines, and other documents produced by the responsible agency; SHPO standards and guidelines; preservation plans that already exist for the area or adjacent areas; etc.]

**3. The HPP will be prepared in consultation with:**

[Here identify other parties known or thought to have interests or expertise that should be represented in development of the HPP, such as relevant professional groups, historical or archeological societies, historic preservation boards or commissions, Indian tribes and other Native American groups. Since consultation with the SHPO has been specified in the body of the PA, it need not be specified here.]

**4. The essential purpose of the HPP will be to establish processes for integrating the preservation and use of historic properties with the mission and programs of the [name of agency] in a manner appropriate to the nature of the historic properties involved, the nature of the [installation, land area, district, etc.], and the nature of the [agency's] mission, programs, and planning processes.**

**5. In order to facilitate such integration, the HPP, including all maps and graphics, will be made consistent with [specify database management system, geographical information system, etc., used by the agency].**

**6. The HPP will include the following:**

[Use or adapt as applicable.]

**a. Foreword.** The foreword shall explain the basis upon which the HPP is being prepared.

**b. Introduction.** The introduction shall explain the organization and use of the various sections of the HPP.

**c. Overview.** This element of the HPP will synthesize available data on the history, prehistory, architecture, architectural history, landscape architecture, and ethnography of the [installation, land area, district, etc.] and its surrounding area, to provide a context in which to evaluate and consider alternative treatment strategies for different classes of historic properties. The overview shall include, but not be limited to:

[Here insert specific matters to be addressed: e.g., the architecture and landscape architecture of a facility, a particular class of archeological sites, a pattern of historical land use, a known or suspected area of traditional cultural importance to a Native American group.]

**d. Inventory.** This element of the HPP will include descriptions of all properties within the [installation, land area, district, etc.] that are known or thought to meet the National Register criteria (36 CFR § 60.4), including but not limited to the following information on each such property:

[Specify information needs relevant to different property types, etc.]

The inventory will be prepared based on [specify data sources to be used. See *Section 110 Guidelines*, Section 110(a)(2) Discussion § (b)(1) for example].

**e. Predictions.** [Note: This section is applicable only where historic properties have not been fully identified.] Based on the overview, this element of the HPP will predict the distribution and nature of [historic properties/specify those kinds of historic properties whose distribution and nature have not been fully documented] within the [installation, land area, district, etc.]. This element will also offer an estimate of the accuracy of the predictions, and outline ways that the predictions will be tested, refined, and verified to the extent needed through field survey and other further research.

**f. Identification system.** [Note: This section is applicable only where historic properties have not been fully identified.] Based on the overview and predictions, this element of the HPP will establish procedures for the identification and evaluation of historic properties that may be affected by [management of the installation/land use activities within the area, etc.]. This element of the HPP will take into account the *Section 110 Guidelines*, Section 110(a)(2) Discussion §§ (b)(2) through (b)(10) as applicable, and will provide for identification and evaluation to take place in a timely manner during the planning of any actions that might affect historic properties.

**g. Management system.** This element of the HPP will establish procedures for the management of historic properties within the [installation, land area, district, etc.], including but not limited to:

[Note: Use or adapt as applicable.]

**i. procedures for the use of historic properties for agency purposes or the purposes of others, in a manner that does not cause significant damage to or deterioration of such properties, with reference to the *Section 110 Guidelines*, Section 110(a)(1), Discussion § (b), {and specifically proving for [specify as needed]};**

ii. **procedures for affirmatively preserving historic properties, with reference to the *Section 110 Guidelines*, Section 110(a)(1), Discussion § (c), {and specifically providing for [specify as needed]};**

iii. **procedures for the maintenance of historic properties, with reference to the *Section 110 Guidelines*, Section 110(a)(2), Discussion § (d)(1)(i), {and specifically providing for [specify as needed]};**

iv. **procedures for the avoidance or mitigation of adverse effects on historic properties, with reference to the *Section 110 Guidelines*, Section 110(a)(2), Discussion § (d)(1)(iii), {and specifically providing for [specify as needed]};**  
and

v. **procedures of consultation with relevant parties during implementation of the HPP, with reference to the *Section 110 Guidelines*, Part III, {and specifically providing for [specify as needed]}.**

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### **Archeological plan implementation**

**General discussion.** In some cases, it may not be efficient to develop a complete HPP as outlined above, but it may be appropriate to develop a somewhat more restricted plan applicable only to archeological survey, identification, evaluation, and treatment. This is sometimes the case where large and complicated undertakings are involved (e.g., reservoirs, surface mines, major urban developments, long pipelines), or where project impacts are widespread and indirect (e.g., regional irrigation projects), but where many or all predicted property types subject to effect are archeological. Such a plan should be developed in consultation with the SHPO, the Council, and other concerned persons (e.g., landowners, local communities, Indian tribes) and should be responsive to applicable professional standards. The PA adopting the plan should provide that properties meeting the National Register criteria for reasons other than their archeological information value (e.g., historic buildings, Native American cemeteries and other cultural sites) will be reviewed under the regulations in the standard manner. Alternatively, the PA might establish special processes for the review of effects on such properties.

#### **PA stipulation: provision for implementation of archeological plan**

**The [name of agency] shall ensure that historic properties valuable for their potential contribution to archeological research are identified, evaluated, and treated in accordance with the archeological plan entitled [provide full citation with date] and attached hereto as Appendix \_\_\_\_\_. The [name of agency] shall ensure that historic properties valu-**

able for other reasons are considered further in accordance with 36 CFR §§ 800.4 through 800.6.

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## General provisions

With very rare exceptions, every agreement document that stipulates work to be done should contain one or more general provisions designed to ensure, as applicable, that reports on the work conducted are properly prepared and distributed, that the work is carried out by qualified persons, that changes in personnel or organizations carrying out major agreed-upon measures are subject to review, and that mechanisms are available for the resolution of disputes about implementation of the measures agreed to.

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## Reporting

**General discussion.** Copies of final reports on surveys, archeological data recovery, architectural recording, historical research, and other preservation activities should be supplied to the SHPO and other interested parties.

### NAE condition/MOA or PA stipulation: general reporting

**The [name of agency] shall ensure that [a] report[s] on all activities carried out pursuant to this [determination/agreement] [is/are] provided to the SHPO, [to the Council] {and to [specify others]} and, upon request, to other interested parties.**

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## Qualification of personnel

**General discussion.** All historic preservation work done pursuant to an agreement document should be conducted by or under the supervision of a person or persons meeting appropriate professional qualifications standards. Generally, these are the standards of the Secretary of the Interior set forth in the *Secretary of the Interior's Professional Qualifications Standards* (48 FR 44738-9, hereafter *Qualification Standards*), but it may be appropriate to cite other standards under particular circumstances. For example:

- where a professional specialty is called for that is not covered by the *Qualifications Standards* (e.g., landscape architecture; cultural anthropology);
- where more detailed standards are desirable (e.g., those of the Society of Professional Archaeologists, or detailed standards used by the SHPO); or
- where there is good reason to waive application of the *Qualifications Standards* (e.g., on some Indian lands, Pacific and Caribbean is-



lands, and small communities where competence in dealing with local cultural systems and detailed knowledge of local history may be more important than specific professional training).

Note that there is nothing in Section 106 or 36 CFR Part 800 that prohibits an agency from using paraprofessionals, volunteers, trainees, students, or others who are not fully qualified professionals in the conduct of historic preservation work. In order to encourage quality control, however, all such work should be supervised by appropriately qualified individuals.

**NAE condition/MOA or PA stipulation: qualifications where only one kind of expertise is required**

**The [name of agency] shall ensure that all historic preservation work carried out pursuant to this [determination/agreement] is carried out by or under the direct supervision of a person or persons meeting at a minimum the [cite pertinent standards].**

**NAE condition/MOA or PA stipulation: qualifications where multiple kinds of expertise are required**

**The [name of agency] shall ensure that all [specify first type of work] carried out pursuant to this [determination/agreement] is carried out by or under the direct supervision of a person or persons meeting at a minimum the [cite standards pertinent to first type of work]; that all [specify second type of work] is carried out by or under the direct supervision of a person or persons meeting at a minimum the [cite standards pertinent to second type of work] . . . . [etc.]**

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## **Review of implementation**

**General discussion.** Particularly in the case of a PA, but also in the case of an MOA or NAE determination whose terms will be carried out over a considerable period of time, it is appropriate to include provision for one or more kinds of review during the process of implementation. One such provision is the establishment of a date on which the agreement document, if not implemented, will become null and void, causing the undertaking to be reviewed anew under the regulations. A less severe approach is to provide for review of the terms of the agreement document at a particular time by the consulting parties. Many PAs include provision for annual or other periodic review. Finally, an agreement document can provide for review of specific important changes, such as changes in personnel or organizations responsible for major implementing actions.

**NAE condition/MOA or PA stipulation: establishment of date on which agreement becomes null and void**

If [specify substantive conditions/stipulations--e.g., "stipulations B through F above"] **have not been implemented** {by [date]}, **this [determination/agreement] shall be considered null and void, and the [name of agency], if it chooses to continue with the undertaking, shall re-initiate its review in accordance with 36 CFR Part 800.**

**NAE condition/MOA or PA stipulation: provision for review if terms are not carried out by particular date**

If [specify substantive conditions/stipulations--e.g., "stipulations B through F above"] **have not been implemented** {by [date]}, **the [parties to this agreement/specify parties if NAE] shall review this [determination/agreement] to determine whether revisions are needed. If revisions are needed, the [parties to this agreement/specify parties if NAE] will consult in accordance with 36 CFR Part 800 to make such revisions.**

**NAE condition/MOA or PA stipulation: provision for annual or other periodic review**

The [parties to this agreement/specify parties if NAE] **shall consult [annually/specify review period] to review implementation of the terms of this [determination/agreement] and determine whether revisions are needed. If revisions are needed, the [parties to this agreement/specify parties if NAE] will consult in accordance with 36 CFR Part 800 to make such revisions.**

**NAE condition/MOA or PA stipulation: provision for annual or other periodic review**

The [name of agency/specify other party--e.g., holder of permit or license] **shall not** {be permitted by the [name of agency] to} [specify change--e.g., alter the terms of a contract/change supervisory personnel] **without first affording the [parties to this agreement/specify parties if NAE] the opportunity to review the proposed change and determine whether it will require that revisions be made in this [determination/agreement]. If revisions are needed, the [parties to this agreement/specify parties if NAE] will consult in accordance with 36 CFR Part 800 to make such revisions.**

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## Dispute resolution

**General discussion.** Where designs, plans, or specifications are to be submitted to the SHPO, the Council, a CLG, or another party for review in accordance with the terms of an agreement document, the document should provide a mechanism for resolving any objections the reviewing

party may have. If objections from the public may occur, provision should be made for taking these objections into account and acting on them appropriately. The document should also provide a way to note objections and take final actions in the event an objection cannot be resolved.

To address these needs, most agreement documents should contain one or more dispute resolution conditions or stipulations. The character of such conditions or stipulations varies depending on the nature of the property, the nature of the undertaking, the likelihood of dispute, and the likely disputants. Consulting parties may select or adapt one or more of the models given below, as appropriate. The first provides for resumption of consultation pursuant to the regulations in the event of dispute among the parties, the second for a flexible process of rendering a final advisory recommendation, and the third for review of public objection.

**NAE condition/MOA or PA stipulation: dispute resolution among consulting parties (Version 1)**

**Should the [specify reviewing party or parties: e.g., SHPO, CLG, Indian tribe, Council, etc.] object within \_\_\_\_ days to any [plans provided for review/specifications provided/actions proposed] pursuant to this [determination/agreement], the [name of agency] shall consult with the objecting party to resolve the objection. If the [name of agency] determines that the objection cannot be resolved, the [name of agency] shall request the further comments of the Council pursuant to 36 CFR § 800.6(b). Any Council comment provided in response to such a request will be taken into account by the [name of agency] in accordance with 36 CFR § 800.6(c)(2) with reference only to the subject of the dispute; the [agency's] responsibility to carry out all actions under this [determination/agreement] that are not the subjects of the dispute will remain unchanged.**

**NAE condition/MOA or PA stipulation: dispute resolution among consulting parties (Version 2)**

**Should the [specify reviewing party or parties: e.g., SHPO, CLG, Indian tribe, Council, etc.] object within \_\_\_\_ days to any [plans provided for review/specifications provided/actions proposed] pursuant to this [determination/agreement], the [name of agency] shall consult with the objecting party to resolve the objection. If the [name of agency] determines that objection cannot be resolved the [name of agency] shall forward all documentation relevant to the dispute to the Council. Within \_\_\_\_ days after receipt of all pertinent documentation, the Council will either:**

- 1. provide the [name of agency] with recommendations, which the [name of agency] will take into account in reaching a final decision regarding the dispute; or**

2. notify the [name of agency] that it will comment pursuant to 36 CFR § 800.6(b), and proceed to comment. Any Council comment provided in response to such a request will be taken into account by the [name of agency] in accordance with 36 CFR § 800.6(c)(2) with reference to the subject of the dispute.

Any recommendation or comment provided by the Council will be understood to pertain only to the subject of the dispute; the [agency's] responsibility to carry out all actions under this [determination/agreement] that are not the subjects of the dispute will remain unchanged.

**NAE condition/MOA or PA stipulation: review of public objections**

At any time during implementation of the measures stipulated in this [determination/agreement], should an objection to any such measure or its manner of implementation be raised by a member of the public, the [name of agency] shall take the objection into account and consult as needed with the objecting party, the SHPO, [specify others as needed] or the Council to resolve the objection.

## VIII. Complete sample documents

This section provides complete sample documents as illustrations of the ways in which agreement documents may be drafted. These sample documents involve various programs, undertakings, and effects, but use some of the same fictitious parties: the Bureau of Indoor Recreation (BIR), the city of Bluewater in the State of Hypothetical, the Harris House Historians Association, the Bluewater Indian Tribe, and the Hypothetical State Historic Preservation Officer.

Figure 8 illustrates an NAE determination submitted with summary documentation. In this hypothetical case, BIR proposes to fund city rehabilitation of the Bluewater Swimming Pool and associated rehabilitation and new construction to create the Bluewater Sports Center. The undertaking affects three historic properties: the Bluewater Downtown Historic District, which will not be physically affected since the pool has been located in the district for 75 years and new construction will be designed to avoid adverse visual effects; the C. W. Harris House, which will be rehabilitated according to the *Standards and Guidelines* and for which 35-percent plans and specifications already exist for review; and archeological site 57Blu729, which will be destroyed but for which a data recovery plan is complete and available for review.

Given these circumstances, BIR has determined that the undertaking will have no adverse effect on historic properties. Note that in the example, the SHPO has concurred in BIR's determination. Had the SHPO not concurred, BIR would need to send additional documentation to the Council to support its position.

### Figure 8. Sample No Adverse Effect (NAE) determination submitted with summary documentation

April 1, 1991

Ms. Abigail C. Achpie  
 Director, Eastern Office of Project Review  
 Advisory Council on Historic Preservation  
 1100 Pennsylvania Avenue, NW, Suite 809  
 Washington, DC 20004

Dear Ms. Achpie:

The Bureau of Indoor Recreation (BIR) is considering an application for Federal assistance under the Recreation Facilities Improvement Act of 1991 for rehabilitation of the Bluewater Swimming Pool in Bluewater, Hypothetical, and for associated rehabilitation and new construction to create the Bluewater Pools Sports Center. In consultation with the Hypothetical State Historic Preservation Officer (SHPO), we have applied the Criteria of Effect and Adverse Effect found in 36 CFR § 800.9 of your regulations to this undertaking and determined that it will have

no adverse effect on historic properties. As indicated by his signature on the attached letter, the SHPO has concurred in our determination.

The following summary documentation is attached for your review:

- A description of the Sports Center project;\*
- A map showing the area of potential effect;\*
- A summary description of the historic properties subject to effect;\*
- Our reasons for believing that the undertaking will have no adverse effect on historic properties (Attachment 1)
- A copy of my letter of February 30, 1991, to the SHPO, with the SHPO's responding signature indicating concurrence in our determination (Attachment 2); and
- Copies of the views of the City of Bluewater, the Harris House Historians Association, and the Bluewater Indian Tribe, as provided to us during consultation on this project.\*

Since our determination that this undertaking will have no adverse effect is based on the special exceptions set forth in 36 CFR § 800.9(c)(1) and (2), we are also enclosing the scope of work for data recovery at archeological site 57Blu729 and plans and specifications for rehabilitation of the C. W. Harris House.

In making our determination, we have agreed with the SHPO to carry out the actions outlined in the attached letter of February 30, 1991, to ensure that adverse effect will be avoided.

Please review the material enclosed and contact Sam Smith at (222) 222-2222 if you have any questions. If we do not hear from you within thirty (30) days after your receipt of this letter, we will assume that you do not object to our determination, and will proceed with our review of the application, subject to the agreement noted above and the provisions for treating historic properties during implementation of an undertaking contained in 36 CFR § 800.11.

Sincerely,

Susan W. Immer, Regional Director  
Bureau of Indoor Recreation

\*Note: While these documents would be attached as part of the NAE summary documentation submission to the Council, samples are not provided as part of this figure.

## Attachment 1

**REASONS FOR BELIEVING THAT THE BLUEWATER POOLS SPORTS CENTER PROJECT WILL HAVE NO ADVERSE EFFECT ON HISTORIC PROPERTIES**

February 30, 1991

1. The undertaking will affect three historic properties: the Bluewater Downtown Historic District, the C. W. Harris House, and archeological site 57Blu729.
2. The undertaking will have no physical effect on the Bluewater Downtown Historic District. A swimming pool and other recreation facilities have existed on the site for more than 75 years and were integral parts of the District in its heyday; the Sports Center will not alter this use of the District. Although the potential for adverse visual effects exists, all new construction will be carried out in accordance with plans and specifications designed to avoid such effects, ensuring that new construction will be consistent with the applicable provisions of the *Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings* (U. S. Department of the Interior, National Park Service, 1983; hereafter *Standards and Guidelines*). The SHPO has agreed, based on review of 35-percent plans and specifications, that the design is consistent with the recommendations of the *Standards and Guidelines*, and will have the opportunity to review and approve subsequent plans and specifications. Accordingly, the undertaking should not "diminish the integrity" of the District's "location, design, setting, materials, workmanship, feeling, or association." (36 CFR § 800.9(b))
3. The C. W. Harris House will be rehabilitated to serve as the Center's Library and Reading Room. Rehabilitation will be strictly in accordance with the recommended treatments in the *Standards and Guidelines*.
4. Archeological site 57Blu729 will be destroyed by the undertaking; however, this site is of value only for its potential contribution to archeological research, and this value will be preserved through the conduct of a data recovery program, described in documentation enclosed.



## Attachment 2

## SHPO CONCURRENCE

January 15, 1991

Mr. John Porter  
State Historic Preservation Officer  
Hypothetical Secretariat of Culture and History  
New Begonia, HY 77876

Dear Mr. Porter:

As you know from our discussion with Harry Foote of your staff, the Bureau of Indoor Recreation (BIR) is considering a request for assistance from the City of Bluewater regarding construction of the Bluewater Pools Sports Center Project. Pursuant to the requirements of Section 106 of the National Historic Preservation Act (16 U.S.C. 470f) and 36 CFR Part 800, we have been consulting with Mr. Foote to determine what effect this undertaking may have on historic properties. In consultation with Mr. Foote, we have applied the Criteria of Effect and Adverse Effect found at 36 CFR § 800.9 and determined that the project will have an effect upon the Bluewater Downtown Historic District, the C. W. Harris House, and archeological site 57Blu729, properties eligible for inclusion in the National Register of Historic Places. We have also determined, however, that the effect will not be adverse if the following conditions are implemented.

1. Project design

We will ensure that the design of the project is compatible with the historic and architectural qualities of the Bluewater Downtown Historic District. Enclosed are 35-percent plans and specifications for the project, which have been prepared with reference to, and we believe are consistent with, the recommended approaches to new construction set forth in the *Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings* (U.S. Department of the Interior, National Park Service, 1983; hereafter *Standards and Guidelines*). We welcome your comments on the enclosed plans and specifications, and will incorporate your recommendations into the design. Further plans and specifications will be submitted to you for review and approval at the 75-percent and 95-percent stages.

2. Interim protection

We will ensure that the C. W. Harris House and archeological site 57Blu729 are protected against damage until the applicable treatment measures proposed below are implemented.

3. C. W. Harris House

A. We will ensure that the C. W. Harris House is rehabilitated and maintained as the Sport Center's Library and Reading Room, in accordance with the recommended approaches in the *Standards and Guidelines*, in consultation with your office. Enclosed are 35-percent plans and specifications for rehabilitation, for your review and approval. Further plans and specifications will be submitted to you for review and approval at the 75-percent and 95-percent design stages.



B. We will ensure that the C. W. Harris House is properly secured and protected from vandalism, weather damage, construction damage, and arson during the period it is unoccupied.

C. We will ensure that the following recordation measures are carried out in consultation with the Harris House Historians Association prior to the rehabilitation of the C. W. Harris House:

(1) Large format, perspective-corrected recordation photographs will be taken of the front and rear facades (the side walls are party walls), and of the interior staircase to the second floor, the formal dining room, and the kitchen, these being the only interior spaces identified by Mr. Foote, our architectural historian Archie Hiss, AIA, and the Harris House Historians Association as being architecturally significant.

(2) The original floor plans and elevations, recently obtained from the original builder, will be photocopied on acid-free paper.

(3) A written history of the house and its use by the C. W. Harris family and their successors will be prepared in a manner consistent with the *Secretary of the Interior's Standards and Guidelines for Historical Documentation* (48 FR 44728-30), in consultation with or under contract by the Harris House Historians Association.

(4) During rehabilitation, care will be taken to record, document, preserve, and/or retain for curation all objects, artifacts, and design features that may come to light. A report will be prepared describing and analyzing any such items.

(5) Copies of all photographs, floor plans and elevations, the historical report, any reports on features found during rehabilitation, and original field notes will be filed with the Harris House Historians Association and with the SHPO; original floor plans and elevations will be filed with the Bluewater Public Library's Special Documents Room.

#### 4. Archeological site 57Blu729

A. In consultation with your staff and the Cultural Committee of the Bluewater Indian Tribe, we have determined that site 57Blu729 is of value only for its potential contribution to archeological research. Enclosed is a data recovery plan for this site, entitled *Household Organization and Environmental Change in Prehistoric Bluewater: A Proposal for Data Recovery at 57Blu729*, dated October 20, 1990, which explains our rationale for this determination and outlines the data recovery program we propose to undertake. This plan has been developed by our archeological contractor, Dr. M. C. Jones, Jr., in consultation with Marvin Mudd of your staff. We believe that this data recovery plan is consistent with the *Secretary of the Interior's Standards and Guidelines for Archeological Documentation* (48 FR 44734-37); the Council's publication, *Treatment of Archeological Properties* (Advisory Council on Historic Preservation, 1989); and the SHPO publication, *Data Recovery at Archaic Shell Middens* (HY SHPO, 1989). We will ensure that this data recovery plan is implemented.

B. We will ensure that all records resulting from the data recovery project are curated by an institution acceptable to the SHPO in accordance with 36 CFR Part 79, and that all

materials resulting from the data recovery are maintained by such institution in accordance with 36 CFR Part 79 until their analysis is complete and they are returned to their owner, provided, however, that in the unlikely event human remains and grave-associated artifacts are discovered, these will be disposed of as outlined below.

C. Human remains are not anticipated in 57Blu729, since such remains are almost never found in archaic shellmounds in this part of the State, but if such remains should be discovered, we will ensure that any human remains and grave-associated artifacts excavated during the data recovery are reburied after analysis as specified in the data recovery plan, in consultation with the Cultural Committee of the Bluewater Indian Tribe. All analysis of human remains and grave-associated artifacts must be completed with sixty (60) days after their exhumation.

D. After completion of the fieldwork component of the data recovery, we will ensure that 57Blu729 is graded under the supervision of an archeologist meeting the *Secretary of the Interior's Professional Qualifications Standards* (48 FR 44738-9) and in accordance with the following procedures:

- (1) Grading to be conducted with equipment capable of maintaining high vertical and horizontal control, in levels not to exceed fifteen (15) centimeters.
- (2) All grading to be under the direct supervision of the supervising archeologist or personnel reporting directly to the supervising archeologist.
- (3) Supervising archeologist and staff to be equipped with video recording equipment for fast documentation of discoveries.
- (4) Transit team to be maintained on station during all grading to record locations of all discoveries.
- (5) Supervising archeologist empowered to halt or redirect grading to provide time for excavation of significant features.
- (6) No less than five (5) field technicians, not including the transit team, assigned to work under the supervising archeologist's direction, to record and recover discoveries.
- (7) No less than two (2) working days to be allocated to completion of supervised grading.
- (8) All material and documents, including videotapes, to be curated and disposed of as specified in paragraphs 4.B and 4.C as applicable.
- (9) Results of supervised grading to be incorporated into final project reports.

E. We will ensure that all final archeological reports resulting from actions connected with this undertaking are provided to the SHPO, the Cultural Committee of the Bluewater Indian Tribe, the City of Bluewater, and Hypothetical State University at Bluewater, Department of Anthropology, and to the National Park Service for possible peer review and submission to the National Technical Information Service (NTIS) of the Department of

Commerce. We will ensure that all such reports are responsive to contemporary professional standards and to the Department of the Interior's *Format Standards for Final Reports of Data Recovery Program* (42 FR 5377-79).

F. We will ensure that information resulting from the archeological data recovery is provided to you in a form acceptable to you for inclusion in the State historic properties inventory.

#### 5. Administrative conditions

A. We will ensure that all historic research carried out pursuant to this agreement is carried out by or under the direct supervision of a person or persons meeting at a minimum the *Secretary of the Interior's Professional Qualifications Standards* (48 FR 44738-9) for Historians; that all studies in architectural history are carried out by or under the direct supervision of a person or persons meeting at a minimum the *Secretary of the Interior's Professional Qualifications Standards* (48 FR 44738-9) for Architectural Historians; and that all archeological studies are carried out by or under the direct supervision of a person or persons meeting at a minimum the *Secretary of the Interior's Professional Qualifications Standards* (48 FR 44738-9) for Archeologists.

B. If any of conditions 1 through 4 above have not been implemented with two (2) years after execution of this agreement, we will schedule a meeting with you and other interested persons to review the matter and determine whether revisions are needed in our agreement. If revisions are needed, we will consult with you and other interested persons in accordance with 36 CFR Part 800 to make such revisions.

C. We will arrange for and welcome your review and comment on all contracts that either we or the City of Bluewater propose to use to implement the terms of this agreement, and will ensure that the Bluewater Indian Tribe and the Harris House Historians Association are provided a full opportunity to review and comment on all contracts pertaining to 57Blu729 and the C. W. Harris House respectively. We will not alter or permit alteration of the personnel responsible for overseeing such contracts, without first affording you the opportunity to review the proposed change and determine whether it will require that revisions be made in this agreement. If revisions are needed, we will consult with you and others in accordance with 36 CFR Part 800 to make such revisions.

D. Should you, the City of Bluewater, or the Bluewater Indian Tribe object within thirty (30) days after receipt to any plans, specifications, contracts, or other documents provided for review pursuant to the agreement embodied in this letter, or to the manner in which this agreement is being implemented, we will consult with the objecting party to resolve the objection. If we determine that the objection cannot be resolved, we will forward all documentation relevant to the dispute to the Council and request that within thirty (30) days after receipt of all pertinent documentation, the Council either:

(1) provide us with recommendations, which we will take into account in reaching a final decision regarding the dispute; or

(2) notify us that it will comment pursuant to 36 CFR § 800.6(b) and proceed to comment. We will take any Council comment provided in response to such a request

into account in accordance with 36 CFR § 800.6(c)(2) with reference to the subject of the dispute.

E. Any recommendation or comment provided by the Council will be understood to pertain only to the subject of the dispute; our responsibility to carry out all actions under this agreement that are not the subjects of the dispute will remain unchanged.

F. At any time during implementation of the conditions outlined above, should an objection to any such measure be raised by a member of the public, we will take the objection into account and consult as needed with the objecting party, yourself and your staff, others as needed, and the Council if necessary to resolve the objection.

If you agree that we should carry out the above conditions and that by carrying them out we will ensure that this undertaking has no adverse effect on historic properties, please sign the "concur" line below and return this letter to us. Having received a signed copy of the letter, we will notify the Council of our determination and, absent objection by the Council, will proceed with our decisionmaking regarding this undertaking, implementing the conditions outlined above if and when we approve the City's application.

Sincerely,

Susan W. Immer, Regional Director  
Bureau of Indoor Recreation

Enclosures

cc: City of Bluewater  
Bluewater Indian Tribe

Concur: \_\_\_\_\_ Date: \_\_\_\_\_  
John Porter, State Historic Preservation Officer

Figure 9 provides a sample two-party MOA. The hypothetical case in Figure 9 is the same as that used in Figure 8, with several important exceptions. The C. W. Harris House cannot be rehabilitated as part of the Bluewater Sports Center. Rather, it will be marketed for sale and the new owner will be permitted to move it to a new site. Archeological site 57Blu729 will be destroyed (as in the Figure 8 case), but in Figure 9 an archeological recovery plan has not yet been developed.

Given these circumstances, BIR has determined there will be adverse effects to historic properties and has submitted a signed two-party MOA, which mitigates adverse effects, for Council acceptance. The city of



Bluewater, the Harris House Historians Association, and the Tribal Council and Cultural Committee of the Bluewater Indian Tribe have participated in consultation and the city has been invited to concur in the MOA. (Note: BIR could have chosen a three-party MOA, in which case the Council would have participated as a consulting party. A three-party MOA would be identical except that the Council would be listed as a consulting party in the first "Whereas" clause; the words, "its subsequent acceptance by the Council" would not appear in the final paragraph; and a signature block, rather than an acceptance line, would be provided for the Council.)

**Figure 9. Sample two-party Memorandum of Agreement (MOA)**

**MEMORANDUM OF AGREEMENT  
SUBMITTED TO THE ADVISORY COUNCIL ON HISTORIC PRESERVATION  
PURSUANT TO 36 CFR § 800.6(a)**

WHEREAS, the Bureau of Indoor Recreation (BIR) has determined that the Bluewater Pools Sports Center Project will have an effect upon the Bluewater Downtown Historic District, the C. W. Harris House, and archeological site 57Blu729, properties eligible for inclusion in the National Register of Historic Places, and has consulted with the Hypothetical State Historic Preservation Officer (SHPO) pursuant to 36 CFR Part 800, regulations implementing Section 106 of the National Historic Preservation Act (16 U.S.C. § 470f); and

WHEREAS, the City of Bluewater, the Harris House Historians Association, and the Tribal Council and Cultural Committee of the Bluewater Indian Tribe participated in the consultation, and the City of Bluewater has been invited to concur in this Memorandum of Agreement; and

WHEREAS, the definitions given in Appendix 1\* are applicable throughout the Memorandum of Agreement;

NOW, THEREFORE, BIR and the Hypothetical SHPO agree that the undertaking shall be implemented in accordance with following stipulations in order to take into account the effect of the undertaking on historic properties.

**Stipulations**

BIR will ensure that the following measures are carried out:

1. Project design

BIR shall ensure that the design of the project is compatible with the historic and architectural qualities of the Bluewater Downtown Historic District and is consistent with the recommended approaches to new construction set forth in the *Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings* (U.S. Department of the Interior, National Park Service, 1983; hereafter *Standards and Guidelines*), and that the design and specifications for the project are developed in consultation with the SHPO and submitted to the SHPO for approval.

## 2. Interim protection

BIR shall ensure that the C. W. Harris House and archeological site 57Blu729 are protected against damage until the applicable treatment measures stipulated below are implemented.

## 3. C. W. Harris House

A. In consultation with the SHPO, BIR shall prepare a marketing plan for the C. W. Harris House, which shall include the following elements:

(1) An information package about the property, including but not limited to

- photographs of the property;
- a parcel map;
- information on the property's historic significance;
- information on the property's cost;
- information on assistance that BIR will provide to purchasers, including but not limited to reducing the purchase price by the cost of demolition;
- information on Federal and City of Bluewater tax benefits for rehabilitation of historic structures;
- notification that the purchaser will be required to rehabilitate and maintain the property in accordance with the recommended approaches in the *Standards and Guidelines*; and
- notification that the restrictive covenant attached as Appendix 2\* will be included in the transfer document.

(2) A distribution list of potential purchasers or transferees.

(3) An advertising plan and schedule.

(4) A schedule for receiving and reviewing offers.

B. Upon the SHPO's agreement with the marketing plan, BIR shall implement the plan.

C. BIR shall review all offers in consultation with the SHPO prior to acceptance. BIR shall ensure that transfer of the property incorporates the covenant attached hereto as Appendix 2.\*

D. If there is no acceptable offer that will conform to the requirements of rehabilitation and maintenance, BIR, with the approval of the SHPO, may transfer the C. W. Harris House without the preservation covenant. In that event, the property shall be recorded prior to transfer in accordance with Stipulation J.

E. Should a purchaser propose to relocate the C. W. Harris House, BIR shall ensure that the SHPO is afforded thirty (30) days to review and comment on its new proposed site. BIR shall take the SHPO's comments into account in reaching a final decision about moving the property. Before the C. W. Harris House is moved, BIR shall ensure that it is documented in its original setting and context in accordance with Stipulation J. BIR shall ensure that the property is moved in accordance with the approaches recommended in *Moving Historic Buildings* (John Obed Curtis, 1979, American Association for State and Local History), in consultation with the SHPO, by a professional mover who has the capability to move historic buildings properly.

F. BIR shall ensure that the C. W. Harris House is properly secured and protected from vandalism, weather damage, construction damage, and arson during the period it is unoccupied.

G. Prior to permitting the C. W. Harris House to be moved, BIR will execute a contract with the recipient ensuring that after the C. W. Harris House is relocated the recipient will accept title to the C. W. Harris House subject to the covenant attached as Appendix 2.

H. Within ninety (90) days of the move, BIR shall afford the SHPO the opportunity to re-evaluate the property on its new site as to its continued eligibility for inclusion in the National Register.

I. The covenant attached hereto as Appendix 2\* will be included in the instrument used to transfer title to the C. W. Harris House and will be recorded in the real estate records of Ocean County, State of Hypothetical, for the sale of the C. W. Harris House.

J. BIR shall ensure that the following recordation measures are carried out in consultation with the Harris House Historians Association prior to its demolition, alteration, rehabilitation, or transfer:

- Preparation of a history of the house and its builder and occupants, prepared in accordance with the *Secretary of the Interior's Standards and Guidelines for Historical Documentation* (48 FR 44728-30), in consultation with or under contract by the Harris House Historians Association;
- Preparation of architectural documentation in accordance with the *Secretary of the Interior's Standards and Guidelines for Architectural and Engineering Documentation* (48 FR 44730-38) and including, but not limited to:

Measured or photogrammetric drawings of the front and rear facades,

Large-format photos of all exposed facades,

Floor plan of each floor in its present condition,

Transfer of original floor plans to acid-free paper,

Large-format photographs and measured drawings of interior spaces selected in consultation with the Harris House Historians Association, and

Delivery of copies of all documentations to the Harris House Historians Association, the SHPO, and the Bluewater City Library.

4. Archeological site 57Blu729

A. BIR shall ensure that a data recovery plan is developed in consultation with the SHPO for the recovery of archeological data from 57Blu729. The plan shall be consistent with the *Secretary of the Interior's Standards and Guidelines for Archeological Documentation* (48 FR 44734-37) and take into account the Council's publication, *Treatment of Archeological Properties* (Advisory Council on Historic Preservation, (draft) 1980), subject to any pertinent revisions that the Council may make in that publication prior to completion of the data recovery plan, and the SHPO publication, *Data Recovery at Archaic Shell Middens* (HY SHPO, 1989). It shall specify, at a minimum:

- the research questions to be addressed through the data recovery, with an explanation of their relevance and importance;
- the methods to be used, with an explanation of their relevance to the research questions;
- the proposed disposition of recovered materials and records;
- proposed methods for involving the interested public in the data recovery;
- proposed methods for disseminating results of the work to the interested public;
- proposed methods by which the Cultural Committee of the Bluewater Indian Tribe will be kept informed of the work and afforded the opportunity to participate; and
- a proposed schedule for the submission of progress reports to the SHPO, the Council, and the Tribal Council of the Bluewater Indian Tribe.

B. BIR shall ensure that the data recovery plan is submitted to the SHPO, Council, and Tribal Council of the Bluewater Indian Tribe for thirty (30) day review. Unless the SHPO or the Council object within thirty (30) days after the receipt of the plan, BIR shall ensure that it is implemented.

C. BIR shall ensure all records resulting from the data recovery project are curated by an institution acceptable to the SHPO in accordance with 36 CFR Part 79 and that all materials resulting from the data recovery are maintained by such institution in accordance with 36 CFR Part 79 until their analysis is complete and they are returned to their owner, provided, however, that human remains and grave-associated artifacts will be disposed of as outlined in Stipulation 4.D.

D. BIR shall ensure that any human remains and grave-associated artifacts excavated during the data recovery are reburied after analysis as specified in the data recovery plan, in consultation with the Cultural Committee of the Bluewater Indian Tribe. All analysis of human remains and grave-associated artifacts must be completed within sixty (60) days after their exhumation.



E. After completion of the fieldwork component of the data recovery, BIR will ensure that 57Blu729 is graded under the supervision of an archeologist meeting the *Secretary of the Interior's Professional Qualifications Standards* (48 FR 44738-9) and in accordance with the following procedures:

- (1) Grading to be conducted with equipment capable of maintaining high vertical and horizontal control, in levels not to exceed fifteen (15) centimeters.
- (2) All grading to be under the direct supervision of the supervising archeologist or personnel reporting directly to the supervising archeologist.
- (3) Supervising archeologist and staff to be equipped with video recording equipment for fast documentation of discoveries.
- (4) Transit team to be maintained on station during all grading to record locations of all discoveries.
- (5) Supervising archeologist empowered to halt or redirect grading to provide time for excavation of significant features.
- (6) No less than five (5) field technicians, not including the transit team, assigned to work under the supervising archeologist's direction, to record and recover discoveries.
- (7) No less than two (2) working days to be allocated to completion of supervised grading.
- (8) All material and documents, including videotapes, to be curated and disposed of as specified in Stipulations C and D as applicable.
- (9) Results of supervised grading to be incorporated into final project reports.

F. BIR will ensure that all final archeological reports resulting from actions pursuant to this agreement are provided to the SHPO, the Cultural Committee of the Bluewater Indian Tribe, the City of Bluewater, and Hypothetical State University at Bluewater, Department of Anthropology, and to the National Park Service for possible peer review and submission to the National Technical Information Service (NTIS) of the Department of Commerce. BIR shall ensure that all such reports are responsive to contemporary professional standards and to the Department of the Interior's *Format Standards for Final Reports of Data Recovery Program* (42 FR 5377-79).

G. BIR will ensure that information resulting from the archeological data recovery is provided to the Hypothetical SHPO in a form acceptable to the SHPO for inclusion in the State historic properties inventory.

#### 5. Administrative conditions

A. BIR shall ensure that all historic research carried out pursuant to this agreement is carried out by or under the direct supervision of a person or persons meeting at a minimum the *Secretary of the Interior's Professional Qualifications Standards* (48 FR 44738-9) for

Historians; that all studies in architectural history are carried out by or under the direct supervision of a person or persons meeting at a minimum the *Secretary of the Interior's Professional Qualifications Standards* (48 FR 44738-9) for Architectural Historians; and that all archeological studies are carried out by or under the direct supervision of a person or persons meeting at a minimum the *Secretary of the Interior's Professional Qualifications Standards* (48 FR 44738-9) for Archeologists.

B. If any of Stipulations 1 through 4 above have not been implemented with two (2) years after execution of this agreement, the parties to this agreement shall review this agreement to determine whether revisions are needed. If revisions are needed, the parties to this agreement will consult in accordance with 36 CFR Part 800 to make such revisions.

C. BIR shall permit the SHPO to review and comment on all contracts that BIR proposes to use to implement the terms of this agreement and shall permit the Bluewater Indian Tribe and the Harris House Historians Association to review and comment on all contracts pertaining to 57Blu729 and the C. W. Harris House respectively. BIR shall not alter the terms of any such contract, nor change personnel responsible for overseeing such contract, without first affording the SHPO the opportunity to review the proposed change and determine whether it will require that revisions be made in this. If revisions are needed, the parties to this agreement will consult in accordance with 36 CFR Part 800 to make such revisions.

D. Should any party to this agreement object within thirty (30) days after receipt to any plans, specifications, contracts, or other documents provided for review pursuant to this agreement, or to the manner in which this agreement is being implemented, BIR shall consult with the objecting party to resolve the objection. If BIR determines that the objection cannot be resolved, BIR shall forward all documentation relevant to the dispute to the Council. Within thirty (30) days after receipt of all pertinent documentation, the Council will either:

(1) provide BIR with recommendations, which BIR will take into account in reaching a final decision regarding the dispute; or

(2) notify BIR that it will comment pursuant to 36 CFR § 800.6(b) and proceed to comment. Any Council comment provided in response to such a request will be taken into account by BIR in accordance with 36 CFR § 800.6(c)(2) with reference to the subject of the dispute.

E. Any recommendation or comment provided by the Council will be understood to pertain only to the subject of the dispute; BIR's responsibility to carry out all actions under this agreement that are not the subjects of the dispute will remain unchanged.

F. At any time during implementation of the measures stipulated in this agreement, should an objection to any such measure be raised by a member of the public, BIR shall take the objection into account and consult as needed with the objecting party, the SHPO, others as needed, and the Council if necessary to resolve the objection.

Execution of this Memorandum of Agreement by BIR and the Hypothetical SHPO, its subsequent acceptance by the Council, and implementation of its terms, evidence that BIR has afforded the Council an opportunity to comment on the Bluewater Pools Sports Center Project

and its effects on historic properties and that BIR has taken into account the effects of the undertaking on historic properties.

**BUREAU OF INDOOR RECREATION**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Susan W. Immer, Regional Director

**HYPOTHETICAL STATE HISTORIC PRESERVATION OFFICER**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
John Porter, State Historic Preservation Officer

**CITY OF BLUEWATER**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Georgina Lubb, Mayor

**ACCEPTED for the Advisory Council on Historic Preservation**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Richard Smith, Executive Director

\*Note: While those appendices would be attached as part of the MOA submission to the Council, sample appendices are not provided as part of this figure.

A sample Programmatic Agreement is illustrated in Figure 10. This hypothetical case does not involve a particular undertaking. Rather, BIR proposes to administer a broad funding program for local recreation centers. The PA anticipates that projects funded in the future might adversely affect historic properties and provides a procedure for ensuring that these historic properties are given sufficient consideration as specific future projects are carried out. Consultation among BIR, the Council, NCSHPO, and the Association of American Recreators, has resulted in agreement on procedures that BIR will use.

Figure 10. Sample Programmatic Agreement (PA)

**PROGRAMMATIC AGREEMENT  
AMONG  
THE BUREAU OF INDOOR RECREATION,  
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION,  
AND THE NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION  
OFFICERS  
REGARDING IMPLEMENTATION OF THE LOCAL RECREATION CENTER  
IMPROVEMENT PROGRAM**

WHEREAS, the Bureau of Indoor Recreation (BIR) proposes to administer the Local Recreation Center Improvement Program (Program) authorized by the Recreation Center Improvement Act of 1991 (16 U.S.C. . . .); and

WHEREAS, BIR has determined that the Program may have an effect upon properties included in or eligible for inclusion in the National Register of Historic Places and has consulted with the Advisory Council on Historic Preservation (Council) and the National Conference of State Historic Preservation Officers (NCSHPO) pursuant to Section 800.13 of the regulations (36 CFR Part 800) implementing Section 106 of the National Historic Preservation Act (16 U.S.C. 470f); and

WHEREAS, the Association of American Recreators (AAR) has participated in the consultation and has been invited to concur in this Programmatic Agreement; and

WHEREAS, the definitions given in Appendix 1\* are applicable throughout this programmatic agreement;

NOW, THEREFORE, BIR, the Council, and NCSHPO agree that the Program shall be administered in accordance with the following stipulations to satisfy BIR's Section 106 responsibility for all individual aspects of the program.

**Stipulations**

BIR will ensure that the following measures are carried out:

1. In its Program Direction to applicants for assistance, BIR will direct applicants to include the following in their applications for BIR assistance:

A. A description of the area of potential effects of the project to which to application pertains, defined in accordance with 36 CFR § 800.2(c).

B. Documentation describing all historic properties within the area of potential effects, developed in consultation with the pertinent State Historic Preservation Officer (SHPO) and with local historic preservation commissions and other interested persons, and based on identification efforts carried out in accordance with the *Secretary of the Interior's Standards and Guidelines for Identification* (48 FR 44720-23) and with reference to the Council/National Park Service publication, *Identification of Historic Properties: A Decisionmaking Guide for Managers* (Washington, DC, 1988).



- C. The applicant's assessment of the project's potential effects on each such property.
- D. The SHPO's comments on the applicant's assessment.

2. BIR will use the material required by Stipulation 1 in evaluating each such application.
3. Whenever BIR admits an application to "Advanced Consideration" status, BIR will provide the Council with the material required by Stipulation 1 plus BIR's written comments on the material and any conditions that BIR proposes to include in the assistance agreement if the application is approved.
4. Within thirty (30) days after receiving BIR's submission under Stipulation 3, the Council will:
  - A. Concur in BIR's position regarding the application, in which case BIR will continue to process the application and, if it decides to provide the requested assistance, will condition the assistance agreement as it proposed to the Council; or
  - B. Propose changes in BIR's position, whereupon BIR will initiate consultation with the Council, the SHPO, the applicant, and interested persons, if any, to seek agreement on adopting such conditions, which if agreed upon will lead the Council to concur in BIR's position; or
  - C. Object to BIR's position, whereupon BIR will initiate consultation regarding the project in accordance with 36 CFR § 800.5(e).
5. AAR will provide training and other assistance to local governments in carrying out the requirements of this Programmatic Agreement, in consultation with the Council, NCSHPO, and BIR, as part of its Recreation Assistance Project.
6. In the event that any individual undertaking of the Program may have a direct and adverse effect on a National Historic Landmark, BIR shall comply with 36 CFR §§ 800.5, 800.6, and 800.10 for the undertaking.
7. The Council, NCSHPO, and AAR may monitor activities carried out pursuant to this Programmatic Agreement, and the Council will review such activities if so requested. BIR will cooperate with the Council, NCSHPO, and AAR in carrying out their monitoring activities.
8. Any party to this Programmatic Agreement may request that it be amended, whereupon the parties will consult in accordance with 36 CFR § 800.13 to consider such amendment.
9. Any party to this Programmatic Agreement may terminate it by providing thirty (30) days notice to the other parties, provided that the parties will consult during the period prior to termination to seek agreement on amendments or other actions that would avoid termination. In the event of termination, BIR will comply with 36 CFR §§ 800.4 through 800.6 with regard to individual undertakings covered by this Programmatic Agreement.
10. In the event BIR does not carry out the terms of this Programmatic Agreement, BIR will comply with 36 CFR §§ 800.4 through 800.6 with regard to individual undertakings covered by this Programmatic Agreement.

Execution and implementation of this Programmatic Agreement evidences that BIR has satisfied its Section 106 responsibilities for all individual undertakings of the program.

**ADVISORY COUNCIL ON HISTORIC PRESERVATION**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
John Smith, Executive Director

**BUREAU OF INDOOR RECREATION**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Susan W. Immer, Regional Director

**HYPOTHETICAL STATE HISTORIC PRESERVATION OFFICER**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Andrew H. Poe, State Historic Preservation Officer

Concur:

**ASSOCIATION OF AMERICAN RECREATORS**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Patrick R. Akey, Director

\*Note: While this appendix would be attached as part of the PA submission to the Council, a sample appendix is not provided as part of this figure.

The final sample document, a sample PA with a local government, is shown in Figure 11. In this situation the city of Bluewater proposes to administer its Community Development Block Grant program with funds from HUD. Consultation has determined that administration of this program will have an effect on properties included in or eligible for inclusion in the National Register of Historic Places. This PA contains stipulations by which the city will ensure careful consideration of historic properties as it implements community development programs. Numerous interested persons have participated in consultation and been invited to concur in this Programmatic Agreement.

**Figure 11. Sample Programmatic Agreement (PA) with a local government**

**PROGRAMMATIC AGREEMENT  
CITY OF BLUEWATER  
COMMUNITY DEVELOPMENT BLOCK GRANT PROGRAM**

WHEREAS, the City of Bluewater (City), State of Hypothetical, proposes to administer its Community Development Block Grant (CDBG) program with funds from the Department of Housing and Urban Development under Title I of the Housing and Community Development Act of 1974; and

WHEREAS, for the purposes of this Agreement, the City's CDBG program (Program) encompasses the following activities:

- Facade Improvement Revolving Fund,
- Downtown Bluewater Rehabilitation and Revitalization Program,
- Recreational Facilities Upgrading Project,
- Streetscape and Signage Modernization Project; and

WHEREAS, the City has determined that the administration of its Program may have an effect on properties included in or eligible for inclusion in the National Register of Historic Places and has consulted with the Hypothetical State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (Council) pursuant to 36 CFR § 800.13 of the regulations implementing Section 106 of the National Historic Preservation Act (16 U.S.C. 470f); and

WHEREAS, the Bluewater Downtown Historic District Board of Architectural Review, the Downtown Bluewater Merchants' Association, the Lower Bluewater Coalition for Better Neighborhoods, and the Bluewater Indian Tribe participated in the consultation and have been invited to concur in the Programmatic Agreement; and

WHEREAS, the definitions given in Appendix 1\* are applicable throughout this Programmatic Agreement;

NOW, THEREFORE, the City, the SHPO, and the Council agree that the Program shall be administered in accordance with the following stipulations to satisfy the City's Section 106 responsibilities for all individual undertakings of the Program.

**Stipulations**

The City will ensure that the following measures are carried out:

1. All buildings, structures, streetscapes, and open spaces within the Bluewater Downtown Historic District, as defined in Appendix 1\*, shall be considered eligible for inclusion in the National Register of Historic Places (Register) and subject to the terms of this Programmatic Agreement.

2. Whenever Program assistance may be used to affect buildings that are not within the Bluewater Downtown Historic District, the City will consult with the SHPO and, if necessary, the Keeper of the National Register in accordance with 36 CFR § 800.4(c) to determine whether the property or properties subject to effect is or are eligible for inclusion in the Register. All eligible properties shall be subject to the terms of this Programmatic Agreement.
3. The City shall ensure that an archeological survey is conducted of all areas where the program may result in ground disturbance. Such survey shall be consistent with the *Secretary of the Interior's Standards and Guidelines for Identification* (48 FR 44720-23) and take into account the National Park Service (NPS) publication, *The Archeological Survey: Methods and Uses* (1978, GPO stock #024-016-00091), and pertinent SHPO guidelines. The survey shall be conducted in consultation with the SHPO, and a report of the survey, meeting the standards of the SHPO, shall be submitted to the SHPO for review and approval. The City shall evaluate properties identified through the survey in accordance with 36 CFR § 800.4(c). If the survey results in the identification of properties that are eligible for the Register, the City shall comply with 36 CFR § 800.5.
4. The City shall ensure that all rehabilitation of buildings, structures, streetscapes, and open spaces within the Bluewater Downtown Historic District, and all such rehabilitation affecting buildings, structures, streetscapes, or open spaces determined eligible for inclusion in the Register pursuant to Stipulation 2 is carried out in a manner that is compatible with the historic and architectural qualities of the affected property or properties and consistent with the recommended approaches to rehabilitation set forth in the *Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings* (U.S. Department of the Interior, National Park Service, 1983).
5. The City shall ensure that the design and specifications for any rehabilitation project within the Bluewater Downtown Historic District are developed in consultation with the Bluewater Downtown Historic District Board of Architectural Review (Board) and submitted to the Board for review and approval. Provided the Board approves such design and specifications, no further review is required by the SHPO and/or the Council, except that the SHPO and/or Council may require such further review, in accordance with 36 CFR § 800.5, at their respective discretion.
6. The City shall ensure that the design and specifications for any rehabilitation project outside the Bluewater Downtown Historic District affecting one or more properties eligible for inclusion in the Register are developed in consultation with the SHPO and submitted to the SHPO for review and approval. Provided the SHPO approves such design and specifications, no further review is required by the Council, except that the Council may require such further review, in accordance with 36 CFR § 800.5, at its discretion.
7. Where the City proposes a treatment other than rehabilitation including, but not limited to, demolition, construction of an addition, disturbance of an archeological site, and where the City proposes rehabilitation but the design and specifications for such rehabilitation are not approved by the Board under Stipulation 5 or the SHPO under Stipulation 6, the City shall comply with 36 CFR § 800.5.
8. The Council and the SHPO may monitor activities carried out pursuant to this Programmatic Agreement, and the Council will review such activities if so requested. The City will cooperate with the Council and the SHPO in carrying out their monitoring and review responsibilities.



9. In the event that any individual undertaking of the Program may have a direct and adverse effect on a National Historic Landmark, BIR shall comply with 36 CFR §§ 800.5, 800.6, and 800.10 for the undertaking.

10. This Programmatic Agreement will continue in full force and effect until February 30, 1994. At any time in the six-month period prior to this date, the City may request the Council and SHPO in writing to review the City's program and consider an extension or modification of this Programmatic Agreement. No extension or modification will be effective unless all parties to the Programmatic Agreement have agreed to it in writing.

11. Any party to this Programmatic Agreement may request that it be amended, whereupon the parties will consult in accordance with 36 CFR § 800.13 to consider such amendment.

12. Any party to this Programmatic Agreement may terminate it by providing thirty (30) days' notice to the other parties, provided that the parties will consult during the prior to termination to seek agreement on amendments or other actions that would avoid termination. In the event of termination, the City will comply with 36 CFR §§ 800.4 through 800.6 with regard to individual undertakings covered by this Programmatic Agreement.

13. In the event the City does not carry out the terms of this Programmatic Agreement, the City will comply with 36 CFR §§ 800.4 through 800.6 with regard to individual undertakings covered by this Programmatic Agreement.

Execution and implementation of this Programmatic Agreement evidences that the City has afforded the Council a reasonable opportunity to comment on the Program and that the City has taken into account the effects of the Program on historic properties.

**ADVISORY COUNCIL ON HISTORIC PRESERVATION**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
John Smith, Executive Director

**CITY OF BLUEWATER**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Georgina Lubbo, Mayor

**HYPOTHETICAL STATE HISTORIC PRESERVATION OFFICER**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Andrew H. Poe, State Historic Preservation Officer

**BLUEWATER DOWNTOWN HISTORIC DISTRICT BOARD OF ARCHITECTURAL REVIEW**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Charles R. Mansard, FAIA, Chairperson

**DOWNTOWN BLUEWATER MERCHANTS' ASSOCIATION**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Patrick C. Asch, President

LOWER BLUEWATER COALITION FOR BETTER NEIGHBORHOODS

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Ray I. Dent, Coordinator

BLUEWATER INDIAN TRIBE

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Richard Longknife, Tribal Council Chairperson

\*Note: While this appendix would be attached as part of the PA submission to the Council, a sample appendix is not provided as part of this figure.

## **IX. Conclusion**

This publication is provided as a guideline for the preparation of the various agreement documents developed through the consultation of parties involved in determining ways to reduce or avoid the adverse effects of an undertaking on historic properties. The language and formats suggested here, again, are not intended to be used as inflexible models; the examples are presented to show what a document might need for legal sufficiency and clear intent to all readers. Each undertaking that involves historic properties will have distinct concerns, and participants in review are encouraged to review all possible solutions before developing one specific approach.

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**Notes**