

Historic Preservation Assessment Regulatory Background

Section 106 of the National Historic Preservation Act of 1966 (NHPA), as amended, requires the lead federal agency with jurisdiction over an undertaking to consider impacts to historic properties, before the undertaking occurs. Undertakings in this sense include activities, projects, or programs that are directly or indirectly funded by a federal agency, such as the CDBG funding source from Housing and Urban Development for this application's improvements. The implementing regulation of Section 106 is 36 CFR Part 800, overseen by the Department of Interior's Advisory Council on Historic Preservation (ACHP).

The NHPA defines a historic property as any archeological site, district, building, structure, or object that is listed in, or eligible for inclusion in, the National Register of Historic Places (NRHP). Under this definition, other cultural resources may be present within a project's Area of Potential Effects but are not historic properties if they do not meet the eligibility requirements for listing in the NRHP. To be eligible for the NRHP, a property generally must be historically significant and greater than 50 years of age, although there are provisions for listing recent cultural resources if they are of exceptional federal, state or local importance.

36 CFR 800 establishes the three-step processes for: (1) identifying whether historic properties will be affected by the proposed undertaking; (2) assessing the undertaking's effects on identified historic properties, and (3) engaging in consultation with stakeholders to avoid, reduce, or mitigate any adverse effect from the undertaking. Adverse effects include, but are not limited to (per 36 CFR 800.5): destruction or alteration of all or part of a property; isolation from or alteration of its surrounding environment; introduction of visual, audible, or atmospheric elements that are out of character with the property or that alter its setting; transfer or sale of a federally owned property without adequate conditions or restrictions regarding preservation, maintenance, or use; and neglect of a property resulting in its deterioration or destruction.

36 CFR Part 800 specifies that certain parties must be consulted during the process. These parties include: the State Historic Preservation Officer (SHPO) who is appointed by each state to protect the interests of its cultural heritage; and federally-recognized Native American Tribes that have stated a claim to the area. Sections 101(b)(3) and 101(d)(6)(B) of the NHPA provides each SHPO and Tribe, respectively, a prominent role in advising the responsible federal agencies and ACHP in their efforts to carry out Section 106 requirements. Federal agencies usually consult with the SHPO and Tribes when developing methodologies related to cultural resource investigations and are required to notify SHPO and Tribes when making findings related to the establishment of an undertaking, findings of NRHP-eligibility of identified cultural resources, project effects to historic properties, and resolution of adverse effects. That process has been formalized for this New Jersey Hurricane Sandy disaster recovery program through the execution of a Programmatic Agreement signed in 2013. For projects located within municipal boundaries, the assessment and resolution of adverse effects must also be comply with local building codes and ordinances, and any local historic district requirements that are mandated by a Certified Local Government or local Historic Preservation Commission.

The Programmatic Agreement stipulations state that each SHPO and Tribe generally are required to respond within 15 days of receiving a request to review a proposed action, or a request to make a finding or determination regarding historic properties located within the project's Area of Potential Effect. In the event that the SHPO/Tribe does not respond within this time frame, 36 CFR 800.3(c)(4) states that the lead agency (DCA) can decide to (1) proceed to the next step in the application process based on any earlier findings or determinations that have been made up to that point; or (2) consult directly with the ACHP in lieu of the SHPO/Tribe. If, after this step is followed, the SHPO or Tribe decides to re-enter the Section 106 process, 36 CFR 800.3(c)(4) further states that the lead agency may continue the consultation proceeding without being required to reconsider previous findings or determinations.

Assessment of Section 106 Compliance

The proposed project complies with NHPA Section 106 requirements. Consultation with the New Jersey Historic Preservation Office (NJHPO, also SHPO) was initiated by URS on behalf of the program in an email dated February 24, 2014. The email included a form developed by URS for Section 106 disaster recovery evaluations involving locations where high archaeological site potential was suspected, but not proven (Site Visit Form). The submitted form stated that there was no concern that the undertaking would affect above-ground cultural resources.

The basis for this determination for above-ground historic properties was through the allowances contained within the Programmatic Agreement between NJHPO and Federal Emergency Management Agency (FEMA) for Hurricane Sandy and its subsequent expansion to include the state Departments of Environmental Protection (NJDEP) and Community Affairs (NJDCA). The preamble to Appendix B states the types of reviews that do not require SHPO consultation:

The allowances consist of two tiers - Tier I and Tier II. The Tier I allowances will have no effect on historic properties. FEMA staff may apply Tier I allowances without meeting any professional historic preservation qualification standards. Tier II allowance will have limited effect on historic properties. Only FEMA staff meeting the applicable Secretary Professional Qualifications in accordance with Stipulation I.B.1.a of this Agreement may apply Tier II allowances to ensure that the work is in conformance with the Secretary for the Treatment of Historic Properties.

The Tier I Allowances exempts the requirement for a Section 106 review for above-ground historic buildings if they were constructed less than 48 years ago. That exemption / allowance is stated within Appendix B, Tier I allowance Stipulation II, which reads:

Tier I Allowances

II. BUILDINGS

A. Repair or retrofit of buildings less than 48 years old when the disaster was declared.

There is no tax assessment record for this property from the New Jersey Association of County Tax Boards. In order to determine if the application met the Tier 1 allowance, historic imagery was reviewed. It demonstrated that there was no building or development on the lot in 2012, before Hurricane Sandy made landfall. Given that this will be new construction that will not impact a historic building that was on the parcel at the time of the storm, the proposed project meets this allowance (vacant lot verification file). The proposed project is not situated within a local historic district and so consultation with the municipal government regarding potential historic preservation concerns was not required.

The NJHPO was consulted for archaeological concerns as it will involve new construction. The URS form submitted on February 24, 2014 indicated that the parcel was of relatively large size, did not display evidence of ground disturbance, was near water features and situated on well-draining soils. The form stated that the parcel had the potential to contain an unrecorded archaeological site and that subsurface testing was warranted to ensure the project activities would not affect an undocumented historic property. The NJHPO replied by letter on February 26, 2014 that they concurred with the assessment made by URS and the undertaking could impact an archaeological site (NJHPO Concur).

In order to expedite the review of Hurricane Sandy applications, the SHPO and the New Jersey Department of Community Affairs (NJDCA) agreed to the following protocol for implementing a Section 106 Treatment Standard under the Programmatic Agreement for the Reconstruction, Rehabilitation, Elevation and Mitigation (RREM) and Landlord Rental Repair Programs (LRRP). This standard is invoked when the SHPO has stated that additional field assessments are needed to determine NRHP-eligibility of above ground buildings or archaeological resources. The Treatment Standard requires that

property will be treated as eligible and compensatory mitigation will be assessed: \$3,000 per each above-ground property affected and \$6,000 per property for potential effects to archaeological sites.

The Treatment Standard was developed specifically for the RREM & LRRP programs. After receipt of the archaeology field assessment request, URS initiated consultation with NJDEP and NJHPO to determine if the above treatment plan could also encompass this Neighborhood Enhancement Program parcel. Anthony McNichol and Kate Marcopul at NJHPO stated in a March 13, 2014 communication to URS that: "NEP projects are subject to the same adverse effect treatment protocols as RREM and LRRP with the caveat that 'larger' projects (typically those larger than a single-family dwelling), would require negotiation between the consulting parties. This means that NEP projects would be looked at on a case by case basis. Projects 14-1669, 70, 71, and 72 are small enough that they are covered under the \$3,000/6,000 treatment standard." This information was forwarded on to NJDEP.

Per the stipulations in the Programmatic Agreement, the Treatment Standards requires a separate concurrence by the SHPO, a minimum 15-day comment period that is provided to the municipality and to the affected homeowner, and that these communications be documented in the Environmental Review Record. URS conducted these required consultations on behalf of NJDEP. The request for concurrence to the SHPO was submitted by email on March 13, 2014 (NJHPO AE MIT Request). SHPO replied that they concurred to the proposed mitigation treatment in a letter received on March 18, 2014 (NJHPO Reply AE MIT). The second stage of the consultation process, letters to the municipality and the applicant involved, were sent by email on March 19, 2014 (Applicant Notice). No response was received by either party and a memorandum recording that fact was created on April 4, 2014 by URS, the day after the 15 day comment period ended (Memorandum of Record). Section 106 compliance was achieved through the above culmination of the Standard Treatment consultation process and the agreement by NJDCA to pay \$6,000 in compensatory mitigation.

Sources: Programmatic Agreement for New Jersey Hurricane Sandy Disaster Recovery. Vacant lot verification file. URS Site Visit form submitted to NJHPO and signed letter from NJHPO. Adverse effect mitigation request submitted to NJHPO and agency reply. Applicant notification letter. Municipal notification letter. Memorandum of Record.