

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 action complies with Section 106 of the National Historic Preservation Act (NHPA). The property was exempt from the Section 106 review for above-ground historic buildings given 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 (NJDECA). That document exempts the requirement for a Section 106 review for above-ground historic buildings if it falls within the Historic Preservation Exclusion “Green” Zone that was defined by staff of FEMA and the NJHPO through windshield surveys conducted soon after the storm (see [RRE0003694MFPProgrammaticAgreement](#)). That exemption / allowance is stated within Stipulation II.D.1 of the Programmatic Agreement and Appendix B, which reads :

Main Document, Stipulation II.D.1

D. Emergency Demolition and Debris Removal of Privately-Owned Properties: FEMA may need to fund debris removal activities involving the demolition and removal of buildings and structures that are damaged beyond repair or that are completely collapsed and/or disassembled by the actions of the storm and therefore must be removed for health and safety reasons). FEMA is required by the NHPA to determine if its specific actions in response to disasters will cause adverse effects to any historic properties. FEMA EHP will review these projects using the following emergency process outlined below.

1. Areas in the surge zone where there is substantial and widespread damage to improved property and where it is anticipated that FEMA funds will be used for the emergency removal of private property will be targeted for surveys by a joint FEMA-SHPO team. The purpose of the survey is to delineate areas of no above ground historic properties. FEMA and SHPO survey team will jointly identify these areas through background research and a windshield survey. The post-survey write-up will provide a description of the survey boundary where the no historic above ground properties. It also includes information about where there are properties that will require more information if an undertaking takes place. The boundaries of the area where there are no historic above ground properties are digitally mapped. The survey write-up, the maps and photos taken during the survey comprise the consultation package which is formally submitted to SHPO for review and approval. Undertakings occurring within these areas have been formally determined to contain no above ground historic properties in accordance 36 CFR§ 800.4(d)(I) and will have no effect on historic properties. FEMA

may approve undertakings to above ground resources in these areas without further consultation with SHPO.

The joint FEMA / NJHPO survey that designated this location as not having above-ground historic preservation concerns was Toms River Township, NJHPO project number 13-0311-1 and was conducted on December 31, 2012; its NJHPO chronological log number for it is L2012-148. Its position within this zone is shown in the enclosed map (see RRE0003694MFHistoricPreservationExemptionZoneMap).

The Programmatic Agreement also states that an archaeological investigation of the project area is not required when it is a reconstruction project, if it is located on a barrier island the property is less than 5 acres in area and there are no known archaeological sites nearby (see RRE0003694MFProgrammaticAgreement). That allowance is stated under Appendix B, Tier II Stipulation I, which states:

Tier II Allowances

I. BARRIER ISLANDS ONLY - GROUND DISTURBING ACTIVITIES AND SITE WORK:

Any projects located on a barrier island will be exempt from archaeological review by the New Jersey State Historic Preservation Office except when any of the following conditions applies:

- A. There is a known shipwreck site on or adjacent to the project site; or
- B. There is a known archaeological site on or adjacent to the project site;
- C. Local officials or members of the public identify to the federal agency archaeological resources, or strong potential, within the project site; or
- D. Footprint of ground disturbance exceeds 5 acres; or
- E. FEMA personnel meeting or exceeding the Secretary's Professional Standards for archaeology assesses the project site as possessing a high potential for the presence of significant archaeological deposits, as guided by archaeological site sensitivity models developed for the region.

The application parcel is 0.568 acres in area, is located on a northern New Jersey barrier island and there are no known sites located in the area based on NJHPO records. None of the above exceptions apply; therefore the project is exempt from an archaeological review. As the proposed activity is permitted under the PA allowances, consultation with Native American Tribes was not needed.