

PROFESSIONAL
ARCHAEOLOGISTS OF
NEW
YORK
CITY



NEWSLETTER NO. 31
November 1987

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Materials for inclusion in the PANYC Newsletter should be sent to the editors, Anne-Marie Cantwell and Diana diZerega Wall, Department of Anthropology, New York University, 25 Waverly Place, New York, N. Y. 10003.

Minutes of the PANYC General Membership Meeting
CUNY Graduate Center, Room 1126, September 24, 1986
Wall called the meeting to order at 7:00

Secretary's Report: Minutes of the May 14, 1986 meeting were corrected to read: "President's Report: ...Ellis Island, updated Wall..."; "Newsletter Committee: 4...correspondence as well as local newspaper articles...; with these corrections the minutes were accepted.

Treasurer's Report: Wall for Winter, balance in PANYC account \$1,110 as of this meeting.

President's Report: Wall announced chairs for new committees: Museum: Geismar; City Archaeology: Henn. Correspondence in current newsletter includes letters to: NYC Parks department regarding looting of Classon's Point site; U.S. Army Corps regarding National Register sensitivity of Pier 41, Brooklyn; NYC City Planning stating PANYC position on 17 State Street site; Board of Standards and Appeals two comments submitted by PANYC as part of the public record for 17 State Street site hearings. PANYC members were encouraged to write letters to Herbert Sturz, City Planning Commissioner expressing concern over the apparent loop hole in the permit application process that allowed destruction of archaeological resources at 17 State Street to occur.

Dr. Leo Herskowitz is exploring possibility of museum for archaeology in the Tweed Courthouse. Odwyer will talk to David Dinkins next week and if successful will consult PANYC Museum Committee.

COMMITTEE REPORTS

Action: No report.

AIA Participation: No report.

Awards: No report.

City Archaeological Affairs: Wall indicated that she and Henn met with Baugher and Woodoff of Landmarks and that concern was expressed by PANYC regarding review of Landmarks work on Parks property.

Curation: No report.

Legislation: Orgel reported on conversation with Baugher in which Baugher indicated that at this point Landmarks has no intent to revise its current law. This is because the danger presented by opening up the law for archaeological interests would inevitably result in its modification in an adverse way through efforts from the construction lobby who have more financial resources and political clout.

Museum: Geismar indicated that Robert MacDonald of the Museum of the City of New York is interested in continuing its public programs effort with PANYC.

Native American Affairs: Cantwell noted that this committee will serve as an information source. 1. An open meeting for PANYC membership to examine Native American affairs will take place in early December. 2. Please note the proposed "Bridge of Respect" bill in the Sept. Newsletter. Members are encouraged to comment on this bill while it is in draft form. Questions of concern include, has issue of repatriation been adequately addressed? This proposed legislation demonstrates the need for the professional community to be more actively involved in addressing Native American interests.

Newsletter: Orgel and T. Klein volunteered to handle photocopying of next newsletter. Warm thanks were extended to them from PANYC membership.

Public Program: Orgel will check with Museum of the City of New York to secure date for next program; program theme will be considered.

Research and Planning: T. Klein reported that a symposium is planned prior to Thanksgiving holiday. Sue Henry is planning the urban roster for a number crunching workshop to address three research topics (a. socioeconomic status and economic behavior; b. subsistence patterns; c. urban geography) identified from previous survey of urban archaeologists. One professional from New York City will address each topic.

Standards: Rothschild requested that a vote be taken on the proposed "Standards for Archaeological Mitigation Reports." Discussion followed. Suggestions for revision included:

J. Klein: information on scope of work for project should be included;

Marshall: specify - client's name, time frame of project, phase of activity, legal regulations being addressed, map of where site is located;

Pagano: include for reference on standards bibliography of reports that meet proposed standards.

Comments from membership included: T. Klein - concerned about voting on standards that might present conflict of interest; Rothschild - suggested that standards be forwarded to state and federal agencies as well as architectural firms for feedback; Vetter - standards are offered as a guideline where none existed before, burden of standards raised; Nurkin - concern raised regarding noncompliance with standards and what recourse would PANYC have. Wall suggested that PANYC allow one year of time to elapse before standards are adopted by PANYC. Geismar motioned that PANYC accept standards on trial basis as corrected, motion was seconded and passed by voice vote with one abstention.

Old Business: 1. The Hussar. Henn noted that the permit section of the Army Corps has no knowledge of a permit application for excavation of the Hussar. Nurkin indicated that a letter was sent to the Attorney General's office expressing concern for human remains that might be still buried with the Hussar. Vetter expressed concern for problem of no need for permit to survey only to excavate. Nurkin suggested that at issue is whether survey meets archaeological or salvage standards. 2. Vetter noted that the toxic waste superfund program will present new fieldwork opportunities. Both removal and re-storage of waste will require construction that effects archaeological and historic resources. While program will be exempt from NEPA regulations will be incorporated that with ask for cultural resource review during various stages in the process.

New Business: A proposal to move PANYC meetings to Tuesday evenings was discussed and approved by the members present.

Membership Applications: A new membership application from James L. Nolan was reviewed and accepted unanimously by the members present.

Respectfully Submitted, Daniel N. Pagano, PANYC Secretary 1986/87

PROFESSIONAL ARCHAEOLOGISTS OF NEW YORK CITY

411 East 70th St.
New York, N.Y. 10021
30 September 1986

The Honorable Herbert Sturz
Chairman, Department of City Planning
2 Lafayette Street
New York, New York 10007

Dear Chairman Sturz,

The members of the Professional Archaeologists of New York City (PANYC) are deeply concerned about the situation that permitted the destruction of archaeological deposits at 17 State Street, in lower Manhattan. The developer of this site applied for a discretionary permit and therefore the project was subject to environmental review under the CEQR process. As part of this review procedure, the Landmarks Preservation Commission identified this site as having the potential for containing archaeological deposits significant to the cultural heritage of New York. An archaeologist, Dr. Joan Geismar, was hired by the developer to conduct a preliminary study of the site. Her study documented that in fact part of the property had definite potential for containing important archaeological deposits.

However, while this project was being reviewed and before Geismar had even begun her study, the developer applied for and received a permit from the Department of Buildings to build an as-of-right building on the property. Operating under this permit, excavation for the foundation of the proposed building was begun and thus the potential archaeological deposits on the site were destroyed.

The Department of Buildings should not have issued an as-of-right permit in a case where the developer had also applied for a discretionary permit and the environmental impact of the project was in the process of being reviewed. A procedure must be established whereby the Department of Buildings is notified both by its fellow City agencies and by the applicant that a developer has applied for a discretionary permit, so that an as-of-right permit cannot be obtained while a project is under environmental review.

We strongly urge that the representatives of the Department of City Planning, the Department of Buildings, the Landmarks Preservation Commission, and other relevant city agencies work out an effective procedure to deal with this problem. The existence of this loophole threatens the cultural heritage of New York City as well as the CEQR process as a whole.

Sincerely yours,

Diana diZerega Wall
PANYC President

cc Philip Hess, Esq.
Mr. Joseph Ketas
Hon. Gene A. Norman
Ms. Lenore Norman
Hon. Charles M. Smith, Jr., R.A.

PROFESSIONAL ARCHAEOLOGISTS OF NEW YORK CITY

411 East 70th St.
New York, N. Y. 10021
30 September 1986

Dr. Sherene Baugher
Landmark's Preservation Commission
20 Vesey Street
New York, N. Y. 10007

Dear Sherene,

As you know from our discussions on the phone this summer, many members of FANYC are troubled about some aspects of the arrangement that is being worked out between Landmarks and the Department of Parks and Recreation whereby archaeological work required for Parks properties will be carried out by Landmarks' staff. We are concerned about this arrangement for two reasons.

First of all, as both you and Barbara Chutroo at Parks described it to me, this arrangement does not allow for the outside review of this work at the city level. Such review should be applied at all project stages, from scopes of work to the final report. Should Landmarks' staff conduct these projects, then the quality of work should be reviewed by an independent archaeologist (if not an independent agency) of equal authority. Such an archaeologist could be hired by Landmarks, the City Planning Commission, or the Department of Parks and Recreation. It is only through such outside review that we can ensure that the high standard of archaeological work that you have established for projects in the city be continued. Careful examination of the procedures in place at both the State and National level provide for such independent review.

Secondly, we are concerned about the lack of codified procedures and standards under which such work would be carried out. If this arrangement with Parks will become a model for memoranda of agreement among all of the city agencies for which archaeology is an issue, as you indicated to me on the phone, it seems particularly important that clear, written standards and procedures be built into the model from its inception. Proposed standards and guidelines should be developed by the appropriate city agencies and circulated for comment before they are finally adopted.

Many of FANYC's members agree that any model that is set up for conducting archaeology in the city should be based on the Federal model. This model has stringent procedures and standards and the capability for independent review built into its

structure. It is also preferable to other arrangements that have evolved either through historical accident (such as Paul Huey's situation) or where the projects are carried out for research, rather than compliance, purposes (as with Pam Cressey's situation in Alexandria).

As you know, FANYC has set up a committee - the City Archaeology Policy Committee - to work with city agencies. The committee would like to meet with you, Joseph Bresnan, and Jeremy Woodoff in the next few weeks in order to work out an arrangement for conducting archaeology on city land that would best serve the city's archaeological resources. Roselle Henn, the chair of that committee, will call you soon so that such a meeting can be arranged.

Sincerely yours,

Diana Wall
FANYC President

cc Joseph Bresnan, Executive Director, Landmarks Preservation
Commission

Roselle Henn, Chair, City Agency Policy Committee, FANYC

PROFESSIONAL ARCHAEOLOGISTS OF NEW YORK CITY

411 East 70th St.
New York, N. Y. 10021
25 October 1986

The Honorable Sylvia Deutsch
Board of Standards and Appeals
161 Avenue of the Americas
New York, N. Y. 10003

Re: BSA No. 532-858Z

Dear Chairman Deutsch,

I am writing on behalf of the members of the Professional Archaeologists of New York City in response to the Final Environmental Impact Statement for Proposed Project at 17 State Street, New York City. In this report, five options are presented for an archaeological exhibit to serve as "mitigation" for the destruction of the potential archaeological deposits in the project area.

The two exhibit options proposed by the developer are inadequate for two reasons. First, both of these proposed exhibits are too small in scope and scale. They are in fact similar in this regard to archaeological exhibits that have been designed for sites where archaeological excavations also took place (e.g., 85 Broad Street and the Barclays Bank building at Water and Wall Streets). As the proposed exhibit is to stand in place of, rather than to supplement, an archaeological excavation, it should be of a scope and scale far larger than either of those proposed by the developer.

Secondly, the information conveyed by either of these proposed exhibits is trivial. As it was information about the cultural history of the city that was lost with the destruction of the potential archaeological deposits, and as the exhibit is to serve as "mitigation" for the loss of this information, the exhibit should make a substantial contribution in conveying information to the public about the history and archaeology of the city.

We strongly urge that one of the three exhibit options proposed by the Landmarks Preservation Commission be adopted. Each of these proposed exhibits is of an appropriate scope and scale. Furthermore, due attention has been given to the importance both of the exhibit's information content and of using qualified personnel in the design, implementation and maintenance of the exhibit.

If, as we hope, the Board grants a discretionary permit with the condition that one of the three Landmarks exhibit options be

adopted, we are concerned about ensuring that such an exhibit is actually installed. We therefore urge that a Certificate of Occupancy for the proposed building be withheld by the Buildings Department until the exhibit is in place. The adequacy of the exhibit should be determined in the course of a site visit by Landmarks staff.

It is only through the execution of a well-conceived archaeological exhibit that the people of New York can be partially recompensed for the loss of information about the history of the city that resulted from the destruction of the potential archaeological deposits in the project area. The adoption of either of the developer's exhibit options would set a precedent that would have a negative impact on the cultural heritage of the city as well as on the CEOR process as a whole.

Sincerely yours,

Diana diZerega Wall
FANYC President

PANYC RESEARCH AND PLANNING SYMPOSIUM
ARCHAEOLOGICAL INVESTIGATIONS OF LANDMAKING IN NEW YORK CITY

By Terry Klein

The Professional Archaeologists of New York City (PANYC) and the New York City Landmarks Preservation Commission (LPC) co-sponsored a symposium on landmaking in New York City. The symposium was held on May 21, 1986, in the LPC conference room. The purpose of the symposium was to review the current status of archaeological studies of landfill soils and landmaking structures. Presentations were given on eight sites in the city: 64 Pearl Street, 7 Hanover Square, the Telco Block, 175 Water Street, the Shearson AMEX Site, Barclays Bank, 53rd and 3rd Street Site, Inwood, Sullivan Street, and the Assay Site.

During the presentation, various issues concerning research methodology and field strategies were highlighted. There was a consensus on the need to improve the field methods used in excavating and testing landfill sites. The use of backhoe trenching, the most common means of sampling landfill soils, was felt to be a poor field technique, due to the lack of stratigraphic controls. Most believed that landfill sites need to be studied in greater detail, focusing on patterns of landfill technology and variability. Others also suggested that landfill materials could be used in the study of city-wide dietary patterns and in the investigation of economic and social factors in the city's development. However, some felt that landfill cannot be used to address such issues and that landfill research should not be a primary focus of future archaeological research in the city. The major concern was that artifacts from landfill could not be linked to specific historical events, activities and groups within the city. After the presentation of these different viewpoints, a lively discussion ensued, which examined the nature of landfill deposits, their research value, methods that should be used to investigate these contexts, and the appropriate levels of effort that might be applied to future landfill studies. Many issues remained unresolved; enough to be the basis of another symposium which would undoubtedly be just as lively and stimulating.

Twenty people attended the symposium, including PANYC members and others involved in the archaeology of the metropolitan area. There were also two archaeologists from Philadelphia.. Both had been involved in the investigations of landfill sites in that city and were interested in how such sites were studied in New York.

undertakings that affect historic properties. These final regulations supersede the Council's existing section 106 regulations.

EFFECTIVE DATE: October 1, 1986.

FOR FURTHER INFORMATION CONTACT: John M. Fowler, Acting Executive Director, Advisory Council on Historic Preservation, Room 809, 1100 Pennsylvania Ave., NW., Washington, DC 20004 (202) 786-0503.

SUPPLEMENTARY INFORMATION: The Council published proposed revisions to its existing regulations on pages 41828-41833 of the Federal Register of October 15, 1985, and invited comments for 60 days, followed by a 30-day extension period ending January 15, 1986. The purpose of the proposed changes is to reduce regulatory burdens and paperwork, increase flexibility of compliance with section 106, and generally streamline the administrative process. An appropriate degree of Council involvement is maintained in the process, while encouraging State- and local-level decisionmaking and providing a reasonable opportunity for public participation. The Council received 240 comments from Federal agencies, State and local governments, preservation organizations, businesses, Indian representatives, and individuals. The full Council met to consider and discuss all the comments. The Council organized the comments into nine major areas. These areas of concern and the Council's response to them follow.

The Council has determined that these amendments are not "major rules" within the meaning of Executive Order 12291. Because the revised regulations expedite the current commenting process under section 106 of the National Historic Preservation Act, they will not cause increases in costs for local government agencies and will not have significant adverse effects on competition, employment, or investment. These amendments were submitted to the Office of Management and Budget 10 days prior to publication.

Pursuant to 36 CFR Part 805, "National Environmental Policy Act Implementation Procedures," the Council has determined that an Environmental Impact Statement is not required.

The Council has determined there are no information collection reporting or recordkeeping requirements in these revised regulations that require Office of Management and Budget approval under the Paperwork Reduction Act of 1980 (Pub. L. 96-511).

It should be noted that special regulations governing section 106 requirements for Urban Development

Action Grant Projects, currently set forth in 36 CFR Part 800, will be amended in the future.

Major Comments

1. *Comment:* The proposed regulatory revisions, particularly in sections 800.5 and 800.6, reduce the effectiveness of the Council's role in the consultation and commenting processes.

To streamline the process and eliminate potential for delay of a project by the Council, the proposed regulations made several revisions to the Council's current role. First, the Council was given an optional role in the consultation process, the objective being to encourage the resolution at the Agency Official-State Historic Preservation Officer (SHPO) level and to conserve Council resources. Second, agencies could terminate the consultation process at any time after initiating discussions with the SHPO on ways to reduce or avoid effects on historic properties. This was intended to avoid agencies being delayed by the consultation process and forced to reach agreement. Finally, time limits were imposed on the Council when it reviewed Memoranda of Agreement and provided comments.

Many commenters viewed these provisions as weakening the Council's role in the process and lessening the level of protection afforded to historic properties. While many commenters applauded the increased reliance on agency-SHPO negotiation and agreement, there was a recurring concern that the Council had removed itself too far from the consultation. Concern over the termination of consultation provision was particularly widespread. The proposed language was viewed as discouraging agencies from resolving preservation/development conflicts through consultation. Finally, while a number of commenters, notably Federal program agencies and their State counterparts, supported the notion of time limits on Council action, many commenters, including some of those agencies, felt the time limits were too short and inflexible.

In response, changes were made in the final regulations. While the emphasis on agency-SHPO consultation has been maintained, minor revisions have been made in the Council's relation to the consultation process, allowing for greater involvement when necessary (§ 800.5(e)). Agencies are also required to notify the Council when consultation is initiated (§ 800.5(e)). Language regarding termination of consultation has been revised to extend the authority to terminate to the SHPO and the Council and has been recast to

ADVISORY COUNCIL ON HISTORIC PRESERVATION

36 CFR Part 800

Protection of Historic Properties

AGENCY: Advisory Council on Historic Preservation.

ACTION: Final rule.

SUMMARY: On October 15, 1985, the Council published proposed revisions to its regulations implementing section 106 of the National Historic Preservation Act. This final rulemaking establishes the Council's revised regulations governing the process of review and comment upon federally supported

encourage, rather than discourage, agencies from using the consultation process (§ 800.5(e)(6)). The Council retained the fixed time limits on its actions as one of the fundamental objectives of regulatory reform (§ 800.6), but modified the 60-day limit on the Council set forth in § 800.6(b) to apply only when requested by an agency.

2. *Comment:* Revisions to the criteria of effect and associated procedural changes would make the section 106 process more complicated and less effective.

One of the initial objectives of the Council's regulatory reform was to eliminate the negative tone in the existing regulations, an example of which was the term "adverse effect." Some agencies objected to characterizing their actions, which they obviously felt were beneficial, as having "adverse effects." For example, rehabilitation projects, the effects of which were clearly beneficial to historic properties, typically had some impact on historic fabric and, therefore, were technically "adverse."

While many commenters supported those objectives, a far greater number expressed dissatisfaction with how the regulations were changed to achieve them. A widespread comment was objection to Council review of the new "no effect" determination. When the definition of "effect" was changed to eliminate the need for a separate determination of "adverse effect," a situation was created in which a substantial number of marginal cases that now are treated as "no adverse effect" and are submitted to the Council for review could fall into the "no effect" category. To monitor such cases to avoid misuse, a provision was established for notification of the Council in "no effect" cases. However, this requirement extended to a large number of cases that are not seen by the Council under the current "no effect" determination. Commenters noted that this would introduce a new review step, which most felt was unnecessary. In fact, this was one of the most commented upon revisions, and comments were overwhelmingly negative.

Another large group of commenters, primarily user agencies and SHPO's, expressed concern over elimination of the "no adverse effect" determination, a procedural device used for quick processing of simple cases with a minimum of paperwork. Commenters did not want this to be replaced by the more involved Memorandum of Agreement process.

In response, the Council has reinstated the distinction between

"effect" and "adverse effect." Changes to the criteria (§ 800.9) and the process (§ 800.5(b)-(d)) have been made to achieve this, similar to the existing criteria and process. Council review of no effect determinations has been eliminated. Several innovations have been made to streamline the no adverse effect determination procedure and to meet the original objectives of reform. First, review of no adverse effect determinations, at agency discretion, is assigned to either the SHPO or the Council (§ 800.5(d)), rather than requiring all such findings to be submitted to the Council for 30-day review. Second, the criteria themselves have been revised for clarity (§ 800.9). Finally, a category of exceptions, covering such things as rehabilitation, has been created (§ 800.9(c)) so that certain kinds of projects need not be labeled and processed as adverse effect cases. Provision has also been made for a more flexible approach to no adverse effect determinations, allowing the Council and the agency to negotiate what would otherwise be an adverse effect situation into one that qualifies for expedited no adverse effect review (§ 800.5(d)(2)).

3. *Comment:* Proposed regulatory language and procedures that introduce new terminology and concepts would complicate compliance and require retraining, often without any clear increase in efficiency.

The proposed regulations contained many introductions of new language and processes to eliminate some of the negative elements of the current regulations, to use simpler language for increased clarity, and to introduce more flexibility in agency application of the regulations.

A large number of commenters, especially those Federal agencies and SHPO's who work regularly with the regulations, expressed reservations about new terminology or new procedures without any demonstrable improvement in clarity or efficiency. They noted that the terminology and basic structure of the current section 106 process have been in place since 1974. Both Federal and State agencies noted the substantial investment in the development of internal procedures for compliance with section 106 and in the education of staff. Likewise, the interaction among the Council, SHPO's and agency officials on a daily basis has led to a widespread understanding of current terminology and attendant procedural steps. Recalling the amount of time and effort required to reach this level of understanding, a sizable number of commenters felt that introduction of new terms and procedures would cause

a disruption in smooth operations, resulting in increased costs and delays.

The changes that cause this concern included the elimination of the distinction between "effect" and "adverse effect," which in turn abolished the current procedure for no adverse effect and conditional no adverse effect determinations, changes in the Council's participation in the consultation process; elimination of certain definitions such as "area of potential environmental impact"; changes in the existing Memorandum of Agreement process; and numerous minor changes in language, terminology, and section renumbering. Commenters felt that the proposed regulations created the perception of new regulatory processes that would require widespread retraining.

The Council was sensitive to these comments as it redrafted the regulations. In response, the concept of "effect"/"adverse effect" and associated procedures were reinstated in a streamlined manner (§ 800.5(d)). In modified form, the "conditional no adverse effect" device was revised (§ 800.5(d)(2)) and "area of potential effects" added to definitions (§ 800.2(c)). In other places, editing has taken place, with the objective of introducing new words, phrases, and processes only where necessary to meet specific requirements of regulatory reform. The Council believes the result is to integrate innovative concepts and procedures into a document that maintains familiar reference points for users.

4. *Comment:* The regulations lack sufficient guidance and clear standards for the identification and evaluation of historic properties.

The proposed regulations moved to a more general statement of agency responsibilities for identifying and evaluating historic properties. The emphasis was more on process (e.g., who to contact, etc.) rather than specific technique. Reliance for detailed guidance in these areas was placed on the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation, which are quite specific but nonbinding. Commenters from both the preservation community and user agencies requested more specificity and guidance on this aspect of the process.

In response, §§ 800.4(a) and 800.4(b) have been redrafted to more clearly state the Council's expectations for agency identification efforts. However, the Council continues to believe detailed guidance in these areas should be set forth in nonregulatory material. Accordingly, the Council intends to

work with Interior to provide nonbinding guidance to assist agencies in meeting their identification responsibilities under section 106.

5 *Comment:* The language of the proposed regulations is ambiguous and unclear in many places, lacking specificity and guidance for the user.

The Council's regulations are general-purpose regulations, intended to apply to all kinds of undertakings, all kinds of effects, and all kinds of historic properties. The proposed revised regulations used general language to permit flexibility in the application of the regulations.

Many commenters, viewing the proposed process from the perspective of their undertakings and the kinds of effects and properties with which they are familiar, objected to the changes of language, commenting that the proposed regulations were too general, or ambiguous and unclear. Thus, land-management agencies raised concerns about procedural steps and consultation with the public; urban citizen organizations sought more procedural safeguards and public participation; oil and gas companies wanted "avoidance" discussed, a matter relevant to them, but meaningless in an urban development context; and applicants for Federal assistance and permits requested a specific role in the process.

In response, the Council undertook to introduce more precision to the regulations while retaining the general principles of regulatory flexibility and economy of language. Throughout the final regulations, the Council has refined language to meet specific concerns raised by commenters. In particular, § 800.1(c) has been extensively rewritten to better spell out the roles of participants in the section 106 process, including the public.

6. *Comment:* Regulatory flexibility is desirable, but the language proposed in § 800.3 was vague.

The Council has endorsed the principle of flexible application of the Section 106 regulations as fundamental to regulatory reform. It specifically asked commenters whether the policy formulation in the proposed regulations at § 800.3 accomplished the Council's purposes. Many commenters applauded the notion of regulatory flexibility but felt that the language as proposed was vague. Others expressed concern that the notion of "substantial fulfillment" would encourage agencies to disregard the regulations. Commenters were nearly all in agreement that the section needed to be rerafted.

In response, the Council revised the language to retain but clarify the concept of regulatory flexibility. The

term "substantial fulfillment" was deleted. As noted in the preamble to the proposed regulations, the Council continues to be concerned that its regulations primarily be of assistance to Federal agencies in complying with section 106 and not be the source of unwarranted litigation regarding insubstantial procedural details.

7. *Comment:* The regulations should deal more clearly with coordination with other statutes that establish preservation review responsibilities.

The existing section 106 regulations set forth a process for coordinating Section 106 reviews with environmental reviews under the National Environmental Policy Act. The provision was deleted in the proposed rules in the interests of shortening the regulations. A number of commenters asked for more definite coordination of the requirements of the regulations with those of statutory authorities other than section 106. The National Environmental Policy Act was mentioned most often, but the Archeological Resources Protection Act, section 4(f) of the Department of Transportation Act, and the Archeological and Historic Preservation Act of 1974 were also referred to.

In response, the Council agreed with this idea and added a section to carry out the suggestion (§ 800.14). It deals with each of the enumerated statutory requirements, but in a general and nonmandatory manner.

8. *Comment:* The regulations are either too specific or too general concerning public participation.

The proposed regulations eliminated the existing section dealing with public participation, opting instead to add specific requirements for public notification and opportunity for input. This was intended to strengthen the public role in the process and at the same time encourage the use of established agency public involvement processes.

Comments on public participation ran in several directions: objection to excessive public involvement requirements; proposals for more mandatory involvement; proposals for better integration with existing processes; and proposals to relate public participation requirements to project type and level of public interest or controversy.

In response, the Council reconsidered its treatment of public participation. The general section on public participation (§ 800.1(c)(iv)) was revised to urge use of existing public involvement processes, such as those used to meet NEPA obligations, and to encourage greater opportunities for public input.

Certain additional revisions were made in the body of the regulations to promote public involvement in a flexible, nonmandatory manner. In particular § 800.6(e) was added, allowing the public to bring questions about individual section 106 cases to the Council.

9. *Comment:* Participation by American Indians and other Native Americans needs to be strengthened.

In revising the regulations, the Council was sensitive to creating a more prominent role for affected Native Americans and inserted specific references to promote notification and consultation. A large number of commenters raised questions and offered comments about how the regulations afforded Indian tribes and other Native Americans the opportunity to participate in section 106 review. The comments generally broke down into concerns about sovereignty and about who is the appropriate representative of Native Americans.

A number of commenters raised the question of the sovereignty of Indian tribes, most pointing out that Indian tribes are sovereign entities and arguing, at least, that SHPO's should not be expected to represent Indian concerns. A few argued that section 106 should not apply to actions undertaken by Indians on Indian land.

How "Indian tribe" should be defined was also a major issue, as it determined participation in the process. One commenter felt that only officially recognized tribal governments should be dealt with. Others did not propose limiting section 106 consultation to "government-to-government" interaction, but did want to deal only with officially recognized tribes. Still others argued for a broad definition that would allow both formally recognized and currently unrecognized tribes to participate. Commenters also urged that more attention should be given to participation by traditional cultural authorities in the tribes. A few commenters suggested that the same opportunities to participate in review of impacts on their traditional properties should be afforded to other Native American groups, such as Native Hawaiians, as is afforded to Indians.

In response, the Council revised the provisions related to this area (§ 800.1(c)(2)). Formal government-to-government consultation remains with recognized tribes as defined in the National Historic Preservation Act, but traditional cultural leaders and others are provided the opportunity to participate as interested persons. Tribes with established historic preservation

programs are given the opportunity to assume the role of the SHPO (§ 800.1(c)(2)(iii)).

Title 36, Chapter VIII, is amended by revising Part 800 to read as follows:

PART 800—PROTECTION OF HISTORIC AND CULTURAL PROPERTIES

Subpart A—Background and Policy

Sec.

- 800.1 Authorities, purposes, and participants.
- 800.2 Definitions

Subpart B—The Section 106 Process

- 800.3 General.
- 800.4 Identifying historic properties.
- 800.5 Assessing effects
- 800.6 Affording the Council an opportunity to comment.
- 800.7 Agreements with States for section 106 reviews.
- 800.8 Documentation requirements
- 800.9 Criteria of effect and adverse effect.

Subpart C—Special Provisions

- 800.10 Protecting National Historic Landmarks
- 800.11 Properties discovered during implementation of an undertaking.
- 800.12 Emergency undertakings.
- 800.13 Programmatic Agreements.
- 800.14 Coordination with other authorities.
- 800.15 Counterpart regulations.

Authority: Pub. L. 89-665, 80 Stat. 915 (16 U.S.C. 470), as amended, 84 Stat. 204 (1970), 87 Stat. 139 (1973), 90 Stat. 1320 (1976), 92 Stat. 3467 (1978); E.O. 11593, 3 CFR 1971 Comp., p. 154.

Subpart A—Background and Policy

- § 800.1 Authorities, purposes, and participants.

(a) *Authorities.* Section 106 of the National Historic Preservation Act requires a Federal agency head with jurisdiction over a Federal, federally assisted, or federally licensed undertaking to take into account the effects of the agency's undertaking on properties included in or eligible for the National Register of Historic Places and, prior to approval of an undertaking, to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking. Section 110(f) of the Act requires that Federal agency heads, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic Landmark that may be directly and adversely affected by an undertaking and, prior to approval of such undertaking, afford the Council a reasonable opportunity to comment. These regulations define the process used by a Federal agency to meet these

responsibilities, commonly called the section 106 process.

(b) *Purposes of the section 106 process.* The Council seeks through the section 106 process to accommodate historic preservation concerns with the needs of Federal undertakings. It is designed to identify potential conflicts between the two and to help resolve such conflicts in the public interest. The Council encourages this accommodation through consultation among the Agency Official, the State Historic Preservation Officer, and other interested persons during the early stages of planning. The Council regards the consultation process as an effective means for reconciling the interests of the consulting parties. Integration of the section 106 process into the normal administrative process used by agencies for project planning ensures early, systematic consideration of historic preservation issues. To this end, the Council encourages agencies to examine their administrative processes to see that they provide adequately for the efficient identification and consideration of historic properties, that they provide for participation by the State Historic Preservation Officer and others interested in historic preservation, that they provide for timely requests for Council comment, and that they promote cost-effective implementation of the section 106 process. When impediments are found to exist in the agency's administrative process, the agency is encouraged to consult with the Council to develop special section 106 procedures suited to the agency's needs.

(c) *Participants in the section 106 process.*—(1) *Consulting parties.* Consulting parties are the primary participants in the section 106 process whose responsibilities are defined by these regulations. Consulting parties may include:

(i) *Agency Official.* The Agency Official with jurisdiction over an undertaking has legal responsibility for complying with section 106. It is the responsibility of the Agency Official to identify and evaluate affected historic properties, assess an undertaking's effect upon them, and afford the Council its comment opportunity. The Agency Official may use the services of grantees, applicants, consultants, or designees to prepare the necessary information and analyses, but remains responsible for section 106 compliance. The Agency Official should involve applicants for Federal assistance or approval in the section 106 process as appropriate in the manner set forth below.

(ii) *State Historic Preservation Officer.* The State Historic Preservation

Officer coordinates State participation in the implementation of the National Historic Preservation Act and is a key participant in the section 106 process. The role of the State Historic Preservation Officer is to consult with and assist the Agency Official when identifying historic properties, assessing effects upon them, and considering alternatives to avoid or reduce those effects. The State Historic Preservation Officer reflects the interests of the State and its citizens in the preservation of their cultural heritage and helps the Agency Official identify those persons interested in an undertaking and its effects upon historic properties. When the State Historic Preservation Officer declines to participate or does not respond within 30 days to a written request for participation, the Agency Official shall consult with the Council, without the State Historic Preservation Officer, to complete the section 106 process. The State Historic Preservation Officer may assume primary responsibility for reviewing Federal undertakings in the State by agreement with the Council as prescribed in § 800.7 of these regulations.

(iii) *Council.* The Council is responsible for commenting to the Agency Official on an undertaking that affects historic properties. The official authorized to carry out the Council's responsibilities under each provision of the regulations is set forth in a separate, internal delegation of authority.

(2) *Interested persons.* Interested persons are those organizations and individuals that are concerned with the effects of an undertaking on historic properties. Certain provisions in these regulations require that particular interested persons be invited to become consulting parties under certain circumstances. In addition, whenever the Agency Official, the State Historic Preservation Officer, and the Council, if participating, agree that active participation of an interested person will advance the objectives of section 106, they may invite that person to become a consulting party. Interested persons may include:

(i) *Local governments.* Local governments are encouraged to take an active role in the section 106 process when undertakings affect historic properties within their jurisdiction. When a local government has legal responsibility for section 106 compliance under programs such as the Community Development Block Grant Program, participation as a consulting party is required. When no such legal responsibility exists, the extent of local government participation is at the

discretion of local government officials. If the State Historic Preservation Officer, the appropriate local government, and the Council agree, a local government whose historic preservation program has been certified pursuant to section 101(c)(1) of the Act may assume any of the duties that are given to the State Historic Preservation Officer by these regulations or that originate from agreements concluded under these regulations.

(ii) *Applicants for Federal assistance, permits, and licenses.* When the undertaking subject to review under section 106 is proposed by an applicant for Federal assistance or for a Federal permit or license, the applicant may choose to participate in the section 106 process in the manner prescribed in these regulations.

(iii) *Indian tribes.* The Agency Official, the State Historic Preservation Officer, and the Council should be sensitive to the special concerns of Indian tribes in historic preservation issues, which often extend beyond Indian lands to other historic properties. When an undertaking will affect Indian lands, the Agency Official shall invite the governing body of the responsible tribe to be a consulting party and to concur in any agreement. When an Indian tribe has established formal procedures relating to historic preservation, the Agency Official, State Historic Preservation Officer, and Council shall, to the extent feasible, carry out responsibilities under these regulations consistent with such procedures. An Indian tribe may participate in activities under these regulations in lieu of the State Historic Preservation Officer with respect to undertakings affecting its lands, provided the Indian tribe so requests, the State Historic Preservation Officer concurs, and the Council finds that the Indian tribe's procedures meet the purposes of these regulations. When an undertaking may affect properties of historic value to an Indian tribe on non-Indian lands, the consulting parties shall afford such tribe the opportunity to participate as interested persons. Traditional cultural leaders and other Native Americans are considered to be interested persons with respect to undertakings that may affect historic properties of significance to such persons.

(iv) *The public.* The Council values the views of the public on historic preservation questions and encourages maximum public participation in the section 106 process. The Agency Official, in the manner described below, and the State Historic Preservation

Officer should seek and consider the views of the public when taking steps to identify historic properties, evaluate effects, and develop alternatives. Public participation in the section 106 process may be fully coordinated with, and satisfied by, public participation programs carried out by Agency Officials under the authority of the National Environmental Policy Act and other pertinent statutes. Notice to the public under these statutes should adequately inform the public of preservation issues in order to elicit public views on such issues that can then be considered and resolved, when possible, in decisionmaking. Members of the public with interests in an undertaking and its effects on historic properties should be given reasonable opportunity to have an active role in the section 106 process.

§ 800.2 Definitions.

(a) "Act" means the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470-470w-6.

(b) "Agency Official" means the Federal agency head or a designee with authority over a specific undertaking, including any State or local government official who has been delegated legal responsibility for compliance with section 106 and section 110(f) in accordance with law.

(c) "Area of potential effects" means the geographic area or areas within which an undertaking may cause changes in the character or use of historic properties, if any such properties exist.

(d) "Council" means the Advisory Council on Historic Preservation or a Council member or employee designated to act for the Council.

(e) "Historic property" means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register. This term includes, for the purposes of these regulations, artifacts, records, and remains that are related to and located within such properties. The term "eligible for inclusion in the National Register" includes both properties formally determined as such by the Secretary of the Interior and all other properties that meet National Register listing criteria.

(f) "Indian lands" means all lands under the jurisdiction or control of an Indian tribe.

(g) "Indian tribe" means the governing body of any Indian tribe, band, nation, or other group that is recognized as an Indian tribe by the Secretary of the Interior and for which the United States holds land in trust or restricted status for that entity or its members. Such term

also includes any Native village corporation, regional corporation, and Native Group established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. 1701, *et seq.*

(h) "Interested person" means those organizations and individuals that are concerned with the effects of an undertaking on historic properties.

(i) "Local government" means a city, county, parish, township, municipality, borough, or other general purpose political subdivision of a State.

(j) "National Historic Landmark" means a historic property that the Secretary of the Interior has designated a National Historic Landmark.

(k) "National Register" means the National Register of Historic Places maintained by the Secretary of the Interior.

(l) "National Register Criteria" means the criteria established by the Secretary of the Interior for use in evaluating the eligibility of properties for the National Register (36 CFR Part 60).

(m) "Secretary" means the Secretary of the Interior.

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

(o) "Undertaking" means any project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects. The project, activity, or program must be under the direct or indirect jurisdiction of a Federal agency or licensed or assisted by a Federal agency. Undertakings include new and continuing projects, activities, or programs and any of their elements not previously considered under section 106.

Subpart B—The Section 106 Process

§ 800.3 General

(a) *Scope.* The procedure in this subpart guides Agency Officials, State Historic Preservation Officers, and the Council in the conduct of the section 106 process. Alternative methods of meeting section 106 obligations are found in § 800.7, governing review of undertakings in States that have entered into agreements with the Council for section 106 purposes, and § 800.13, governing Programmatic Agreements with Federal agencies that pertain to specific programs or activities. Under each of these methods, the Council encourages Federal agencies to reach agreement on developing alternatives or

measures to avoid or reduce effects on historic properties that meet both the needs of the undertaking and preservation concerns.

(b) *Flexible application.* The Council recognizes that the procedures for the Agency Official set forth in these regulations may be implemented by the Agency Official in a flexible manner reflecting differing program requirements, as long as the purposes of section 106 of the Act and these regulations are met.

(c) *Timing.* Section 106 requires the Agency Official to complete the section 106 process prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license or permit. The Council does not interpret this language to bar an Agency Official from expending funds on or authorizing nondestructive planning activities preparatory to an undertaking before complying with section 106, or to prohibit phased compliance at different stages in planning. The Agency Official should ensure that the section 106 process is initiated early in the planning stages of the undertaking, when the widest feasible range of alternatives is open for consideration. The Agency Official should establish a schedule for completing the section 106 process that is consistent with the planning and approval schedule for the undertaking.

§ 800.4 Identifying historic properties.

(a) *Assessing information needs.* (1) Following a determination by the Agency Official that a proposed project, activity, or program constitutes an undertaking and after establishing the undertaking's area of potential effects, the Agency Official shall:

(i) Review existing information on historic properties potentially affected by the undertaking, including any data concerning the likelihood that unidentified historic properties exist in the area of potential effects;

(ii) Request the views of the State Historic Preservation Officer on further actions to identify historic properties that may be affected; and

(iii) Seek information in accordance with agency planning processes from local governments, Indian tribes, public and private organizations, and other parties likely to have knowledge of or concerns with historic properties in the area.

(2) Based on this assessment, the Agency Official should determine any need for further actions, such as field surveys and predictive modeling, to identify historic properties.

(b) *Locating historic properties.* In consultation with the State Historic

Preservation Officer, the Agency Official shall make a reasonable and good faith effort to identify historic properties that may be affected by the undertaking and gather sufficient information to evaluate the eligibility of these properties for the National Register. Efforts to identify historic properties should follow the Secretary's "Standards and Guidelines for Archeology and Historic Preservation" (48 FR 44716) and agency programs to meet the requirements of section 110(a)(2) of the Act.

(c) *Evaluating historical significance.* (1) In consultation with the State Historic Preservation Officer and following the Secretary's Standards and Guidelines for Evaluation, the Agency Official shall apply the National Register Criteria to properties that may be affected by the undertaking and that have not been previously evaluated for National Register eligibility. The passage of time or changing perceptions of significance may justify reevaluation of properties that were previously determined to be eligible or ineligible.

(2) If the Agency Official and the State Historic Preservation Officer agree that a property is eligible under the criteria, the property shall be considered eligible for the National Register for section 106 purposes.

(3) If the Agency Official and the State Historic Preservation Officer agree that the criteria are not met, the property shall be considered not eligible for the National Register for section 106 purposes.

(4) If the Agency Official and the State Historic Preservation Officer do not agree, or if the Council or the Secretary so request, the Agency Official shall obtain a determination from the Secretary of the Interior pursuant to the applicable National Park Service regulations.

(5) If the State Historic Preservation Officer does not provide views, then the State Historic Preservation Officer is presumed to agree with the Agency Official's determination for the purpose of this subsection.

(d) *When no historic properties are found.* If the Agency Official determines in accordance with §§ 800.4(a)-(c) that there are no historic properties that may be affected by the undertaking, the Agency Official shall provide documentation of this finding to the State Historic Preservation Officer. The Agency Official should notify interested persons and parties known to be interested in the undertaking and its possible effects on historic properties and make the documentation available to the public. In these circumstances, the

Agency Official is not required to take further steps in the section 106 process.

(e) *When historic properties are found.* If there are historic properties that the undertaking may affect, the Agency official shall assess the effects in accordance with Section 800.5.

§ 800.5 Assessing effects.

(a) *Applying the Criteria of Effect.* In consultation with the State Historic Preservation Officer, the Agency Official shall apply the Criteria of Effect (§ 800.9(a)) to historic properties that may be affected, giving consideration to the views, if any, of interested persons.

(b) *When no effect is found.* If the Agency Official finds the undertaking will have no effect on historic properties, the Agency Official shall notify the State Historic Preservation Officer and interested persons who have made their concerns known to the Agency Official and document the findings, which shall be available for public inspection. Unless the State Historic Preservation Officer objects within 15 days of receiving such notice, the Agency Official is not required to take any further steps in the section 106 process. If the State Historic Preservation Officer files a timely objection, then the procedures described in § 800.5(c) are followed.

(c) *When an effect is found.* If an effect on historic properties is found, the Agency Official, in consultation with the State Historic Preservation Officer, shall apply the Criteria of Adverse Effect (§ 800.9(b)) to determine whether the effect of the undertaking should be considered adverse.

(d) *When the effect is not considered adverse.* (1) If the Agency Official finds the effect is not adverse, the Agency Official shall:

(i) Obtain the State Historic Preservation Officer's concurrence with the finding and notify and submit to the Council summary documentation, which shall be available for public inspection; or

(ii) Submit the finding with necessary documentation (§ 800.8(a)) to the Council for a 30-day review period and notify the State Historic Preservation Officer.

(2) If the Council does not object to the finding of the Agency Official within 30 days of receipt of notice, or if the Council objects but proposes changes that the Agency Official accepts, the Agency Official is not required to take any further steps in the section 106 process other than to comply with any agreement with the State Historic Preservation Officer or Council concerning the undertaking. If the

Council objects and the Agency Official does not agree with changes proposed by the Council, then the effect shall be considered as adverse.

(e) *When the effect is adverse.* If an adverse effect on historic properties is found, the Agency Official shall notify the Council and shall consult with the State Historic Preservation Officer to seek ways to avoid or reduce the effects on historic properties. Either the Agency Official or the State Historic Preservation Officer may request the Council to participate. The Council may participate in the consultation without such a request.

(1) *Involving interested persons.* Interested persons shall be invited to participate as consulting parties as follows when they so request:

(i) The head of a local government when the undertaking may affect historic properties within the local government's jurisdiction;

(ii) The representative of an Indian tribe in accordance with § 800.1(c)(2)(iii);

(iii) Applicants for or holders of grants, permits, or licenses, and owners of affected lands; and

(iv) Other interested persons when jointly determined appropriate by the Agency Official, the State Historic Preservation Officer, and the Council, if participating.

(2) *Documentation.* The Agency Official shall provide each of the consulting parties with the documentation set forth in § 800.8(b) and such other documentation as may be developed in the course of consultation.

(3) *Informing the public.* The Agency Official shall provide an adequate opportunity for members of the public to receive information and express their views. The Agency Official is encouraged to use existing agency public involvement procedures to provide this opportunity. The Agency Official, State Historic Preservation Officer, or the Council may meet with interested members of the public or conduct a public information meeting for this purpose.

(4) *Agreement.* If the Agency Official and the State Historic Preservation Officer agree upon how the effects will be taken into account, they shall execute a Memorandum of Agreement. When the Council participates in the consultation, it shall execute the Memorandum of Agreement along with the Agency Official and the State Historic Preservation Officer. When the Council has not participated in consultation, the Memorandum of Agreement shall be submitted to the Council for comment in accordance with § 800.6(a). As appropriate, the Agency Official, the State Historic Preservation

Officer, and the Council, if participating, may agree to invite other consulting parties to concur in the agreement.

(5) *Amendments.* The Agency Official, the State Historic Preservation Officer, and the Council, if it was a signatory to the original agreement, may subsequently agree to an amendment to the Memorandum of Agreement. When the Council is not a party to the Memorandum of Agreement, or the Agency Official and the State Historic Preservation Officer cannot agree on changes to the Memorandum of Agreement, the proposed changes shall be submitted to the Council for comment in accordance with § 800.8.

(6) *Ending consultation.* The Council encourages Agency Officials and State Historic Preservation Officers to utilize the consultation process to the fullest extent practicable. After initiating consultation to seek ways to reduce or avoid effects on historic properties, State Historic Preservation Officer, the Agency Official, or the Council, at its discretion, may state that further consultation will not be productive and thereby terminate the consultation process. The Agency Official shall then request the Council's comments in accordance with § 800.6(b) and notify all other consulting parties of its requests.

§ 800.6 Affording the Council an opportunity to comment.

(a) *Review of a Memorandum of Agreement.* (1) When an Agency Official submits a Memorandum of Agreement accompanied by the documentation specified in § 800.8(b) and (c), the Council shall have 30 days from receipt to review it. Before this review period ends, the Council shall:

(i) Accept the Memorandum of Agreement, which concludes the section 106 process, and informs all consulting parties; or

(ii) Advise the Agency Official of changes to the Memorandum of Agreement that would make it acceptable; subsequent agreement by the Agency Official, the State Historic Preservation Officer, and the Council concludes the section 106 process; or

(iii) Decide to comment on the undertaking, in which case the Council shall provide its comments within 60 days of receiving the Agency Official's submission, unless the Agency Official agrees otherwise.

(2) If the Agency Official, the State Historic Preservation Officer, and the Council do not reach agreement in accordance with § 800.6(a)(1)(iii), the Agency Official shall notify the Council, which shall provide its comments within 30 days of receipt of notice.

(b) *Comment when there is no agreement.* (1) When no Memorandum of Agreement is submitted, the Agency Official shall request Council comment and provide the documentation specified in § 800.8(d). When requested by the Agency Official, the Council shall provide its comments within 60 days of receipt of the Agency Official's request and the specified documentation.

(2) The Agency Official shall make a good faith effort to provide reasonably available additional information concerning the undertaking and shall assist the Council in arranging an onsite inspection and public meeting when requested by the Council.

(3) The Council shall provide its comments to the head of the agency requesting comment. Copies shall be provided to the State Historic Preservation Officer, interested persons, and others as appropriate.

(c) *Response to Council comment.* (1) When a Memorandum of Agreement becomes final in accordance with § 800.6(a)(1) (i) or (ii), the Agency Official shall carry out the undertaking in accordance with the terms of the agreement. This evidences fulfillment of the agency's section 106 responsibilities. Failure to carry out the terms of a Memorandum of Agreement requires the Agency Official to resubmit the undertaking to the Council for comment in accordance with § 800.6.

(2) When the Council had commented pursuant to § 800.6(a), the Agency Official shall consider the Council's comments in reaching a final decision on the proposed undertaking. The Agency Official shall report the decision to the Council, and if possible, should do so prior to initiating the undertaking.

(d) *Foreclosure of the Council's opportunity to comment.* (1) The Council may advise an Agency Official that it considers the agency has not provided the Council a reasonable opportunity to comment. The decision to so advise the Agency Official will be reached by a majority vote of the Council or by a majority vote of a panel consisting of three or more Council members with the concurrence of the Chairman.

(2) The Agency Official will be given notice and a reasonable opportunity to respond prior to a proposed Council determination that the agency has foreclosed the Council's opportunity to comment.

(e) *Public requests to the Council.* (1) When requested by any person, the Council shall consider an Agency Official's finding under §§ 800.4(b), 800.4(c), 800.4(d), or 800.5(b), and, within 30 days of receipt of the request, advise the Agency Official, the State Historic

Preservation Officer, and the person making the request of its views of the Agency Official's finding.

(2) In light of the Council views, the Agency Official should reconsider the finding. However, an inquiry to the Council will not suspend action on an undertaking

(3) When the finding concerns the eligibility of a property for the National Register, the Council shall refer the matter to the Secretary.

§ 800.7 Agreements with States for section 106 reviews.

(a) *Establishment of State agreements.* (1) Any State Historic Preservation Officer may enter into an agreement with the Council to substitute a State review process for the procedures set forth in these regulations, provided that:

(i) The State historic preservation program has been approved by the Secretary pursuant to section 101(b)(1) of the Act; and

(ii) The Council, after analysis of the State's review process and consideration of the views of Federal and State agencies, local governments, Indian tribes, and the public, determines that the State review process is at least as effective as, and no more burdensome than, the procedures set forth in these regulations in meeting the requirements of section 106.

(2) The Council, in analyzing a State's review process pursuant to § 800.7(a)(1)(ii), shall:

(i) Review relevant State laws, Executive orders, internal directives, standards, and guidelines;

(ii) Review the organization of the State's review process;

(iii) Solicit and consider the comments of Federal and State agencies, local governments, Indian tribes, and the public;

(iv) Review the results of program reviews carried out by the Secretary; and

(v) Review the record of State participation in the section 106 process.

(3) The Council will enter into an agreement with a State under this section only upon determining, at minimum, that the State has a demonstrated record of performance in the section 106 process and the capability to administer a comparable process at the State level.

(4) A State agreement shall be developed through consultation between the State Historic Preservation Officer and the Council and concurred in by the Secretary before submission to the Council for approval. The Council may invite affected Federal and State agencies, local governments, Indian

tribes, and other interested persons to participate in this consultation. The agreement shall:

(i) Specify the historic preservation review process employed in the State, showing that this process is at least as effective as, and no more burdensome than, that set forth in these regulations;

(ii) Establish special provisions for participation of local governments or Indian tribes in the review of undertakings falling within their jurisdiction, when appropriate;

(iii) Establish procedures for public participation in the State review process;

(iv) Provide for Council review of actions taken under its terms, and for appeal of such actions to the Council; and

(v) Be certified by the Secretary as consistent with the Secretary's Standards and Guidelines for Archaeology and Historic Preservation.

(5) Upon concluding a State agreement, the Council shall publish notice of its execution in the Federal Register and make copies of the State agreement available to all Federal agencies.

(b) *Review of undertakings when a State agreement is in effect.* (1) When a State agreement under § 800.7(a) is in effect, an Agency Official may elect to comply with the State review process in lieu of compliance with these regulations.

(2) At any time during review of an undertaking under a State agreement, an Agency Official may terminate such review and comply instead with §§ 800.4 through 800.6 of these regulations.

(3) At any time during review of an undertaking under a State agreement, the Council may participate. Participants are encouraged to draw upon the Council's expertise as appropriate.

(c) *Monitoring and termination of State agreements.* (1) The Council shall monitor activities carried out under State agreements, in coordination with the Secretary of the Interior's approval of State programs under section 101(b)(1) of the Act. The Council may request that the Secretary monitor such activities on its behalf.

(2) The Council may terminate a State agreement after consultation with the State Historic Preservation Officer and the Secretary.

(3) A State agreement may be terminated by the State Historic Preservation Officer.

(4) When a State agreement is terminated pursuant to § 800.7(c)(2) and (3), such termination shall have no effect on undertakings for which review under the agreement was complete or in

progress at the time the termination occurred.

§ 800.8 Documentation requirements.

(a) *Finding of no adverse effect.* The purpose of this documentation is to provide sufficient information to explain how the Agency Official reached the finding of no adverse effect. The required documentation is as follows:

(1) A description of the undertaking, including photographs, maps, and drawings, as necessary;

(2) A description of historic properties that may be affected by the undertaking;

(3) A description of the efforts used to identify historic properties;

(4) A statement of how and why the criteria of adverse effect were found inapplicable; and

(5) The views of the State Historic Preservation Officer, affected local governments, Indian tribes, Federal agencies, and the public, if any were provided, as well as a description of the means employed to solicit those views.

(b) *Finding of adverse effect.* The required documentation is as follows:

(1) A description of the undertaking, including photographs, maps, and drawings, as necessary;

(2) A description of the efforts to identify historic properties;

(3) A description of the affected historic properties, using materials already compiled during the evaluation of significance, as appropriate; and

(4) A description of the undertaking's effects on historic properties.

(c) *Memorandum of Agreement.* When a memorandum is submitted for review in accordance with § 800.6(a)(1), the documentation, in addition to that specified in § 800.8(b), shall also include a description and evaluation of any proposed mitigation measures or alternatives that were considered to deal with the undertaking's effects and a summary of the views of the State Historic Preservation Officer and any interested persons.

(d) *Requests for comment when there is no agreement.* The purpose of this documentation is to provide the Council with sufficient information to make an independent review of the undertaking's effects on historic properties as the basis for informed and meaningful comments to the Agency Official. The required documentation is as follows:

(1) A description of the undertaking, with photographs, maps, and drawings, as necessary;

(2) A description of the efforts to identify historic properties;

(3) A description of the affected historic properties, with information on

the significant characteristics of each property:

(4) A description of the effects of the undertaking on historic properties and the basis for the determinations;

(5) A description and evaluation of any alternatives or mitigation measures that the Agency Official proposes for dealing with the undertaking's effects;

(6) A description of any alternatives or mitigation measures that were considered but not chosen and the reasons for their rejection;

(7) Documentation of consultation with the State Historic Preservation Officer regarding the identification and evaluation of historic properties, assessment of effect, and any consideration of alternatives or mitigation measures;

(8) A description of the Agency Official's efforts to obtain and consider the views of affected local governments, Indian tribes, and other interested persons;

(9) The planning and approval schedule for the undertaking; and

(10) Copies or summaries of any written views submitted to the Agency Official concerning the effects of the undertaking on historic properties and alternatives to reduce or avoid those effects.

§ 800.9 Criteria of effect and adverse effect.

(a) An undertaking has an effect on a historic property when the undertaking may alter characteristics of the property that may qualify the property for inclusion in the National Register. For the purpose of determining effect, alteration to features of a property's location, setting, or use may be relevant depending on a property's significant characteristics and should be considered.

(b) An undertaking is considered to have an adverse effect when the effect on a historic property may diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Adverse effects on historic properties include, but are not limited to:

(1) Physical destruction, damage, or alteration of all or part of the property;

(2) Isolation of the property from or alteration of the character of the property's setting when that character contributes to the property's qualification for the National Register;

(3) Introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting;

(4) Neglect of a property resulting in its deterioration or destruction; and

(5) Transfer, lease, or sale of the property.

(c) Effects of an undertaking that would otherwise be found to be adverse may be considered as being not adverse for the purpose of these regulations

(1) When the historic property is of value only for its potential contribution to archeological, historical, or architectural research, and when such value can be substantially preserved through the conduct of appropriate research, and such research is conducted in accordance with applicable professional standards and guidelines;

(2) When the undertaking is limited to the rehabilitation of buildings and structures and is conducted in a manner that preserves the historical and architectural value of affected historic property through conformance with the Secretary's "Standards for Rehabilitating Historic Buildings", or

(3) When the undertaking is limited to the transfer, lease, or sale of a historic property, and adequate restrictions or conditions are included to ensure preservation of the property's significant historic features.

Subpart C—Special Provisions

§ 800.10 Protecting National Historic Landmarks.

(a) Section 110(f) of the Act requires that the Agency Official, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic Landmark that may be directly and adversely affected by an undertaking. When commenting on such undertakings, the Council shall use the process set forth in §§ 800.4 through 800.6 and give special consideration to protecting National Historic Landmarks as follows:

(a) Any consultation conducted under § 800.5(e) shall include the Council;

(b) The Council may request the Secretary under section 213 of the Act to provide a report to the Council detailing the significance of the property, describing the effects of the undertaking on the property, and recommending measures to avoid, minimize, or mitigate adverse effects; and

(c) The Council shall report its comments, including Memoranda of Agreement, to the President, the Congress, the Secretary, and the head of the agency responsible for the undertaking.

§ 800.11 Properties discovered during implementation of an undertaking.

(a) *Planning for discoveries.* When the Agency Official's identification efforts

in accordance with § 800.4 indicate that historic properties are likely to be discovered during implementation of an undertaking, the Agency Official is encouraged to develop a plan for the treatment of such properties if discovered and include this plan in any documentation prepared to comply with § 800.5.

(b) *Federal agency responsibilities.* (1) When an Agency Official has completed the section 106 process and prepared a plan in accordance with § 800.11(a), the Agency Official shall satisfy the requirements of section 106 concerning properties discovered during implementation of an undertaking by following the plan.

(2) When an Agency Official has completed the section 106 process without preparing a plan in accordance with § 800.11(a) and finds after beginning to carry out the undertaking that the undertaking will affect a previously unidentified property that may be eligible for inclusion in the National Register, or affect a known historic property in an unanticipated manner, the Agency Official shall afford the Council an opportunity to comment by choosing one of the following courses of action:

(i) Comply with § 800.6;

(ii) Develop and implement actions that take into account the effects of the undertaking on the property to the extent feasible and the comments from the State Historic Preservation Officer and the Council pursuant to § 800.11(c); or

(iii) If the property is principally of archeological value and subject to the requirements of the Archeological and Historic Preservation Act, 16 U.S.C. 469(a)-(c), comply with that Act and implementing regulations instead of these regulations.

(3) Section 106 and these regulations do not require the Agency Official to stop work on the undertaking. However, depending on the nature of the property and the undertaking's apparent effects on it, the Agency Official should make reasonable efforts to avoid or minimize harm to the property until the requirements of this section are met.

(c) *Council comments.* (1) When comments are requested pursuant to § 800.11(b)(2)(i), the Council will provide its comments in a time consistent with the Agency Official's schedule, regardless of longer time periods allowed by these regulations for Council review.

(2) When an Agency Official elects to comply with § 800.11(b)(2)(ii), the Agency Official shall notify the State Historic Preservation Officer and the

Council at the earliest possible time, describe the actions proposed to take effects into account, and request the Council's comments. The Council shall provide interim comments to the Agency Official within 48 hours of the request and final comments to the Agency Official within 30 days of the request.

(3) When an Agency Official complies with § 800.11(b)(2)(iii), the Agency Official shall provide the State Historic Preservation Officer an opportunity to comment on the work undertaken and provide the Council with a report on the work after it is undertaken.

(d) Other considerations.

(1) When a newly discovered property has not previously been included in or determined eligible for the National Register, the Agency Official may assume the property to be eligible for purposes of section 106.

(2) When a discovery occurs and compliance with this section is necessary on lands under the jurisdiction of an Indian tribe, the Agency Official shall consult with the Indian tribe during implementation of this section's requirements.

§ 800.12 Emergency undertakings.

(a) When a Federal agency head proposes an emergency action and elects to waive historic preservation responsibilities in accordance with 36 CFR 78.2, the Agency Official may comply with the requirements of 36 CFR Part 78 in lieu of these regulations. An Agency Official should develop plans for taking historic properties into account during emergency operations. At the request of the Agency Official, the Council will assist in the development of such plans.

(b) When an Agency Official proposes an emergency undertaking as an essential and immediate response to a disaster declared by the President or the appropriate Governor, and § 800.12(a) does not apply, the Agency Official may satisfy section 106 by notifying the Council and the appropriate State Historic Preservation Officer of the emergency undertaking and affording them an opportunity to comment within seven days if the Agency Official considers that circumstances permit.

(c) For the purposes of activities assisted under Title I of the Housing and Community Development Act of 1974, as amended, § 800.12(b) also applies to an imminent threat to public health or safety as a result of natural disaster or emergency declared by a local government's chief executive officer or legislative body, provided that if the Council or the State Historic Preservation Officer objects, the Agency

Official shall comply with §§ 800.4 through 800.6.

(d) This section does not apply to undertakings that will not be implemented within 30 days after the disaster or emergency. Such undertakings shall be reviewed in accordance with §§ 800.4 through 800.6

§ 800.13 Programmatic Agreements.

(a) *Application.* An Agency Official may elect to fulfill an agency's section 106 responsibilities for a particular program, a large or complex project, or a class of undertakings that would otherwise require numerous individual requests for comments through a Programmatic Agreement. Programmatic Agreements are appropriate for programs or projects:

(1) When effects on historic properties are similar and repetitive or are multi-State or national in scope;

(2) When effects on historic properties cannot be fully determined prior to approval.

(3) When non-Federal parties are delegated major decisionmaking responsibilities;

(4) That involve development of regional or land-management plans; or

(5) That involve routine management activities at Federal installations.

(b) *Consultation process.* The Council and the Agency Official shall consult to develop a Programmatic Agreement. When a particular State is affected, the appropriate State Historic Preservation Officer shall be a consulting party. When the agreement involves issues national in scope, the President of the National Conference of State Historic Preservation Officers or a designated representative shall be invited to be a consulting party by the Council. The Council and the Agency Official may agree to invite other Federal agencies or others to be consulting parties or to participate, as appropriate.

(c) *Public involvement.* The Council, with the assistance of the Agency Official, shall arrange for public notice and involvement appropriate to the subject matter and the scope of the program. Views from affected units of State and local government, Indian tribes, industries, and organizations will be invited.

(d) *Execution of the Programmatic Agreement.* After consideration of any comments received and reaching final agreement, the Council and the Agency Official shall execute the agreement. Other consulting parties may sign the Programmatic Agreement as appropriate.

(e) *Effect of the Programmatic Agreement.* An approved Programmatic Agreement satisfies the Agency's

section 106 responsibilities for all individual undertakings carried out in accordance with the agreement until it expires or is terminated.

(f) *Notice.* The Council shall publish notice of an approved Programmatic Agreement in the Federal Register and make copies readily available to the public.

(g) *Failure to carry out a Programmatic Agreement.* If the terms of a Programmatic Agreement are not carried out or if such an agreement is terminated, the Agency Official shall comply with §§ 800.4 through 800.6 with regard to individual undertakings covered by the agreement.

§ 800.14 Coordination with other authorities.

To the extent feasible, Agency Officials, State Historic Preservation Officers, and the Council should encourage coordination of implementation of these regulations with the steps taken to satisfy other historic preservation and environmental authorities by:

(a) Integrating compliance with these regulations with the processes of environmental review carried out pursuant to the National Environmental Policy Act, and coordinating any studies needed to comply with these regulations with studies of related natural and social aspects;

(b) Designing determinations and agreements to satisfy the terms not only of section 106 and these regulations, but also of the requirements of such other historic preservation authorities as the Archeological and Historic Preservation Act, the Archeological Resources Protection Act, section 110 of the National Historic Preservation Act, and section 4(f) of the Department of Transportation Act, as applicable, so that a single document can be used for the purposes of all such authorities;

(c) Designing and executing studies, surveys, and other information-gathering activities for planning and undertaking so that the resulting information and data is adequate to meet the requirements of all applicable Federal historic preservation authorities; and

(d) Using established agency public involvement processes to elicit the views of the concerned public with regard to an undertaking and its effects on historic properties.

§ 800.15 Counterpart regulations.

In consultation with the Council, agencies may develop counterpart regulations to carry out the section 106 process. When concurred in by the Council, such counterpart regulations

shall stand in place of these regulations for the purposes of the agency's compliance with section 106.

Dated August 27, 1986

John M. Fowler,

Acting Executive Director.

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BILLING CODE 4310-10-M



"Your aptitude tests indicate that you'd make a good hunter or gatherer."

PARADE, AUGUST 8, 1961 13

'Treasure' island

Prehistoric artifacts unearthed on Davids Island

By Susan Retsky
Staff Writer

Excavation has begun on Davids Island. The digging tools are not the bulldozers and shovels of construction men but the fine picks and brushes of archaeologists.

While a \$1 billion condominium project is being planned for the 80-acre island, the archaeologists are searching for clues to the culture of prehistoric native Americans.

What they have found so far includes the remains of several food-storage pits, a hearth, pottery shards, and charcoal.

The items were "found really in an undisturbed context," said Jay Cohen, an archaeologist with Louis Berger and Associates of New Jersey and the lead-

er of the Davids Island dig.

Cohen said the artifacts were discovered about 18 inches beneath the ground; they were not contaminated with more modern artifacts, such as pieces of glass or rusted nails and bolts, which had been found closer to the surface.

Their findings — to be included in an environmental impact statement for the proposed development — could result in a more extensive excavation of Davids Island if they are considered to be significant by state and federal preservation officials, he said.

"Just collecting artifacts is not enough of a reason" to dig further, he said. Unless it adds to knowledge of the

prehistoric people of Davids Island and New Rochelle and Westchester County, he said, "why spend money?"

Fearing rampaging treasure hunters, Cohen would only reveal that the pits were located in an area that was used as a parade ground when the island was owned by the U.S. Army and was known as Fort Slocum. The meticulous work of archaeologists can be destroyed in seconds by a shovel-wielding vandal, he said.

Joanne Saker, one of the archaeologists on the four-member team, told of finding numerous flakes of stone in former "chipping stations," where tools and weapons were manufactured. Only one arrowhead was found during the survey, said Cohen.

The dig might yield clues to the Woodland culture that existed from 2000 B.C. to A.D. 1600, according to Cohen. But the exact dates of the pottery shards and other arti-

facts are to be determined at a Berger and Associates laboratory in East Orange, N.J.

The goal, said John Hotopp, vice president of the Cultural Resource Division of Louis Berger and Associates, is "to get the knowledge and use it to further understand a past culture."

Archaeology, he said, "is a complex, ancient jigsaw puzzle where you never can get all the pieces."

Once the data is recorded, the artifacts will be sent to universities for further study or put on public display. Rather than destroy a historical site, a builder might incorporate it into a park within the development, Hotopp said.

It is known that Davenport Neck, a peninsula about 1,500 feet from Davids Island, was the site of a small Siwanoy Indian settlement. The Siwanoy were a tribe of Mohegans of Algonquin stock. Hundreds of Indian artifacts are on display at the Huguenot-Thomas Paine Historical Association on

North Avenue in New Rochelle.

Arriving on the island on a recent sunny day, the archaeological team trudged through hip-high poison ivy and ducked brambles as it made its way to the former parade grounds.

First, two sections of about 9 square feet each were measured off. Diggers at each section shoveled soil onto a wire sifter while another worker gingerly felt each clod for a possible artifact.

Each time the soil — composed of sand, silt and clay — changed in texture, the findings were put into a plastic bag. The depth at which the artifacts were found and the hue and texture of the soil were recorded.

The color of the soil gives a clue to what kind of activity was performed on the site. An archaeologist's color codebook is used to help make the identification, Ms. Saker said.

The Reporter
Dispatch
White Plains

20 October 1986

Pre-historic settlement uncovered

EDISON — Cheops may not have yet caused the great pyramid to rise at Gizeh during Egypt's IVth Dynasty when a band of pre-historic Indians encamped along the banks of the Bound Brook in Edison's Dismal Swamp.

Remnants of that settlement have just been uncovered by a team of archaeologists, who date the site as being between 3,000 and 5,000 years old.

"How significant is this site?" asked William Bohn, chairman of the Edison Planning Board, during a recent inspection tour of the area along with Mayor Anthony M. Yelencsics.

"Extremely so," Bohn was told by Charles A. Bello of Research & Archaeological Management Inc. of Highland Park.

The firm was engaged by Edison Tyler Estates, which has plans to develop portions of the Dismal Swamp as a planned unit development (PUD), after it was reported at hearings on rezoning the property PUD that the site between Talmadge Road and Park Avenue contained "Indian artifacts."

According to Mike Seidner, an associate of Edison Tyler Estates, he took this to mean American Indians who roamed this area when it was being settled by the Dutch and English.

He was no little amazed to learn from Bello and his associate, Peter Primavera, that the Indians who left behind evidence of their life in the Dismal Swamp lived here before the dawn of written history at a time when the Bronze Age was just beginning in Europe.

Research & Archaeological Management was engaged by Edison Tyler Woods to first determine if the

reported site existed, what it contained and whether it was "significant."

After three months of work, the archaeologists determined that it was, indeed, significant.

Now Edison Tyler Woods is working with the archaeologists to determine what will be involved in financing a full-scale excavation of the site centered in the woods on elevated ground just a few hundred feet from the brook.

Seidner said that a report on what will be involved is expected in a few weeks.

However, according to Bohn, the area of the settlement will be off limits to any development until all of the artifacts have been removed.

"They'll not be able to build on it until such times that the archaeologists say it's clean," said Bohn.

Bello reported that evidence of the aboriginal inhabitants first was uncovered on the surface and that excavations of up to between 10 and 12 inches produced such objects as argillite arrow heads or "projectile points."

During the tour what appeared to be a small piece of shale kicked up by one of the visitors was identified by Primavera as a fire-cracked stone.

Used to hold the heat in underground "ovens," it was other similar pieces of stone that provided the "tip off" to the existence and location of the Stone Age settlement, according to Primavera.

What makes the Dismal Swamp find so significant, according to Bello, is the fact that so much of the site has never been plowed up or destroyed.

Bello said it was "incredible" to find a settlement *in situ* just as these pre-historic Indians left it with no "accumulation of a later occupation to contaminate it."

The archaeologists described the Indians as nomadic "hunter-gatherers" who did not engage in agriculture and "lived off the land." And while they did not establish permanent homes, they did stake out "territories."

"It was suitable place to live," said Bello of the Dismal Swamp because it provided "high dry ground" on which to set up camp and was close to water.

It also is their supposition that the encampment, tentatively estimated to occupy an area of 300'x300', was occupied only seasonally.

"Doing the digs" to completely mine the site will be "a long and tedious process," Bohn and Mayor Yelencsics were told.

And "it speaks well of the developers," said Primavera, that

the important historic find "is now available to the scientific community."

"It is a contribution to history," said Primavera, who pointed out that failure to excavate the site could result in the ultimate loss of all that it contains.

"This is a rare, rare opportunity to grab something to make a study of it," he said.

He added that the contents of the site do not have "a high dollar value."

"It's scientific value that's buried in there," he added.

According to Primavera, Research & Archaeological Management's main interest in the excavation will be the anthropological knowledge it provides — new information about man and his physical, mental, social and cultural development — rather than the antiquities themselves.

Primavera and Bello tentatively suggested that once studied, the contents of the settlement could be made the property of the New Jersey State Museum and then returned to Edison for permanent exhibition.