



MEMORANDUM FOR RECORD

Date: 1 August 2007

RE: Section 106 of the National Historic Preservation Act (NHPA) process revisions and designation approval to Federal Highway Administration (FHWA) for the Washington State Department of Transportation (WSDOT) projects where the FHWA is the lead federal agency

MFR PURPOSE: This MFR is being prepared to summarize the need for changes, define the designation of the 106 process to FHWA, and provide a process revision to ensure compliance with Section 106 and 110 of the NHPA for transportation projects where FHWA is the lead federal agency and a Department of the Army (DA) permit is required. This MFR serves as the Corps' approval of the designation to FHWA to initiate and conduct the 106 consultation, and approval to use the process summarized below defining the coordination and process requirements between the Corps' Regulatory Branch and Environmental Resources Section (ERS) for complying with Section 106 and 110 of the NHPA for transportation projects.

PROBLEM – Historically the FHWA as the lead federal agency for transportation projects would conduct the Section 106 consultation process without involving the Corps, and complete the process for approval to the State Historic Preservation Officer (SHPO) and Advisory Council on Historic Preservation (ACHP). This resulted in the following problems:

- Permitting delays for projects in cases where there was an adverse effect, and a required memorandum of agreement (MOA) that needed Corps review and approval (and preferably signature).
- Tribal issues and concerns raised, and sometimes addressed during the Section 106 coordination and consultation process are sometimes brought up again as objections to the Corps public notices for permits.
- In some cases, Tribes are waiting to consult with the Corps during the permit process and are not providing information to FHWA or WSDOT during the 106 consultation process.
- ACHP has notified the FHWA that if they will be conducting the 106 consultation process as the lead, and a DA permit will be required, then the Corps must state in writing to ACHP that the Corps wishes to designate FHWA as the lead federal agency pursuant to 36 CFR § 800.2(a)(2) and Appendix C of 33 CFR § 325 to complete Section 106.

DESIGNATION - Regulatory has met with ERS to prepare the following solution summarized and detailed below. In addition, the new process includes the Corps

designating FHWA (Per 36 CFR § 800.2[a][2]) to act on the Corps' behalf to complete Section 106 and 110 of the NHPA consistent with Appendix C of 33 CFR § 325 and all subsequent interim guidance to Appendix C.

Summary of process:

1. The details of the procedures FHWA and WSDOT will follow for initiating consultation and conducting historic properties assessments are defined in the *First Amended Programmatic Agreement Implementing Section 106 of the National Historic Preservation Act for the Federal-aid highway Program in Washington State Administered by the Federal Highway Administration* executed in March 2007.
2. Section 106 Consultation Initiation letters for projects expected to require a DA permit will reference the need for the federal permit, explain that the Section 106 consultation will meet the Section 106 obligations of both the FHWA and the Corps, and note that the Corps defined Area of Potential Effects (APE) is based on the Corps regulated area of jurisdiction and that it may be different than the APE as defined by FHWA. This letter will also invite comments from the Indian Tribes to be sent to the Corps if they prefer to consult with the Corps directly. The Corps will be invited to any meetings or discussions with the Tribes if their concerns will be discussed as they relate to the Corps action and tribal trust responsibilities.
3. The Corps of Engineers Regulatory Branch South Sound Section Chief (presently Beth Coffey) will be copied on all correspondence with the Washington State Department of Archaeology and Historic Preservation (DAHP) and consulting parties concerning the APE.
4. The Corps will receive a copy of the Cultural Resources Survey Report after a WSDOT cultural resources specialist has endorsed its professional suitability and findings. It is expected that the Corps ERS will review the report within 30 days and notify FHWA if it is not suitable to allow the Corps to meet its Section 106 obligations.
5. If there is an adverse effect identified, the Corps will actively participate in the consultation, will define the Corps regulated APE, and will be signatory to the MOA, unless the Corps determines that their permit action is not sufficiently related to the Section 106 effects to require their participation, or the action is outside of the Corps regulated APE.
6. Similarly, if there is a project-specific Section 106 Programmatic Agreement developed for the project, the Corps will participate in the consultation and be signatory to the agreement.

CONCLUSION The Corps' Regulatory Branch, in coordination with the Environmental Resources Section agrees to designate FHWA to act on the Corps behalf to conduct Section 106 and 110 of the NHPA, and will follow the above process to ensure compliance with the NHPA.

Michelle Walker
Chief, Regulatory Branch

Date

Mark Ziminske
Chief, Environmental Resources Section

Date