

Historic Properties Section 106 Review for Multifamily and Office of Residential Care Facility FHA Programs, 7/23/20

Sara Jensen: Welcome everyone. And thanks for attending today's training on Historic Properties Section 106 Review for Multifamily and Office of Residential Care Facility Federal Housing Administration Programs, or FHA. My name is Sara Jensen and I am the program environmental clearance officer for HUD's Office of Housing.

I'm joined by Nancy Boone, HUD's federal preservation officer. She covers all of HUD's programs in her roles, but her position is located in the Office of Environment and Energy. Michelle Grainger and Orlando Velez are our technical assistance providers at Enterprise Community Partners. And we want to thank them for hosting this webinar. Today's webinar will be recorded and posted on the HUD Exchange.

This webinar is intended for FHA lenders, third party consultants, attorneys, and HUD staff that work with Multifamily and Office of Residential Care Facility FHA programs. Before I go over our training objectives and topics, I'll pass it over to Michelle from Enterprise to go over some webinar housekeeping, Michelle?

Michelle Grainger: Thank you, Sara. Just a quick note that all attendees on today's webinar will be muted. Please feel free to use the Q&A panel on the bottom of your screen to ask questions. We will not be utilizing the chat feature for today's webinar. All questions will be taken through the Q&A panel. And we will be answering some common questions for today's webinar.

Today's webinar will be using a Menti polling feature that I will go through in a few minutes. But should you want to change your computer audio to phone audio, please follow the steps at the bottom of your dashboard. To ask a question in today's presentation, please go to [menti.com](https://www.menti.com) and enter code 827811 or scan the QR code. Once there you may enter your nickname and questions will pop up when the presenter says that the poll is open. This is why you will currently not see any questions if you are there.

When a question appears, participants should answer before the countdown ends. A wrong or no answer gives zero points, while the faster you answer the more points you receive. There will be questions that have more than one correct answer. Please feel free to select one. You don't have to close out of the poll and go back to the website. The poll will advance to the next question when the presenter asks that. After the final poll is completed, the final winner will be announced on the webinar.

Now I'll pass it on to Sara to kick is off.

Sara Jensen: Thanks, Michelle. As we mentioned previously, this training is intended for lenders, third party consultants, attorneys, and HUD staff that work with Multifamily and Office of Residential Care Facility FHA programs. Our objectives are to explain how to document and prepare Section 106 preservation submissions for FHA applications, how to comply with specific MAP guide and 232 handbook requirements, and how applications can more fully address regulatory requirements and therefore avoid processing delays.

If you work with a HUD program other than FHA, particularly one that is under Part 58 or if you are a responsible entity, I would like to direct you instead to the HUD Exchange historic preservation page for links to guidance, documents, and training webinars for the programs you work with. Search for HUD and history preservation, or you can find the direct link on slide 76.

Speaking of slide numbers, Enterprise sent out a webinar reminder email Tuesday and again today that included a link to the slides we are using today. Enterprise has posted the link again in the chat feature on this webinar. If you would like to follow along and take notes, you can download those slides now.

Here's our very full list of topics, all presented today through the lens of Multifamily, and ORCF, or Office of Residential Care Facility, FHA programs. Nancy Boone will give an overview of Section 106, how to determine if a property is historic, how to consult with SHPOs, tribes, and interested parties, how to determine effect and resolve adverse effects, and the unpleasant topics of foreclosure, anticipatory demolition, and unanticipated discoveries. We'll walk you through the Section 106 screens in HUD's environmental review online system known as HEROS, explain tricky HEROS questions, what to upload, and how to document compliance in the system.

We'll be sharing new information about a proposed HUD delegation to FHA lenders. The Office of Multifamily Housing posted the proposed delegation memo to the MAP drafting table in February. Please note that the delegation will not go into effect until HUD publishes the MAP guide updates, and there will be a coordinated mortgagee letter for healthcare and hospital programs. We'll end with information about historic tax credits and some additional resources on Section 106.

As Michelle noted, we will have interactive polling questions throughout the presentation today. Thank you to those of you that submitted questions ahead of time with your registration. We have reviewed these questions and have made sure we cover the ones related to FHA programs during the session today.

We'll leave time at the end of the webinar for new questions submitted through the Q&A panel. There are two caveats. We will only accept questions related to FHA programs, and we cannot accept questions about specific projects. Please direct those to the multifamily office processing your application, or to Lean Thinking for Office of Residential Care projects. And they can bring in regional and field environmental officers for consultation.

We plan to finish our prepared remarks by 2:30 Eastern time today. However we will stay on the line until at least 2:45 to answer questions that come in during the presentation. If you need to leave at 2:30, don't worry, the fully recorded webinar will be posted. If we do not get to your question today, we recommend you visit the HUD Exchange for answers and/or contact your program contact. Now I'd like to turn the presentation over to HUD's federal preservation officer, Nancy Boone.

Nancy Boone: Thank you, Sara. It's a pleasure to be here with you today and talk about the National Historic Preservation Act, which was adopted in 1966. The Act itself is now over 50 years old. The Act requires that federal agencies consider the impact of their projects on historic

and cultural resources. The process is known as Section 106. It's named after the original section of the Act.

Section 106 sets out a framework for considering impacts to historic properties. It does not prescribe a particular outcome. Section 106 can actually result in a range of outcomes from full preservation to total loss of historic properties.

Today we're going to talk specifically about how Section 106 works in multifamily and healthcare FHA programs. And we'll be covering a range of activities that are typical for your programs, new construction, rehab, demolition, refinancing, transfers, and HAP renewals with capital repairs.

Section 106 is a consultative process. It involves multiple parties and a four step analysis of project impacts. The first step is preparing to begin the review and determining if a federal undertaking requires consultation. The second step involves the identification of historic properties. If there are no historic properties, the Section 106 review concludes at this stage.

If there are historic properties, but they're not going to be affected, the review also concludes at this stage. If there are historic properties, the review goes on to consider project impacts, and whether in step four the impacts may be adverse. If they are, then consultation continues to avoid, minimize, or mitigate those adverse effects. Essentially the conclusion at each step of the process determines the need for the next step.

For the attorneys in the room I will just mention that the National Historic Preservation Act was renumbered a few years ago in the US Code, and the new citation is listed here. It's in Title 54. HUD regulations adopt the National Historic Preservation Act by reference, as well as the Section 106 regulations which are found at 36 CFR 800.

The MAP guide also provides requirements and guidance in Section 9.5.D. And likewise the Office of Residential Care handbook contains guidance about Section 106 in 7.5.D. Now that's a correction from the handout that you received earlier. The section that is relevant here is 7.5.D. Also RAD has recently issued environmental guidance specifically for RAD projects. And all of these can be found on the HUD Exchange.

There are several instances when a standard Section 106 review is not required. And we're going to look at those first. Some activities are covered by a no potential to cause effects memo. These memos are issued by the Office of Environment and Energy after review of a program and the likelihood of the program's activities to include potential adverse effects. Secondly, as you may know, HUD regulations exempt from review, project activities that are considered to be maintenance. We'll talk more about the so-called maintenance notice a little bit later.

Third, it's also possible that all activities in a project will be included in a programmatic agreement which has an exempt list, to eliminate the need to review projects that are limited to those exemptions. We'll talk more about programmatic agreements further along in this presentation.

And Sara will cover how to document the applicability of these three exemptions later as well. Outside of these three instances that do not require further review, all HUD undertakings must comply with Section 106, which results in one of three possible determinations. No historic property is affected, no adverse effect, or adverse effect.

Let's go into a little bit more detail about the first three situations that do not require further review. No potential to cause effects memos are limited to activities that have no or minimal physical effects. They are formal determinations developed and written by the environmental clearance officer for the department, in collaboration with the program that's the subject of the memo.

There are not very many potential no potential to cause effects memos. Ones that relate to housing include a memo on 223(f) refinancing transactions of noninsured mortgages with no associated rehabilitation or new construction, or there's one for RAD projects limited to maintenance. The memos are posted online at the HUD Exchange.

As I mentioned, HUD and environmental regulations exempt maintenance activities from further environmental review. Over the years there was a lot of confusion about what activities properly belonged in a definition of maintenance. In 2016 we worked with colleagues all across HUD departments to collaborate on a common definition of maintenance that would apply to all programs for environmental purposes. The result was CPD Notice 16-02. The Notice has general guidance on maintenance and a chart that lists specific activities that qualify as maintenance or rehabilitation. Maintenance is exempt and rehabilitation is not exempt in Section 106.

Here you see an excerpt from the chart which characterizes repairs to interior walls and ceilings as maintenance, and replacement of finishes as rehabilitation. So the chart is intended to show the line between those two activities, to help reviewers clarify which activities qualify as maintenance.

It's important to note that the definition of maintenance for environmental review purposes under HUD's environmental regulations may be different from how an individual HUD program uses the term maintenance, or other terms that they use such as renovation or rehabilitation. The maintenance notice and this definition of maintenance applies to the environmental review context specifically.

Programmatic agreements are a wonderful tool to streamline Section 106 review. They are legal documents that are negotiated on a state by state basis with the state historic preservation officer, Indian tribes, and other interested parties. HUD has a database of existing programmatic agreements on the HUD Exchange. And you can check to see if one exists that applies to a given program or a given location. A programmatic agreement usually includes a list that of activities that while exceeding maintenance have little to no potential for adversely affecting historic properties.

So for instance, a PA or programmatic agreement can include an exemption for the rehabilitation of newer buildings that don't include ground disturbance around the building. A PA could include replacement activities like re-roofing a structure, or installing new kitchen cabinets, or new bathroom fixtures, often the kinds of activities that HUD projects entail. If project activities

consist solely of exempt activities in a programmatic agreement, further review by the SHPO and tribes is not required.

Many programmatic agreements have been created by cities and counties for Part 58 programs like the Community Development Block Grant program. However there are fewer Part 50 programmatic agreements. This slide shows the status of Part 50 agreements across the country, Kansas, California, Alaska, Minnesota, and South Carolina have executed programmatic agreements that apply to those states for Part 50 projects.

Work on additional Part 50 PAs is underway in Texas, New York, and Nevada. We have a model statewide PA available for other states that are interested in pursuing this option. And we are also working on a proposed model Part 50/58 PA, a PA that includes both Part 58 and 50 programs. We plan to offer a webinar on how to create programmatic agreements sometime this fall and hope that you will attend.

A little bit about Section 106 terminology. The purpose of Section 106 is to consider the effects of federal projects on historic properties. So what is an historic property? It can be a prehistoric or historic district, building, structure, or object that is included in or eligible for inclusion in the National Register of Historic Places.

Hundreds of thousands of properties are already listed on the National Register, and hundreds of thousands more meet the criteria for the National Register and are considered eligible for the National Register. Historic properties include properties of traditional, religious, and cultural importance to Indian tribes, Alaskan native villages, and native Hawaiian organizations as well.

You saw on the chart how consultation continues through the Section 106 process. Consultation may involve a number of parties depending on the complexity of a project or its potential for adverse impacts. Besides the state historic preservation officer, known as the SHPO, federally recognized tribes, tribal historic preservation officers, local governments, and organizations with a demonstrated interest, the general public, and the advisory council on historic preservation, may all be consulting parties.

The area of potential effects, or APE, is another key term in Section 106. It applies to the area that may be directly or indirectly affected by a project. Here's an example of an APE where the project boundary shown in purple is smaller than the area of potential effect shown in green. The project proposed within that purple area will have visual impacts on a surrounding historic district because the scale of the new development is much greater than the surrounding historic houses. Sometimes things like changes in neighborhood traffic can cause an effect in a more broad way. The effects that you take into account include reasonably foreseeable effects.

Generally speaking, a project that involves interior rehabilitation only has an APE of the building itself. For an exterior rehab, the APE is usually the building and its immediate setting or parcel. Major rehabilitation in a historic district may also have broader impacts and require a broader APE. When looking at an area of potential effects, it's important to consider both physical effects and indirect things like visual effects. Sometimes a project will also involve new access roads or borrow areas for construction materials, and those areas would then also be considered part of the APE for a project.

National Register of Historic Places was established by the National Preservation Act in 1966. It lists properties across the country that have significance in one or more areas and are considered worthy of preservation. Those four areas of significance are historic significance, association with an important historic figure, architectural significance, or archeological significance. We'll go into each of those in more detail. Even though it's called a National Register of Historic Places, it includes properties that are significant at the local, regional, and state level as well.

Generally a property has to be at least 50 years old to be eligible for the National Register, although there are exceptions. A property must possess significance under one of the National Register criteria. And properties can be eligible for the National Register individually or as part of a group of buildings in a historic district like the downtown pictured here, or a historic complex or landscape. So 50 years is a threshold, but not all properties over 50 years old qualify. They must meet one of the National Register criteria.

Criteria A of the National Register applies to properties that are associated with events that have made a significant contribution to the broad patterns of our history. It could be a place of a national event, like a civil war battlefield pictured here with President Lincoln, or an ancient Native American site like Big Medicine Wheel in the center. Historic significance can also apply to properties that contribute to a broad pattern of our history, like this lower east side tenement pictured on the left in lower Manhattan, a site of many waves of immigrant settlement in the 19th and early 20th century. The National Register recognizes the complete range of American history and the history of all Americans.

Criteria B of the National Register recognizes places associated with the lives of significant persons in our past. They may be national figures like Elvis. Graceland is now on the National Register, as well as being designated a National Historic Landmark.

Lauderdale Courts, the public housing property where Elvis grew up playing guitar is also listed on the National Register partly for its association with Elvis. Incidentally I understand that Elvis fans can rent his apartment by the night.

On the right is Anne Spencer, a distinguished Harlem renaissance poet, but not really a nationally recognized household name. But her home is now a museum and is listed on the National Register.

Properties can also be listed on the National Register for their architectural significance. They can embody the distinctive characteristics of a type or a method of construction, or be the work of a master, or generally represent an assemblage of components that may lack individual distinction, like a historic district.

Here you see Frank Lloyd Wright's Falling Water on the left and the housing authority office in Houston on the right. The housing authority building uses the same architectural features as Falling Water, cantilevered upper story, wraparound glass windows, and overall horizontal orientation. It's a more vernacular interpretation of the same architectural period. And it's also listed on the National Register of Historic Places. In fact it won an architectural design award when it was constructed in the 1940s.

Many buildings that are listed on the National Register are contained within historic districts, groups of buildings in a similar location. Often a district contains some outstanding landmark buildings, but also a supporting case of more humble structures. And together they create a distinctive greater whole. In historic districts buildings fall into two categories, contributing and non-contributing. Non-contributing buildings lack age, they're not old enough to be considered historic, or they are old but they've been so altered that they no longer are considered historic. They lack integrity is the term, not the moral kind of integrity, but physical integrity related to whether it retains original materials, design, workmanship, etc.

Criteria D of the National Register applies to archeological properties mostly and traditional cultural sites that have the potential to yield information about prehistory and history. A site eligible under criteria D may be a natural landmark that is important to a tribe's origin story, as on the left, or the location of an ancient occupation with artifacts that have been left behind from a previous period, that can expand our knowledge of people who lived millennia ago.

Historic archeology is represented by this brick vault in the lower right, is the archeology of the more recent past. Here this underground brick vault was discovered on the site of a new construction project. After the discovery it was evaluated for its potential to yield information about the industry that it previously served. But it was found to lack enough significance to be eligible for the register.

I will now hand it back to Michelle, who will describe the process for voting on our first polling question.

Michelle Grainger: Thanks, Nancy. So to answer questions in today's presentation, feel free to go to [menti.com](https://www.menti.com) and use code 827811. Or you can use the QR code once you're there and you can enter your nickname. The question will pop up when the presenter says that the poll is open. When the question appears, you should answer the question before the countdown ends. A wrong answer or no answer gets zero points. The faster you answer, the more points you receive. There will be questions that have more than one correct answer. Please feel free to select one answer. You don't have to close out of the poll and go back to the website. The poll will advance to the next question when the presenter asks it. After the final poll, the final winner will be revealed. Now I'll pass it back to Nancy for our first poll.

Nancy Boone: Thank you, Michelle. So in addition to meeting at least one National Register criteria, an eligible property must also retain integrity. And as we said recently, this kind of integrity is how much the building retains those important original features, like the location, the setting, the design, the materials, the workmanship, feeling, and association. Does this building retain its historic significance as changes occur? Oftentimes changes occur across a range of minor changes that may add up to something that loses its historic appearance.

So here we start with a modest wood frame building from the late 19th century. It has an interesting porch, doors on the front, multi-paned windows. In the first change the building has lost some of those features. So the door is gone, the multi-paned windows is gone. In the next iteration, the porch itself is gone and the chimney is gone. C, the siding has changed. And the

brackets along the roofline are gone. And finally in the last iteration, the pattern of windows and doors on the building has completely changed.

So when you're looking at whether a building has lost integrity, you look at a situation like this and it becomes to decide has a building crossed the line. So where along this continuum do you think that the building has crossed from being worthy of being considered a historic property to having lost its historic character? We will open the poll now and you can vote for which property you believe has lost its integrity and is no longer considered a historic property. Vote your answer on the Menti site on your phone or laptop.

Orlando Velez: Thank you, Nancy. This is Orlando. The poll is now closed. And we have results from our first poll. 12 percent voted for A. 37 percent voted for B. 30 percent voted for C. And 21 percent voted for D.

Nancy Boone: Thank you, Orlando. So there is no one absolutely correct question. Most of you voted for somewhere between B and C. And I think I would agree with that. But you can see how it may be a hard decision. And oftentimes the answer will depend on judging a building in the context of the immediate surrounding area. A historic preservation professional can be called on to help when a decision like this is difficult

Integrity is not the same thing however as condition. And on the right you see the original John Jay housing above and a later image below. And you can see the difference between the two. The original building has had a change of roof form, the siding has changed, the windows have been changed, the porch has been changed. So much change has occurred to that building that it has lost its integrity, and no longer would be considered an historic property.

A contrast on the left, the building does retain its historic features, that wonderful corner tower, cast iron column by the old storefront, a second floor oriel or bay window on the left hand side, and brackets along the roof. It retains its historic features and would be considered historic. It's pretty obvious that it is in deteriorating condition. The property may undergo an assessment of whether it's feasible to preserve it. That's a separate question. But the first question of whether this building is a historic property, the answer is yes.

You can find information about historic properties in several places. The National Register database is available online. One thing to know is that the National Register database lists historic districts as one entry. So if you're looking at a property within a historic district, you need to look at the linked National Register nomination with building descriptions and map, to learn about individual properties within an historic district, and whether they are considered contributing or not contributing.

State historic preservation offices have been conducting state level inventories of historic buildings for many years. And often the inventories or surveys are available online. But if not, the records are available in state historic preservation offices. There is also an online database of National Historic Landmarks, which are a subset of National Register properties that have outstanding national significance.

And finally there are preservation organizations, local planning offices, and of course the internet, that you can consult about properties that may be eligible for the National Register. Properties that are more than 50 years old and not on any list may still be eligible for the National Register. And those evaluations will need to be made during the Section 106 process, and may require a qualified historic preservation consultant if eligibility is not clear.

Well, here again on the chart of the Section 106 process, we look and see consulting parties going all the way down the left hand side. Now we'll take a look at who those consulting parties might be. First is the agency official. And for those of you who are the HUD officials charged with managing and approving Section 106, that's you. You are the agency official. The agency official must complete the review before a project is approved. And it's important to note that the agency official is the decision making party in Section 106. The agency official makes the final determination of effect for the project and seeks concurrence from the state historic preservation officer. The agency official shares information with the other consulting parties and must consider their comments in reaching a final decision.

Sometimes the agency official engages a historic preservation professional to assist in the review. And we'll talk more about that in a minute. One thing to note, and we've emphasized this at several points: the agency official is the only one who can consult with an Indian tribe. That cannot be delegated to anyone else, to a consultant, or to a lender, or anyone else -- must be initiated by the agency official.

For those of you who work with programs that are conducted under Part 58 of HUD's environmental regulations, and I know we have some of you in the audience today, you know that the local government official, the responsible entity, is the agency official under Part 58 for your projects.

Each state and territory has a state historic preservation officer appointed by the governor. They play a primary role in historic preservation for their state and for the Section 106 process. And I would just say that some SHPO offices review thousands of HUD projects each year. So they do us a tremendous favor in looking at all those materials that we send them.

The SHPO consults with the agency official in the identification of historic properties and evaluation of project effects. And SHPO offices have extensive records of historic and archeological properties and expertise on how to treat historic buildings. So they're a real primary partner in Section 106 and particularly in resolving issues that arise in Section 106.

Besides their 106 rule, state historic preservation offices also review historic tax credit applications, often have grant programs or manage historic sets, and conduct educational programs. They are very busy, often with very small staffs. The goal of consultation with a SHPO is to reach consensus so that the SHPO will concur with the agency official's final determination. And as you see here online there's a directory of state historic preservation officers online.

The applicant clearly is a primary party in Section 106. The applicant for FHA programs is the lender and/or their consultant. In general the role of an applicant is to assemble information about the project and its potential effects on historic properties, and present that information to

the HUD agency official. The applicant sometimes obtains studies like property surveys to help identify historic properties. The applicant is responsible for alerting the agency if issues are anticipated so that proper planning can be done. And very importantly, an applicant needs to prevent any action prior to completion of Section 106. And as we said before, the applicant can never initiate consultation with tribes.

Sara will now discuss current and proposed practice for lenders in the Section 106 review of FHA projects. Sara?

Sara Jensen: Thanks, Nancy. So we're going to move into a discussion, as Nancy said, of a proposed delegation memo. But first let's discuss the current practice for Section 106 consultation in these programs. Let's start with tribes on the second half of this slide where the current practice is straightforward and will not change.

Only HUD can consult with the tribe or tribal historic preservation officer. Lenders and consultants can help prepare the materials that HUD submits to a tribe, and HUD may request a qualified consultant help facilitate tribal consultation in complex, controversial, or adverse effect cases. But as Nancy already mentioned, in no case should a lender or a consultant initiate consultation with a tribe.

It's more confusing for SHPOs. We know that it has been the longtime practice for some lenders to consult directly with some SHPOs in some states. Previous MAP versions allowed this, and the current 232 handbook still does, with the important caveat that HUD makes the final determination of effect. However, without an official delegation from HUD, many SHPOs refuse to engage with lenders or consultants, and they have every right to do so. The 2016 MAP guide tried to address this by allowing lenders to send a preliminary letter to the SHPO. But what this meant exactly has been confusing to HUD and our partners.

In sum, the current practice with respect to the SHPO is confusing and inconsistent for both programs. I'm going to explain how HUD is planning to address this with a proposed delegation memo. And then I will circle back to discuss what to do in this transition period before this memo goes into effect.

The regulations at 36 CFR Part 100, these are the historic preservation regulations, allow federal agencies to authorize applicants to initiate consultation. The regulations lay out what an agency can delegate and what it must retain. For example, HUD may not delegate its responsibility to reach out to tribes.

HUD must also establish a policy about how the delegation will work for a specific program, followed by outreach and written notification to the SHPOs. The director of the Office of Environment and Energy, the acronym is OEE on this slide, can issue these authorizations. To date HUD has issued very few delegations and these have always been for specific programs.

I'd like to address one such HUD delegation that many of you have seen. In 2012 HUD issued a delegation for a pilot low income housing tax credit program that applied in only a few states. This delegation took on a life of its own. And some lenders have applied it to all states for all (inaudible). Nancy and I want to be clear that this delegation is not currently in effect. And in

fact the creep of the 2012 delegation from a few states in a specific pilot program to broader use set back our efforts to create a new delegation memo for FHA.

So what does this new proposed delegation effort for FHA include? When it goes into effect it will apply to lenders using HUD's FHA programs in Multifamily Office of Residential Care facilities and hospital programs. As we mentioned before, these delegations are for specific programs, so unfortunately the memo will not apply to RAD or other housing programs unless those programs are paired with FHA.

The proposed delegation will go into effect when the MAP guide updates are published. And we will coordinate a mortgagee letter to cover the healthcare and hospital programs. Please underline in your notes that the proposed delegation memo is not yet in effect.

This winter Nancy reached out to SHPOs, THPOs, and the advisory council on historic preservation to request comment. She distributed a draft to all SHPO offices via the National Conference of SHPOs. Prior to the notice going into effect, HUD will do additional outreach to all these parties. We will also conduct detailed training on the delegation memo to HUD staff and our partners, and we hope you all will attend. The delegation will allow lenders and their consultants to conduct Section 106 for projects without adverse effects.

For timing the lender and their consultant may begin consultation any time after HUD issues the FHA number. However you must have the appropriate documentation in place. And the memo and associated MAP guide and mortgagee letter will outline the documentation that each consultation request must include.

In order to use the proposed delegation memo, certain projects must use a qualified historic preservation professional to guide consultation. This list includes demolition of a building over 45 years old, new construction in a historic area, substantial ground disturbance, and exterior rehab of a building over 45 years. Before everyone asks in the Q&A pod, substantial ground disturbance is defined in the memo, and we will go over this when we hold the detailed training.

Nancy is shortly going to provide more detail about historic preservation professionals, including information about when they are appropriate for current projects separate from this proposed delegation memo. The proposed delegation memo outlines the situation when HUD must enter SHPO consultation.

We already mentioned that HUD must enter when there is an adverse effect. HUD must also enter when there is a disagreement with the SHPO, objections from tribes or consulting parties, potential store closure or anticipatory demolition -- and for those of you unfamiliar with these terms Nancy will elaborate a bit later -- or if HUD deems the consultation record inadequate.

This memo authorizes lenders to initiate consultation, but it's important to note that HUD's Office of Housing is legally responsible for all findings. Before I pass the webinar back to Nancy, I want to discuss what applicants should do in this period before the delegation memo goes into effect. First and always, only HUD can write to the tribe. If a SHPO will accept a letter from the lender, HUD will accept this in this transition period with a few comments.

First, which SHPOs will accept letters from lenders is not a static list. Recently SHPOs that used to accept letters from lenders have changed course, for example in Washington and Oregon. Before contacting a SHPO, please check in with housing program staff, who can in turn consult with field and regional environmental officers for the latest guidance.

Second, this only applies to situations where there are no historic properties or no adverse effects on a historic property. Not including HUD when there is an adverse effect or a complex or controversial project is a sure way to end up with project delays or worse. Once the delegation is in effect, it will be voluntary.

Lenders will either follow the terms of the delegation or prepare the documentation that HUD staff will need to contact the SHPO. We'll provide more detail on how this will work along with lots of other information about the proposed delegation memo in the future targeted webinar I've been mentioning. The date is to be determined, but it will be scheduled close to the implementation of the delegation memo.

Now I'm going to pass back to Nancy to cover more details about consultation under Section 106.

Nancy Boone: Thanks, Sara. At several points in this presentation we mentioned historic preservation professionals as consultant who may assist an agency official in complying with Section 106.

The Secretary of the Interior sets academic and experience qualifications for historic preservation professionals, and they're outlined at 36 CFR 61, for architectural history, history, archeology, architecture, and historic architecture. These historic preservation professionals can assist in identifying properties, evaluating effects, advising on treatment, and on the techniques and requirements of Section 106 consultation and documentation. Generally these qualified professionals have at least a master's degree.

The MAP guide and 232 handbook advise that professionals be retained when National Register eligibility is unclear or when adverse effects are expected, when there are archeological resources, or when a project is controversial. So it's not just when a lender may want to use the proposed delegation, it also makes a lot of sense in other cases where you have issues in the project which could be helped by a professional. And just a note that preservation professionals are a mortgageable expense. And like lenders they cannot initiate consultation with tribes.

Section 106 is set up to allow interested organizations, individuals, and the general public, with an opportunity to participate in federal decision making about projects that will affect their communities. Agency officials must reach out and identify interested organizations or individuals who may have a demonstrated interest in the project and invite them to participate. Interested organizations and individuals may also request consulting party status from the agency official.

Some examples are shown here, local historic preservation commissions, public housing residents in a RAD project. Sometimes the National Trust for Historic Preservation sees a critical

issue in a project and wants to be involved. And there may be established or ad hoc neighborhood groups that want to participate.

The agency official considers the comments and concerns of interested parties in making a final determination. Typically projects that may have an adverse impact on historic properties, and properties and projects that are locally controversial, will involve other interested parties in consultation. The agency official manages that process of consultation and shares information among all the parties. Sometimes on more complex projects the agency official will hold conference calls or meetings to discuss the project, to hear ideas, and help formulate their final determination of effect.

The advisory council on historic preservation is a small independent federal agency, and they promote the preservation and continued use of the country's historic properties. One way they do this is through the administration of the Section 106 process. They're known by the acronym ACHP, and wrote the 36 CFR 800 regulations. They interpret the Section 106 process and administer the process. Sometimes they get involved in individual cases. And on occasion the ACHP participates directly in consultation. An agency official is required to invite the council or notify the council to participate if a project is going to have an adverse effect. And we'll come back to talk more about that in detail a little bit later.

Under Section 106, Indian tribes, federally recognized tribes, including native Alaskan villages, and native Hawaiian organizations, or NHOs, have consulting party status under Section 106. Consultation with tribes and NHOs is not required for every project, but if a project involves the types of activities that might impact historic properties of religious and cultural significance to tribes, then the agency official must invite them to participate in consultation. It's up to the tribe whether or not they want to participate. But the agency official must notify them and invite them to participate.

HUD developed a checklist of the types of activities that may harm traditional properties of significance to tribes, and you see the list here. These types of activities are clues that there may be an impact to resources of concern to tribes. Ground disturbance is the major one because it may affect underground archeological resources. But some others are less obvious. Sometimes a project may interrupt an important visual view. It could involve a project with a tribal association to a particular building. Those kinds of instances trigger a need to consult.

The kinds of properties -- when I say properties of religious and cultural significance, the kinds of properties are typically those listed here, archeological sites, certainly burial grounds, sacred landscapes or features. So I mentioned earlier a natural feature may be important in a tribe's origin story for instance. There may be ceremonial areas that have been important over time to the tribe. There may be traditional cultural landscapes in places, even plant and animal communities. A river of salmon in the northwest may have sacred significance to a tribe. Or there can be structures with significant tribal association like an Indian school on the lower right here.

HUD has recognized that when it comes to evaluating these types of resources, tribes have special expertise in determining what of these properties may be eligible for the National

Register and therefore considered historic properties under Section 106. But if the activities that you're anticipating have the potential to affect those kinds of properties and you want to reach out to the tribes, who do you know to consult? How do you figure it out? There are currently 573 federally recognized tribes. The agency official needs to reach out to tribes about projects in locations where they reside now or where they lived hundreds and even thousands of years ago.

So as you know, many tribes were removed forcibly from the southeast and moved over to the middle part of the country. And so those tribes may very well have an interest in the areas that they left behind, areas that still retain for them important religious and cultural significance. So consultation with tribes is required not only on tribal lands, but off tribal lands in these ancestral areas. So the invitation to consult goes to tribal leaders and tribal historic preservation officers within a tribe. About a third of tribes have a tribal historic preservation officer or THPO. They play a similar role to a SHPO on tribal land, and are a party to Section 106 projects on other ancestral lands.

So how do you locate these tribes when they have an interest in that location? HUD developed the tribal director assessment tool, TDAT. And I hope that many of you are already familiar with it. It's a wonderful online tool that allows you to type in a project address, and it will return to you a list of the tribes that have an interest in that county, either a current or ancestral interest, and it will give you the name of the tribal leader and their contact information, and the name of the THPO and their contact information, if the tribe has a THPO. It also includes a URL link to the tribe's website.

We are currently working on a project to permanently upgrade TDAT with frequent data updates. We did our last update in May of this year. We are hoping to set up a system that will allow us to make periodic updates on a quarterly or even monthly basis because contact information certainly does change. Although I would have to say that the areas of interest, the counties that tribes have given to us as an indication of the areas where they have an interest, those are pretty unlikely to change. They have not changed much over time.

Our project on TDAT, fingers crossed, hopefully will also include a GIS mapping capability for TDAT. Also we have to assist with tribal consultation a tribal consultation notice. And you see the link for it here. It provides detailed step by step guidance, including template letters and advice on respectful consultation with tribal nation leaders. When HUD consults with tribes, it is a government to government, nation to nation consultation. Very important to do it in a respectful manner.

Sometimes a tribe or a state historic preservation office will suggest that an archeological survey be done to identify potential archeological sites a project location. HUD has issued guidance, historic preservation fact sheet number six, available on the HUD Exchange, that gives guidance on archaeological investigations in HUD projects. It helps the parties to evaluate whether an archeological investigation is needed and merited.

The factors to consider are listed here, including probably at the top there, information from SHPO and tribes. They're the best sources of information about the likelihood of resources at the

site. Tribal resources often are not visible. And in order to know if they're there, you need to ask the tribes.

Information about previous ground disturbance on the site is important to consider, would a site have been destroyed by previous ground disturbance. Sometimes previous construction, particularly going back into the 19th century, did not destroy resources around the footprint of that construction back then. So just because a site has been occupied by buildings, does not mean necessarily that there are no archaeological resources still on the site.

Another factor is whether the project will have an impact on the expected archeological resources. Here for instance, if there is an area that has been identified as being sensitive for archaeological resources, that there's a likelihood, if the project plan includes that area along a riverbank as a green area in a project, and there's not -- it's not going to be disturbed, then there's no need to do a survey because the site will not be impacted as part of the project. Other factors include the likely significance of potential properties and informed parties can sometimes indicate whether the information that's expected is of a high value.

Next we have a poll question about consulting parties. Remember to open the app on your phone or laptop tab, and answer the follow question. Who should be invited to consult in the Section 106 review of this project? And here's the project description. It's transformation of 1960s public housing project into a mixed use development, where phase 1 is an FHA insured new construction project. So take a look at the list here and vote for who should be invited to consult in the Section 106 review. Remember you can log in to the menti.com site or use your QR code. The poll is now open.

Orlando Velez: Thank you, Nancy. And the poll is now closed. And we have results. 1 percent answered B. 2 percent answered E. And 58 percent answered F, all of the above.

Nancy Boone: Thank you, Orlando. And all of the above is the correct answer, and some of it is obvious and some maybe not so obvious. So there is certainly increasing interest in mid-century architecture.

So this property being from the mid-century may trigger that kind of interest. I just want to say that here too, I included project opponents. It is so advisable to include in your outreach to potential consulting parties, even those who you suspect object to the project or oppose the project. Bring them into the conversation. It is much preferable to – (inaudible) – communicating with project opponents far into the process. Bring them in at the beginning of the process and make them part of the process.

Sara Jensen: So Nancy, before we go on, there are a couple of questions that I would like to just bring up for clarification now. So the first is we got a notification that the link on the slides to the programmatic agreement database is incorrect. So we will make sure to fix that link. And when these slides are posted after the webinar, we'll make sure that that link is correct.

There was also a question about how often the programmatic agreement database is updated, and a note that some of the agreements listed have expired, and some new ones may not be posted yet. So do you want to comment on that, Nancy?

Nancy Boone: Sure. So we add new agreements periodically when we receive them. Since we are not a signatory to most of these agreements, we don't actually have copies. So we encourage people to send us copies. And then we do batch updates of those periodically. One thing that we decided was to leave older programmatic agreements on the database so that they could serve as models going into the future. So for instance, if there's an expired PA for a community, typically a Part 58 PA, then the community several years later decides that they want to pick that up again, using that previously existing PA is a great starting point for them. So yes, there are expired programmatic agreements there, but that was pretty much on purpose that we did that. So if – (inaudible) – you are involved in any programmatic agreements, please send them to us and we will make sure that we get them up into the database.

Sara Jensen: And thank you, Nancy. And for this audience, our projects can only use ones that are Part 50 programmatic agreements, and HUD will be a signatory, and those should be therefore up to date in the database. So just a clarification for this group. There was also a request for some clarification on listed National Register properties versus eligible properties, and the point that the websites that you mentioned would only include listed. So do you want to clarify a little bit about listed versus eligible properties?

Nancy Boone: Sure. So the listed properties are pretty straightforward to find. But there are many other properties which meet the National Register criteria. They've never been evaluated for the National Register. And it only happens during the Section 106 process. And if a property that's evaluated against the National Register criteria during the Section 106 process appears eligible for the National Register, then it fits the Section 106 definition of a historic property. And it would be considered on a par with the property that's already listed.

There are so many properties that are eligible out there that have not been evaluated, have not been listed on the National Register, but are still worthy of preservation, and could be nominated by the owners if the owners chose at any given point. So it's important to think about first you check the list to see if it's there. Then if it's not there, but your building is 45, 50 years old more, it's time to look at whether that property is eligible for the National Register during the Section 106 process.

Sara Jensen: Thanks so much, Nancy. One more clarification and then we'll hold the rest of the questions for the end. I just wanted to make sure, I'm seeing a couple questions that make me want to make sure that everyone understands that the delegation memo that I spoke about will only apply to lenders and their authorized third parties that are working with multifamily, or healthcare, or hospital FHA programs. So consultants that are working with HUD or responsible entities on other HUD programs will not be covered under this delegation memo, and will not be able to contact the SHPOs.

So there are some questions about ground disturbance, but I think let's hold those for the end for our Q&A period. And let's continue on. And thanks everyone that submitted questions.

Nancy Boone: Okay. To initiate consultation with the consulting parties, the agency official needs to start with a good project description of the undertaking. For Section 106, this means a detailed description of the current condition and proposed physical treatment of the property.

What physical changes are going to occur on the site? The description must include all parts of the project, the HUD assisted parts, and the non-HUD assisted parts. Sometimes a building has multiple parts and different funding sources are going into different parts of the project. If any part of the building has HUD assistance, the entire building, the entire project has to undergo Section 106. It has to be for the entire project.

The project description should include things like the physical features and condition, dates of construction if they're known, so that it's apparent whether it's within that potentially historic era. There should be any notation of important exterior or interior architectural features, or the absence of. If the interior has already been completely gutted in 1980, then the description should say that. There should be description of the proposed physical project activities, with enough level of detail to understand how those changes, those activities may impact historic features.

So sometimes we see a project description that says rehab. That tells nothing about what's going to happen. It has to say we're going to redo the HVAC system, we're going to replace the kitchen cabinetry, etc. Then of course there needs to be maps of project location and layout of the site. And very importantly good photographs. Google photos, screen captures from Google street view are really not acceptable. They have to be good digital photos. If there are design drawings or sketches for new construction, those are also an important part to accompany a project description. One of the biggest delays in Section 106 is caused by lack of information in a project description. So this is an important part to really pay good attention to.

Ultimately this is the documentation package that the agency official will need to complete and provide to the SHPO for concurrence. So this is spelled out again on the landing page of our HUD historic preservation web page. And you want to have the description of the undertaking, like we just talked about, but then a description of how the agency official has taken steps to look at whether they're historic properties, what the impact of a project will have on those properties, and an explanation of the finding that will be made. And we'll go into all those steps so it will maybe make a little bit more sense as we proceed forward.

But also it should include copies or summaries of any views that you received from consulting parties, Indian tribes, NHOs, the public, etc. The SHPO often has a particular format that they're looking for in submissions for 106. So you would check their website to see if the information package should be put together in a particular format.

So jumping into the process, you've decided that there's no potential to cause effects memo, the work exceeds maintenance, it's not covered by a programmatic agreement, you jump into then looking at whether there are historic properties on the site that could be affected by your project. Based on the description of the undertaking in the project description, the agency official defines the APE and identifies any historic properties within it. If there are not any historic properties, they prepare a no historic properties affected determination, submit that to SHPO for concurrence, and to consulting parties if there are consulting parties, for comment.

If there is a historic property, but the project is not going to affect it in any way, no physical impacts to that property, also the agency official would prepare a no historic properties affected

determination, and submit it to SHPO, and circulate it to consulting parties. Parties have 30 days to respond to a no historic properties affected determination. If the SHPO objects, consultation continues obviously. If the SHPO does not respond, the agency official usually may conclude the review and move it forward. Although I would just add a footnote here, many SHPO offices are closed or operating under limited condition due to the pandemic. And so the guidance from the advisory council on historic preservation is that the agency official should be flexible and wait for the SHPO to respond if possible.

If there are urgent situations where waiting for a SHPO response is causing real problems, the agency official should contact Sara, or the REO, or FEO, for advice on how to proceed. There is some written guidance out there on what to do in those kinds of situations. But it requires some interpretation. And we can try to give you the best advice on how to proceed in that kind of situation. I would just say that the vast majority of times SHPOs respond promptly within the time frame and do hopefully offer a concurrence. And as I said, if they don't concur, then consultation continues.

If a project will affect an historic property, the agency official must evaluate the effects against the criteria of adverse effects that are included under Section 106. So here's the general wording about what is an adverse effect. It's found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify it for inclusion in the National Register in a manner that would diminish the integrity of the property's aspects of integrity. And adverse effects may include reasonably foreseeable effects caused by the undertaking.

So what are some examples of adverse effects? Here are some that are listed in 36 CFR 800. Damage, destruction, or removal of historic properties. Obviously demolition is a pretty clear adverse effect. The others may be a little bit more subtle and they may be partial. So on the upper right, historic windows are being removed. And that would be an adverse effect because a historic feature is being removed. On the lower left a property is being moved. It's lost its location, the historic location. So that's an adverse effect. A change in character, or of use, or setting can be an adverse effect. Even the introduction of incompatible visual, or audible, or atmospheric elements can be considered an adverse effect. So for instance, loud planes flying over a small historic district might be considered under the adverse effect criteria.

One that we come up with a lot is alteration not according to the secretary's standards. That one applies to properties that are considered historic when the secretary's standards for rehabilitation are considered the best practice treatment for historic properties.

Taking a closer look at the Secretary of the Interior's standards, there are 10 of them, and I'm just going to give you a very brief summary here. One, find a compatible use for a property. Don't try to fit something into a building which requires so many changes that it causes the building to lose historic character. Retain historic materials and features. Repair them rather than replace them. If they can't be repaired, they're too deteriorated, replace them in kind, which means for the same design, with the same materials, etc., same dimensions.

The standards say that archeological resources should be preserved, and that any new construction that is added on to an historic property be distinguished in some way from the old,

be compatible but distinguished. It is certainly possible to add on to historic buildings. And the guidance from the National Park Service and other places can help with that. The National Park Service has extensive guidance on the standards, including recently issued guidance on standards about sustainability and flood adaptation. So I'd encourage you to look at their sites there.

Preservation briefs give more detailed information on particular topics like roofing, energy conservation, or windows. The secretary's standards do not require the replacement of missing architectural features or the restoration back to a previous period of time. That's an important concept. Those activities might occur, but they're not required. You are not required to recreate a previous appearance on a historic building.

So if you have looked at the criteria of adverse effect and found that there will be no adverse effect, the agency official makes a determination of no adverse effect, and notifies the SHPO or consulting parties, and they have again 30 days to respond. Here on the right, upper right, we see a property that underwent rehabilitation and actually did go further than was needed in restoring some of the features of the porch. On the lower left project here, restore the exterior, but the interior had been completely changed and was not considered to be historic anyway, so was fitted out with completely modern design on the inside. And all of these projects had no adverse effect.

Sometimes a project will start out with an adverse effect, and then through consultation the adverse effect will be modified. So here's an example where a 221(d)(4) project had a proposal on the lower left for a new entranceway that would replace a pretty elegant mid-century overhang to the entrance. And it was determined to be -- the proposed design was determined to be an adverse effect. There was a consultation with architects, and the owner, and other interested parties. They came up with a design of incorporating the original curved roof feature into a new enclosed lobby. And the adverse effect was avoided.

So here we have another poll question. Remember to check in to the menti.com site or use the QR code on your phone. So the question is, which is not an adverse effect? There's a list of activities here. Which one stands out as being not adverse? The poll question is now open.

Orlando Velez: Thank you, Nancy. And the poll is now closed. We have results from the poll. 3 percent answered A. 24 percent answered B. 66 percent answered C. 2 percent answered D. And 4 percent answered E.

Nancy Boone: Thank you, Orlando. So the correct question of what is not an adverse effect was C. Because if you have a new compatible addition on the rear of a historic building, it does not have to be an adverse effect.

If there is an adverse effect, the agency official must notify the advisory council and offer them an opportunity to participate in consultation. And you have to send them the various bits of the documentation package so that they will understand the project. There's an online notification system called e106. And the council would respond within 15 days to say whether they wanted to participate in consultation.

They decide to participate based on some criteria. You see them here. If they want to participate if there is substantial impact on important properties, or there is a precedent setting issue involved in a project, it's controversial, or a tribe has expressed concern about their role in the review. If a project involves a National Historic Landmark, or NHL, the National Park Service also must be notified.

So the consulting parties come together under the direction of the agency official to share information, consider alternatives, and ultimately look at whether it's possible to avoid, minimize, or mitigate the adverse effects. And basically that is done in that order. If there is an alternative that would avoid the adverse effect like incorporating a historic building into the program for a site instead of demolishing it, that would be a way to avoid it. If an adverse effect cannot be avoided, the record must document why not, and go on to look at alternatives that might minimize the adverse effect.

For instance, a key part of a historic complex could be preserved instead of total demolition of the complex. And if alternatives to avoid are minimized, the adverse effects don't successfully resolve the adverse effect, the consulting parties engage in further consultation about what activities might mitigate or offset the partial or total loss of a historic property.

This is an example of a public housing development that underwent redevelopment in New Orleans. And where it formerly had many blocks of historic public housing properties, after intensive consultation with state, local, and national parties, it was determined that a portion of the property, a portion of the original buildings, a key central portion would be preserved, and the rest would be lost, and new construction would be included. So that was an example through consultation of coming to a consensus about how the project would proceed.

In looking at mitigation, there are different kinds of possibilities to consider. Mitigation measures may relate to a specific property that's being affected. So you might say that a property would be sure to preserve a certain feature or replace maybe a feature that was missing that was deemed very important. Or it can apply to other historic properties in a similar location or of a similar type.

There's a list here just showing some possible examples, certainly documentation, taking pictures, and doing a historic record of the property that's being lost, that's a common one. Putting together interpretive exhibits or online web pages about a property, so that the history of a property is preserved even if the building is not. All of these kinds of things are open. But in general there's a real sense of wanting to allow the consulting parties to be creative in what might be most appropriate for the local condition, what might enhance an appreciate of history, or support current preservation efforts in a community.

When the consulting parties have agreed on how to resolve the adverse effects, the resolution is outlined in a memorandum of agreement, or MOA. The MOA stipulates who will do what and when. And Section 106 is not complete until that MOA is fully executed by the agency official, the SHPO, the owner, and other invited parties that have a role in carrying out the stipulations in the MOA.

Often there are other interested organizations who were part of the consultation and they may sign as concurring parties. The agency official signing the MOA remains responsible for ensuring that all those stipulations in the MOA are carried out. And they are legally binding and should be transferred over and included in the firm commitment.

Here are a couple examples of two conditions that were suggested for a firm commitment. The first one gives good detail, making clear who was going to do what, and how they are going to go about it. The second one is a poor inappropriate condition that tries to kick the consultation down the line saying that there will be an MOA signed in the future. That is not allowed under the regulations. So the MOA needs to be completed before the project is approved. And any conditions need to be transferred over into the firm commitment.

Just a couple of helpful hints. One is don't be too eager in drafting and circulating an MOA before its time. MOAs are the result of consultation and should not precede consultation. Early introduction of an MOA is often perceived as contrary to a good faith consultation. And that sets the consultation off on the wrong foot. And the ultimate example of this, and you have seen this unfortunately, is people will present assigned MOA at the beginning of consultation. That's sort of the extreme case of an indication of – (inaudible) – And now we have one last poll question.

Sara Jensen: Okay. Thank you, Nancy. And I do just want to make a note of the time. We're coming up at the scheduled end of our webinar. However we'd love you to stay if you can.

We are going to be covering how to document Section 106 compliance in HEROS. We're going to talk about foreclosure and anticipatory demolition. And then we will stay on the line for questions at the end. So we have the Zoom room through 3:00. We'll stay as long as it takes. And if you do need to leave, we understand. And this entire webinar will be recorded so you could come back later and watch what you missed.

So the first thing we want to do, we want to start off -- we're going to talk about documenting Section 106 in HEROS, which is the HUD's environmental review online system. And we're going to start off with our last poll question for today, which actually brings us back to Nancy's earlier discussion of no potential to cause effects memos and programmatic agreements.

Imagine that you are working on a 223(f) transaction. The very first question in the Section 106 page in HEROS will ask you to choose one of the following. A, a Section 106 review is not required because the project consists solely of activities listed in a programmatic agreement. B, Section 106 review is not required because the project consists solely of activities included in a no potential to cause effects memo. C, Section 106 review is required because the project includes activities with the potential to cause effects. Or D, not in HEROS, but added for this poll question, I need more information before making this determination. Please go ahead and answer this poll question now. The poll is open.

Orlando Velez: Thank you, Sara. And our last poll is closed. And we have the majority voting for D. And eight participants voted for A.

Sara Jensen: Thank you, Orlando. And do you want to announce the winner?

Orlando Velez: Sure. We're just tallying up right now. And it looks like we have a few winners. B, banana, scored the highest with 3,938 points. Congratulations to B, banana.

Sara Jensen: Thanks. And thanks to everyone that participated in the poll question. And thanks for running that, Orlando. So the correct answer is D. This was probably a leading question and all of you got it. But you definitely would need more information before making this determination. There is no national Section 106 exemption that covers all 223(f) transactions.

You'll need to define what exactly the 223(f) transaction entails before moving forward on this 106 screen in HEROS. I wanted to highlight this question today because it is confusing. And a lot of consultants and HUD staff get this one wrong. Future HEROS updates will include a redrafting of this question, but we're stuck with it for now. So let's go through some examples of how things should work in HEROS.

The first example is a no potential to cause effects. Here you can see that the very first question on the HEROS screen are the same answers that were in our poll question. And in this case the preparer has information about the full scope of the project and knows that there's no work beyond maintenance as part of the transaction. You may note -- I'm sorry, go to the next slide. If you pick no potential to cause effects in the first question, the second question will be a prompt for you to explain the threshold. You need to either upload the no potential to cause effects memo or link to it, and also explain how the criteria fits your project.

In this example, first we define the project and make clear no work is beyond maintenance and there is no ground disturbance. Next we include a link to the no potential to cause effect memo and also cite the MAP guide. If this was a healthcare project, the citation would be 7.A.7 of the handbook.

You may note that the project description specifies that the project is not currently HUD insured. That is because 223(a)(7) and 223(f) that are already in HUD's portfolio, and have no work beyond the maintenance threshold, are categorically excluded not subject to the related laws and authorities, including historic preservation. You would determine a level of review on an early HEROS screen and will never even see this historic preservation screen.

The next step is to make a compliance determination, upload supporting documentation, and determine if any formal compliance steps or mitigation is required. HEROS will automatically populate a compliance determination in this box based on your earlier answers. I strongly recommend that you edit this to make a project specific statement, which we have done in this example. A second point for this box is that technically only HUD can make a compliance determination. However consultants must fully respond to all questions on each screen before you can upload documentation.

In general, consultants should use the compliance determination to explain what actions you took in your suggested course of action to HUD. Your compliance determination should make it clear to HUD which responses are final and which are only advisory. HUD will complete the screen using your feedback. You must then upload documentation. In this case the consultant uploaded the project scope of work. HUD can then confirm that all activities fall under the maintenance

threshold. In the previous screen we included a link to the no potential to cause effects memo, but we could also upload a copy here.

This last question about formal compliance steps or mitigation is only available to HUD staff. HUD partners cannot answer this in HEROS even after the delegation memo goes into effect. After HUD staff review the Section 106 page in HEROS, they will determine if the project in fact meets the no potential to cause effect if additional documentation is needed, and then mark yes or no on formal compliance or mitigation needed. In this example the answer would be no.

Our second example is a programmatic agreement. In this case the preparer has information about the scope of the project, checks the programmatic agreement database, and found that Minnesota has a programmatic agreement that covers Part 50 reviews, and determines the scope of the project fits under the programmatic agreement. If you choose the programmatic agreement in the first question, the next question will ask you to upload or link to the programmatic agreement. (Inaudible) – cite the specific exemption from the programmatic agreement – (inaudible).

For this example the project meets the Minnesota programmatic agreement provision D for – (inaudible). The instructions in HEROS requests that you paste all applicable text here. And this example actually falls short. So this example leaves out a key provision in the programmatic agreement that says this applies to refinancing rehab of existing buildings less than 45 years with no ground disturbance, unless the property is located within or adjacent to or adjoining a National Register of Historic Places or eligible historic district. So that should be included in full.

Next we go to the compliance determination where again I recommend that editing the text to be project specific as you see here. Uploads include the programmatic agreement and prove that the building is under 45 years of age. And please make a note that these two documents are actually not sufficient here. We would also want to see a map or other documentation showing that the project is not within or adjacent to a historic district. Finally, HUD will review all the information in HEROS, make sure to correct and complete, and then determine if there are formal compliance steps or mitigation required.

For this example, HUD staff could come back to our HUD partner and ask for a map to confirm the project is not within or adjacent to a historic district before marking no. And just for your reference, here is the first page of the programmatic agreement. And then the page that shows the relevant stipulation which is D at the bottom here.

The final example -- our third and final example is -- and I apologize, the arrow should be pointing at the third choice -- is when a consultation is required. Most of your projects will check the third option because Section 106 consultation is almost always required. I would like to stress that this example is for a very basic project. More complex projects will require more effort and more documentation.

The first question after determining that Section 106 consultation is required asks about consulting parties. Note that this example has been completed by HUD staff. Consultants should never mark the tribal consultation is complete. There is not a great option in the pull down menu

for consultants. So the best option here is to mark in progress. The other options are complete, not required, response period elapsed, and terminated. You could then describe the situation in the text box and upload documentation in a draft letter to the tribe for HUD to review and send.

The next section is about identifying and evaluating historic properties. In this example the area of potential effect is the boundary of the project site. In other locations or for projects with a broader APE, there may be multiple addresses included in this chart. The last section is assessing effects. Here we have no historic properties affected. Please note in the compliance determination box why you have made this determination. HUD staff will review and edit accordingly. Uploads for this project include the letter to SHPO and its response, and HUD's letter to the tribe.

As always, the HUD staff will review, ask for additional information if needed, and make a determination if formal compliance steps or mitigation is needed. If they are, HUD must explain the mitigation measures and conditions, clearly identify the persons responsible for implementing and monitoring mitigation measures, and outline the timeframe in which they will be completed. These measures and conditions must be incorporated into the firm agreement.

Let me end with some quick HEROS tips. You must be very careful with file names in HEROS. HEROS does not like special characters. If you are using Internet Explorer, the system will give you an error message if you upload a file with a special character in its name. If you are using another browser, you will not get an error message, and you might think all is fine until the system crashes or the files disappear.

Another note about file names, it really helps if you clearly name the file you are uploading. For example, the letter to the SHPO and the response from the SHPO should have distinct names. The HEROS system is closed on Sundays, so please plan ahead if you are trying to meet a deadline. And we have specific guidance for our partners. There are links here for multifamily partners and healthcare partners. And we also have guidance for RAD partners, and we're developing one for multifamily asset management programs. So back to Nancy to close us out.

Nancy Boone: Yes. We are in the home stretch. And just a couple of – (inaudible) – to watch out for, one being foreclosure. Foreclosure is when the agency official has not complied with Section 106, and technically speaking has foreclosed the advisory council's opportunity to comment. So foreclosure is quite a serious kind of allegation. And it takes consultation -- if it's happening to you, it takes consultation to work out.

Ultimately the advisor council can comment to not only the agency official, but the head of the agency -- here we're talking about Secretary Carson -- that a particular project has not followed the law, something that we don't want to be in a position to face. But also finding from the advisory council on foreclosure can be used in litigation. So a project opponent who objects to the project could use the advisory council's finding of foreclosure as evidence that the federal agency did not follow the appropriate law.

Anticipatory demolition was set up under Section 110(k) of the National Historic Preservation Act. And it says that if an agency will -- should not grant assistance, including loans, to an

applicant who with intent to avoid Section 106 took action that significantly adversely affected historic property.

There is an out in the regulation, but the body of it is that strong. And the MAP guide reiterates it, that even before the concept meeting or application takes place, any action by the potential lender or even an action by another party that the lender or borrower has the legal power to prevent, like the seller of the property that you're buying, if the action is taken with the intent to circumvent Section 106, and there results a significant adverse effect on historic property, it could result in rejection of an application.

So here worst case scenario would be if someone buying a new property that has historic properties on it, communicates with the seller that they really don't want those properties to still be there by the time they take ownership, that would be anticipatory demolition, and could result in the rejection of an application.

Sometimes even with the best planning, unanticipated discoveries, unexpected discoveries pop up if during implementation of a project, for instance during construction, additional historic properties are discovered, or there's something new that comes out as an effect that hadn't been anticipated before, work on the project should stop, and there should be notification to tribes, the SHPO, and ACHP, within 48 hours. And then people reenter consultation to address whatever the discovery is, including whether it's a resource that's eligible for the National Register, and if it is a historic property that will be further impacted what should be done.

If a discovery includes human remains, it's critically important to respectfully cover over and secure the remains, notify the same parties plus local law enforcement officials who will want to determine whether it's a more modern death. The priority is always to leave burials undisturbed in place whenever possible.

We recommend if you're faced with unanticipated discoveries and you've notified the parties, if you can get people together on site, all together, looking at the problem in person, you have the best chance of resolving it quickly. Always parties, particularly in burials, if there are human remains, it is important to include tribes or any other descendant communities who may be associated with that potential discovery.

On a bright note, I just wanted to mention historic tax credits. I hope that you know that there is a federal historic tax credit equal to 20 percent of qualified rehab expenses. If a building is listed on the register or in the process of going on the national register, it can be eligible. The tax credit applies to income producing properties, so it's not your individual home. But if it's a rental property for residential use, industrial use, office use, all of those are eligible activities. The credit requires that the developer conduct a substantial rehabilitation that exceeds adjusted basis, and that the work meets the Secretary of the Interior's standards for rehabilitation.

I have a great little graphic here that shows when you're looking at 20 percent of qualified rehab expenses, everything that doesn't fall out of the building, everything that stays attached to the building if you turn it upside down, would be considered a qualified rehabilitation expense. And just a note that this can also be, and often is, combined with the LIHTC credit. There's a lot of information about how to use the historic tax credit. The National Park Service administers the

program with the help of the state historic preservation offices. And you can find information there.

Also I would direct you to the HUD Exchange. We did a great webinar two years ago that specifically looks at applying the historic tax credit program to HUD programs and affordable housing. Here's an example of on the right of a public housing project in Chicago. The after view of the interior of the apartments is above. Public housing projects that are being transformed through RAD are often now using the historic tax credit if some of the buildings are being saved on the site. We're also seeing a trend for conversion of vacant downtown office buildings to residential use using the credit.

I hope that when you have a few minutes you'll Google HUD historic preservation and go to our web page, where you will find an incredible array of information, guidance for both Part 50 and Part 58, training modules, webinars, all the regulations we talked about, all the notices, memos, fact sheets, they're all there, as well as lots of good information on tribal consultation, various template letters to use in consultation, or to invite consulting parties into a consultation, as well as links to other preservation organizations and the HEROS partner worksheets that Sara recommended. So hope that you will check that out.

Sara Jensen: All right. Thanks, Nancy. And we'll just finish out, there is a housing environmental website that links from that HUD Exchange site. There's good program information for the programs we've been talking about today.

We wanted to let you know about some upcoming webinars. On August 20th, we'll be conducting noise training for FHA partners. On September 15th, HEROS training for FHA partners. And on a date to be determined this fall, Nancy will provide the Section 106 training on programmatic agreement that she mentioned earlier. We also have links to past webinars. For this audience it'll highlight the acceptable separation distance training and the flood plain training for FHA partners. The recordings, slides, and Q&A responses are all posted here. And this webinar will also get posted there after it's done.

So let's end, we have some time for questions. We'll hold for at least 10 minutes. And remember the caveats. We're only going to consider questions related to FHA programs today. And no questions about specific projects. Please direct those instead to the multifamily office processing your application. Or if it's an ORCF project, to the Lean Thinking mailbox. And they will bring in regional and field environmental officers for consultation. So with that, we'll stay on the line. And Nancy there are a few questions from earlier that we can get to now.

Nancy Boone: Great.

Sara Jensen: So the first one, there was a question about what about state recognized tribes, so non-federally recognized tribes. Can you talk a little bit about consultation with state recognized tribes?

Nancy Boone: Sure. That's a good question. Certainly we know there are many state recognized tribes, or tribes in the process of pursuing federal recognition. And it is up to the agency official to invite those tribes if they want to. It's also possible for a non-recognized tribe, state recognized

tribe, to participate in the process as an interested organization or individual. But the participation by state recognized tribes is not required in the regulation.

Sara Jensen: Thank you, Nancy. And if a project does consult with a state recognized tribe, would that consultation need to be done by HUD staff? Or could consultants do that consultation?

Nancy Boone: I think it would be a really good idea for HUD to do it. I mean it would not be -- it would be a little bit different in that it was not nation to nation, government to government. But it would certainly be a respectful interchange if HUD conducted that consultation on a par.

Sara Jensen: Thank you. There were a couple questions about ground disturbance. So let me start out with one clarification and then I'll hand it over to Nancy. So when I talked about the proposed delegation memo, I talked about a set of criteria, where in order to use the memo, the delegation memo, lenders would have to hire qualified preservation professionals. And one of their criteria was, if there was substantial ground disturbance, which will be defined in the memo.

I just want to explain that that's a different threshold. That is a threshold for needing to hire a qualified professional. It's a higher threshold than when ground disturbance triggers having to consult with tribes, HUD consulting with tribes, which is a lower threshold. So the lower threshold is what Nancy talked about and what is the current practice. In the tribal consultation memos that Nancy linked to in her slides, there is a definition there. And Nancy, I wonder if you could talk a little bit more -- and some of the specific questions were about when it's an existing project versus new construction.

Nancy Boone: Sure. So the people often want to reach out and say, you know, give us the number, how many inches, how many feet is ground disturbance. And it's really impossible to do that because the geology, the soil topography, is different everywhere. And so what they -- there may be underground resources at six inches in one location, and it may be six feet in another location that's been covered by fill over 10,000 years.

So finding an individual given number is not something that we can do. And sometimes there will be direction that a state archeologist, in the SHPO office, or in an academic institution, can offer for their particular area what is significant ground disturbance. But there is no automatic number. So it is a little bit vague, but it has to be a little bit vague.

Sara Jensen: Thank you, Nancy. So we had one question about the legal power to prevent, and whether that extends to a master developer of a multi mixed use development, where they might be doing earth movement, and whether that would be okay. And the answer is, no. That earth movement, and compacting dirt, and scraping off, clearing and grading, happens on the FHA site, that could lead to foreclosure, that could be anticipatory demolition, and that could be a big problem. Nancy, do you have any other comments?

Nancy Boone: That it has been a real problem. Yeah, so it's something you don't want to do.

Sara Jensen: Yeah. Thanks for that question. There's also a question -- I mentioned in my comments in the HEROS section about the categorical exclusion not subject to the related laws and authorities that applies to 223(a)(7) and 223(f), that are already insured by HUD and don't have work beyond maintenance. That is a regulatory determination and it applies to refinance programs. So the question was, would that also apply to project based rental assistance. And the answer is, no, there's not an equivalent categorical excluded not subject to for that program.

So Nancy, I'm not seeing any other questions related to -- let's see, no, a new one came in. There's a question about CPD notice 1602, which is the maintenance notice. This is kind of technical -- asking about is replacement of a single window is maintenance, but replacing two windows would not be -- does that -- we may not be answer -- yeah, go ahead.

Nancy Boone: So one of the modifiers is replacement the deteriorated window. Another aspect of the guidance is that the reviewer, the agency official, has some latitude in interpreting the fine line. And so part of that is on the ground knowledge and judgment. And if you had two deteriorated windows in different parts of the structure, you might make a determination that you could replace those as maintenance.

Sara Jensen: Thank you, Nancy. And it looks like we're right up against the hour. So thank you, everybody. And this will be recorded and posted in a few weeks. So thank you, Nancy. Thank you, Michelle and Orlando.

Nancy Boone: Thank you.

Michelle Grainger: Thank you all. This concludes our webinar for today.

(END)