

## **Revised - Advisory Guidance for Converting Projects Subject to Historic Preservation Requirements to “Exempt Activities” under 58.34(a)(12):**

Recently, the field raised the issue of converting projects from “Categorical Exclusions subject to §58.5” to “Exempt Activities” per §58.34(a)(12). Based on responses from the field, there appear to be several interpretations of when and how to convert a project to an “exempt activity,” particularly when a project is subject to historic preservation requirements. Therefore, to establish a standard and uniform approach, the Office of Community Viability (OCV) has decided to issue this advisory guidance.

OCV has determined that, in general, minimal levels of review, such as consistency checks or contacting parties with expertise for information, may be deemed to be a pre-compliance strategy and do not preclude converting a categorically excluded project to an exempt activity under §58.34(a)(12). Also, OCV has determined that the proper threshold for converting a project subject to historic preservation requirements to an exempt activity is at the “No Historic Properties Affected” determination (§800.4(d)(1)), as clarified in the bullets below.

OCV bases its position on the fact that a “No Historic Properties Affected” finding is objective and defensible when a “not eligible” and/or “no effect” consensus is reached with the SHPO/THPO (and ACHP if it chooses to participate) or, when a “not eligible” ruling is made by the Keeper of the National Register. Setting the threshold higher than §800.4(d)(1) subjects the historic preservation compliance process to more open-ended consultation over potential effects and mitigation.

- Section 106-related projects may convert from "Categorical Exclusions subject to §58.5" to "Exempt Activities," in that the “no circumstances which require compliance” phrase shall apply per §58.34(a)(12), only when the RE has:
  - Reached an adequately documented finding of "No Historic Properties Affected," in accordance with 36 CFR §800.4(d)(1) (e.g., reached agreement with SHPO/THPO (and ACHP if it has chosen to participate) on this determination), **AND**
  - Received no objections within thirty (30) days from the SHPO/THPO or the ACHP if it has decided to participate.
- Any objection received within thirty (30) days from the SHPO/THPO or ACHP will result in the project being ineligible for conversion to exempt and will require dissemination and/or publication of a Notice of Intent to Request Release of Funds (NOI/RROF) and submission of an RROF and environmental certification.
- For an "adequately documented finding," see 36 CFR §800.11(b) & (d).
- "Within thirty (30) days" commonly means the date from which the SHPO/THPO or ACHP actually receives the documentation.

Please note that §800.4(d)(1) is currently subject to revision (see 68 FR 55354, September 25, 2003, ACHP Notice of Proposed Rulemaking). However, in all likelihood, the forthcoming revisions will not affect this advisory guidance.

Section 106 and other related laws in §58.5 do not apply where the RE has reached a determination that the activity is a “maintenance” activity “(e.g., in-kind replacement or incidental maintenance of external and internal building features) eligible for a “Categorical exclusion not subject to the related laws” under §58.35(b)(3) (Operating Costs) and documented such finding in accordance with §58.35(d).

Any questions about this guidance should be directed to David Blick, Historic Preservation Specialist, at ext.5718.

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