

HUD NSP Training - Consulting With Indian Tribes About Historic Properties in Environmental Review, 6-21-12

Kent Buhl: -- which is "Consulting With Indian Tribes About Historic Properties in Environmental Review."

Did you know that responsible entities must consult with Indian tribes when reviewing a project that might affect historic or prehistoric properties of significance to tribes? HUD has some new tools to aid in the process; a new tribal consultation protocol, an enhanced online Tribal Directory Assessment Tool, and new guidance on when to do archeological surveys.

This webinar will showcase the tools, required protocols, and best practices for effective and efficient tribal consultation. Responsible entities, environmental officers, officials working with NSP grantees, and others will find this webinar very valuable.

So we have with us today Nancy Boone and helping her out in the background will be Katherine Howe [ph]. And I don't think David Noguera or John Laswick are with us today. That could always change. But we definitely have Hunter Kurtz with us. So welcome to you all.

And let's get this show on the road. So hi, Nancy.

Nancy Boone: Hi, Kent. Thank you very much for that great introduction. I'd like to welcome everybody to today's webinar. It's something that we've been looking forward to for many months and glad that the day is here.

As Kent outlined, we're going to cover a lot of material today fairly quickly and we're going to look at topics related to consulting with Indian tribes in the environmental review of HUD projects. When do you consult? How do you know who to consult with? And what are the specifics of a tribal consultation process? We'll cover all those items today.

As Kent noted, HUD has just issued some new tools for tribal consultation. All of these are available online and you'll see the web addresses soon for those.

We're going to look at the notice for tribal consultation. We're going to look at a database that helps identify which tribes are maybe interested in the area of your project. We're going to look at new guidance on factors to be considered in deciding to undertake archaeological studies as Part of HUD projects. And we're going to look at a revision of the request for release of funds certification form on which people will now certify that they have, indeed, consulted with tribes as appropriate under the Section 106 process.

A little bit of background. The webinar is meant for guidance for responsible entities and this is the people who are reviewing HUD projects for their possible impacts on historic properties. It will also be helpful for other HUD officials and grantees. The guidance that we'll be talking about today is focused on consultation with Indian tribes. And for anyone who has a particular

interest in looking at consultation with native Hawaiian organizations, we refer you to the site on the screen here for some additional information.

Let's go back for a minute to the origins of the historic review requirement that we're talking about. In 1966, the National Historic Preservation Act required federal agencies to consider the impact of their projects on historic properties. That requirement was contained in Section 106 of the act and therefore the process has become known as a Section 106 process. Implementing regulations were issued at 36 CFR Part 800. And those regulations and the National Historic Preservation Act were both incorporated by reference into HUD regulations that discuss the environmental review of HUD projects. And those are found at 24 CFR Part 58 and Part 50.

Just a reminder that, as we talk about requirements for review under Section 106, not all HUD projects require such a review. So for instance, projects that are reviewed under Part 50 and Part 58 regulations, those regulations include lists of exempt activities and lists of activities that are categorically excluded and not subject to environmental review.

Some examples of those types of activities include simple maintenance activities, operating costs, studies, plans, etc.

It's possible that some activities are covered by programmatic agreements; agreements that are negotiated on a state, county, or city basis that offer a streamlined process for Section 106 reviews.

And I should note here that a small number of NSP 2 grants to nonprofit organizations are covered by programmatic agreements. So if that applies to you, we can give you more information.

In general, there is quite a bit of information about Section 106 on the HUD website at a site called ATEC, Assessment Tools for Environmental Compliance. You see the URL here. You can also just simply Google HUD ATEC. And we certainly recommend that you bookmark this site for future reference in your environmental reviews of HUD projects because not only is there information about Section 106, but information on all other environmental areas as well.

This webinar, once we're done today, will be posted on that site so that it can help provide future guidance as well.

Under Section 106, it's usually an official of the federal agency who is responsible for the environmental review. However, by law and regulation, HUD projects are treated in one of two ways. Under Part 50, projects are reviewed -- project reviews are the responsibility of HUD staff. But projects that are covered by Part 58 regulations assign that responsibility to a responsible entity. And that's what our focus is today. The responsible entities are state, local, or tribal governments charged with conducting the environmental review. Part 58 applies to many HUD programs, including NSP and formula grant programs like CDBG and HOME.

Again, a footnote here, there is a small number of NSP 2 projects to nonprofits that fall under Part 50. But in general, what we're talking about today is projects that fall under Part 58, which directs responsible entities to assume the responsibility for environmental review.

The Section 106 regulations stipulate a government-to-government consultation. And by federal law and regulation in many HUD projects and those covered by Part 58, responsible entities are required to assume the role of that federal agency in environmental review, including Section 106 and tribal consultation.

So here's a slide that just outlines the four steps of the Section 106 process. And as many of you know, in practice, sometimes, the steps may be merged together. But Section 106 is a collaborative process, one where consulting parties share information at each of the steps. And in the end, the agency official, the responsible entity, decides whether to move forward with the project, even one with adverse effects.

The list of consulting parties can be long depending on the project and the historic properties involved. So today, in looking at this list for our purposes, where we're talking about the agency official, we mean the responsible entity. And in subsequent slides, you'll see that is abbreviated as RE.

Other prominent players in the consulting process are the state historic preservation officer, federally recognized Indian tribes, tribal historic preservation officers, local governments, organizations, and members of the public, and the advisory council on historic preservation. The advisory council oversees the process at the federal level and provides guidance for consulting parties and sometimes participates directly in project consultations.

I wanted to say just a little bit more about tribal historic preservation officers because some federally recognized tribes have designated within the tribe a tribal historic preservation officer and, on tribal lands, that person may have assumed the role of the state historic preservation officer. So in consulting with the tribe, you would consult with the THPO in lieu of the state historic preservation officer.

There are a couple exceptions. The tribal historic preservation officer may request that the SHPO participate or a non-tribal owner of land within a reservation can request that SHPO participate.

I wanted to point out here that HUD guidance directs responsible entities to initial -- to initiate consultation with tribal leaders and THPOs on projects off tribal lands.

Just a reminder here, visual reminder, consultation is a process, not an event. You need to allow time in your review schedule to adequately collaborate with people in looking at the project and its effects. It's advisable to start early; the process may take months.

Since 1992, the Section 106 process has included a requirement to consult with tribes. And basically, this slide illustrates what that requirement consists of. The requirement is to consult with federally recognized tribes. That includes native Alaskans. The requirement is to consult

about historic properties of religious and cultural significance to tribes. And when you consult is when a project may affect historic properties of religious and cultural significance to the tribes.

The definition of Indian tribe is shown here on the screen. There are over 500 tribes, including Alaska native villages and village and regional corporations that have completed the federal recognition process. And those federally recognized tribes are the tribes who participate under Section 106 as consulting parties.

This slide illustrates that a tribe's area of interest may not be limited to where they reside today and consultation is required for areas where a tribe may have current interest or where they perhaps had interests many years ago. This map shows some of the migratory routes -- the force migration routes that some tribes took many years ago.

It's also possible that multiple tribes may have interests in the same location and if that's the case, a responsible entity needs to invite all those tribes who have an interest in the area into the consultation process.

It's also possible for the responsible entity to invite non-federally recognized tribes.

So let's look at what you need to consult about. Here's a fairly long list and some of it may be a little bit difficult to understand. But if we look at some examples, I think it will become clearer. It's possible to have archeological sites with above ground remains of structures and villages, like you see here on the left, or archeological sites that have below ground features and artifacts, like the pot here that you see in the foreground in the center.

These things may date from thousands of years ago. More recent structures with significant tribal association can also be historic properties of religious and cultural significance to tribes, as indicated here by the Indian school on the upper right.

Plant and animal communities associated with tribal culture and life may be considered historic properties of religious and cultural significance to tribes. And on the lower right, we see fishermen mounted on horseback gaffing for salmon in a river in Washington state.

Historic properties of religious and cultural significance don't necessarily have to have manmade attributes. There can be areas where ceremonies have been held, as in the top left. Or sacred landscapes or features, as in the right, where a culture may believe that spirits of the tribe reside. Traditional cultural places, like this ancient tree, may be sites where elders gathered or may still gather. So there may be physical locations that don't have manmade attributes that can still be considered historic properties of religious and cultural significance.

The notice contains a checklist on when to consult with tribes under Section 106 and I hope that you'll look at this in more detail later. But we'll take a brief look at it now. When a project involves the types of activities that are listed here, the project has the potential to affect historic properties of religious and cultural significance to tribes and you need to ask the tribes if any such properties are present in the project area.

So if we look at some examples here, ground disturbance. If your project involves significant digging for new construction of foundations, basements, new utility lines, new access roads, grading, that kind of thing, it definitely has the potential to affect below ground resources.

Other types of activities that may affect historic properties are work on a building with significant tribal association. So if a former school, for instance, is being rehabilitated or demolished, that would be an example of a activity that had the potential to affect properties of religious and cultural significance.

We mentioned that entire landscapes can have significance. Here, one example would be new construction in undeveloped natural areas of large scale facilities. It's also possible to have an effect by introducing visual, audible, or atmospheric changes that are out of character with the area. And here, by way of example, is a mockup of the Cape Wind project in Nantucket Sound in Massachusetts, in which Nantucket Sound itself was judged to be a traditional cultural place of significance to tribes.

Other types of activities that may affect historic properties of religious and cultural significance include the transfer or sale of properties that contain known archaeological sites or burial grounds or the types of sacred places that we've been talking about including building with significant tribal association.

In consulting, it's important to consult early before decisions are made. And that's a mantra that you'll hear again and again throughout the Section 106 guidance and it's an important thing to factor into your timeframe for a project.

On June 15th, 2012, HUD issued a notice on the process for tribal consultation in projects that are reviewed under 24 CFR Part 58. And this notice provides step by step guidance on consulting with tribes in Section 106 reviews and, in general, supplements the guidance on 106 in general that can be found on the ATEC website, the site that I referenced earlier with the information about environmental issues and topics.

The -- one thing to note here is that while this notice gives great detail about how to conduct tribal consultation, it also makes allowance for use of agreements that you may already have about tribal consultation or that you may develop as you go forward in your relationships with tribes. This notice can work in tandem with existing agreements that you may have already created.

The notice is organized along the four steps of the 106 process and the first step is to invite a tribe to consult. But how do you know how to -- how do you know who to invite? HUD, and particularly the Office of Community Planning and Development, has revised a very helpful tool, the Tribal Directory Assessment Tool; we call it TDAT. And you see the web address here on the screen.

It is something that has pulled together the information about tribes, tribal contacts, and the counties of interest that tribes have expressed. And the information was gathered in 2011. We know that it's going to be updated as time goes on.

You can access information in TDAT in a number of different ways and I'd like to describe those and illustrate those briefly. I hope also that you'll go online after this webinar and this yourself by putting in addresses and queries.

So it's possible in the new TDAT, in TDAT version 2.0, to find tribal contact information by putting in the address of a project. So here, there's a little box on the right that allows you to put in the street address, city, state, zip code. And then, you hit find tribes and it will return a list of the tribes who have expressed an interest in the county where that project is located. And you can export it from that list to Excel and have it appear as an Excel spreadsheet, which you can then use later on for analysis or for mail merge kinds of functions.

The database yields lists with entries for tribal leaders and for tribal historic preservation officers both.

You can also find information on tribal contacts by looking at states or counties of interest to you. So you can choose a county from a drop down -- well, excuse me. Let me back up. You can choose first a state. You can choose by clicking on that state on the map that's on the TDAT homepage or by choosing the state's name from the list below the map. And once you've done that, it will offer you two options. It will offer you the option of choosing one county within the state to request information on or, down below, you can request information on all the tribes in that state.

So if you choose for a county, it will return a list to you of all the tribes who have expressed an interest in that county, who the tribal leaders are, who the tribal historic preservation officers are, what their mailing address, their e-mail address if it's available, their fax number, their work phone.

The list that you get, and this is an example of a state list, this is page one of multiple pages of tribes with interests in the state of Wisconsin, you can print the list as well as export it to Excel. So it's something that you can print off for handy reference if you'd like.

Above the map on the TDAT homepage, you can choose the name of a tribe from the drop down list and it will return the tribal contact info for that tribe. So you can also look things up specifically by individual tribal names.

Two things to note that you'll also see on the TDAT homepage and that is that there's a user manual that you can access by clicking on the link on the homepage. And also, I wanted to point out that we have set up a system for receiving feedback and corrections on the data that's in the database. And so, we're hoping that people will indeed send us new information as it changes so that we can incorporate those changes into the TDAT database so that it remains up to date.

So after you've used the when to consult with tribes checklist to determine if you need to consult, and after using TDAT you've identified which tribes to consult, let's look at what happens next. Using the information from TDAT, you would write a letter to the tribe and invite them to

consult. We've provided a template letter. You can access it within the notice; there's a hyperlink and you can literally mail merge with the information that you've gathered from TDAT.

The letter enquires about historic properties and asks you to insert a description of the project so people will know a little bit about what you're doing. We have some sample project descriptions that are available, again, in the hyperlinks through the notice, and also a very good map that shows where the project is located.

The letter requests a response about who is the principal contact for the consultation. So the letter goes to both the tribal leader and the tribal historic preservation officer and we ask that the response tell us who the tribe would prefer that we consult with.

So after you've -- oh, I wanted to point out that something's very important, and that is that, under Part 58, it is the responsibility of the responsible entity official, the head official of that responsible entity, who must initiate the consultation, who must sign the letter. The letter has to be on their letterhead. So this is something that cannot be delegated down to a consultant or a grantee. It must be done by the responsible entity official.

A footnote. If someone is dealing with a project that's being reviewed under Part 50, that letter comes from the HUD official.

This letter may be transmitted by regular mail, by certified mail, by e-mail. You have a number of choices.

The letter requests that the tribe respond within 30 days. And I wanted to just point out that the 30-day clock there is for the tribe to respond whether they want to participate in consultation. It's not their tribe has to provide information within 30 days. That could very well take longer. But we're asking that they either accept or decline the invitation to consult within 30 days.

If a tribe responds with no interest or there's no response, then we will say that the tribal consultation is complete.

In RE mail -- so invite non-federally recognized tribes to be consulting parties, or those tribes' [inaudible] will participate as members of the public.

So moving on to the next step in Section 106, identify and evaluate historic properties. I'm sure these steps are familiar to many of you. So in this step, you're gathering and sharing information about known and potential historic properties. You're looking at whether those properties are eligible for the National Register of Historic Places if they aren't already listed. And one very important thing here is that HUD recognizes that tribes possess special expertise in evaluating historic properties of religious and cultural significance to them. So keep that in mind. Keep -- rely on tribes. Rely on that expertise.

If parties disagree about whether something is eligible for the National Register, any party can invite the advisory council to consult. A tribe can also ask the advisory council to request that the responsible entity go through a more formal process to determine -- to request a determination of

eligibility from the National Parks Service, the people who maintain the National Register of Historic Places. And remember that National Register listing or eligibility is essential for consideration as an historic property under Section 106.

A few notes about confidentiality and things that are likely to come up. In meeting with tribes, face to face meetings are by far the best. We know that it's not always feasible and there are other technological ways to hold consultation. But if you have the opportunity to hold meetings face to face, to hold meetings on site, we certainly encourage you to do that.

Joint consultation with other tribes and other consulting parties, like the SHPO, is certainly also recommended. Sometimes, you'll find that parties don't want to meet jointly and be flexible and respect that. But try to aim to have joint consultation meetings.

Sometimes the question of fees comes up and there is -- it is not appropriate to have to pay fees to parties for consultation per se. However, you can pay for travel expenses to facilitate meetings if needed or for consultant services, like detailed survey documentation that would otherwise be provided by a consultant. Those can be eligible costs if they're approved by HUD and the grantee.

A word about confidentiality. Some of the information that tribes may be sharing may be confidential, something that should not be distributed or available to the broader public. And if a tribe requests confidentiality on any of the information that they share, we want you to respect that request and have as part of your discussion with the tribe how to ensure that you will be able to honor their request for confidentiality.

There are practical means that you can talk about about making sure that it's not included in any sort of public dissemination of information or any website, that kind of thing. You can also look to state laws or federal laws for the protection that they may offer in terms of withholding information. And there is a process under federal law for that to occur and it's detailed in the notice on tribal consultation.

Sometimes, when you're talking with tribes, you will find that they may be unable to share information, that it is inappropriate culturally for them to share certain things with you. Or sometimes, it may be that they have an inability to share information at a given time of year. So try to be flexible and open and continue talking and work it through.

Sometimes in discussions about identifying and evaluating historic properties, one of the consulting parties, a tribe, tribal historic preservation officer, a state historic preservation officer may request that an archaeological investigation be undertaken to identify properties.

In June 2012, HUD issued a revised historic preservation fact sheet number six with guidance on when to do archaeological investigations in HUD projects. This is available on the website and through hyperlinks the notice and we encourage you to take a close at it. It general background information and then lists some specific factors to consider in deciding whether to undertake an archaeological field investigation. And we'll take a brief look at some of those now.

So you want to look at information that you're receiving. That's part of the whole point of consultation. So what are you hearing from SHPOs and from tribal historic preservation officers and tribes? Do sources corroborate that there's a likelihood of previously undiscovered sites in the area that would merit investigation through an archaeological survey?

You look at where the project will have a likely impact on those potential properties. If a project won't have an impact because it's in a slightly different part of the property from where the physical impacts are occurring for instance, it's generally not necessary to document those sites with a survey.

You want to look at previous ground disturbance, previous digging, that may have destroyed the integrity of the site. Archaeological sites yield information, not just artifacts. And the information that you get depends on intact deposits and features. If the ground is jumbled, that information is likely lost.

You want to look at the likely significance of potential properties. Are the experts who are sharing their advice with you saying that they expect that these sites will yield important information that would qualify the site for the National Register of Historic Places, information about how people lived in the ancient past?

You also want to look at the magnitude of the project and degree of HUD involvement and make sure that the cost and level of effort in the survey has a logical relationship to that magnitude.

You want to look at whether a project seems to be in the public interest as you balance public values of program mission and cost and other public benefits. Does the idea of doing a survey, of expending funds on the survey, appear to be in the public interest?

A couple of special things to note. You also want to consider whether someone has indicated that there may be human remains on the property. And if that's the case, it's a very special case, and we'd certainly recommend a survey to identify the presence and the boundaries of those burials or human remains in consultation with tribes and the state historic preservation officer.

Next, there is a policy statement on affordable housing in historic preservations and guidance that was issued by the advisory council on historic preservation that specifically ties archaeological investigations with the idea of affordable housing and says, as you see here on the screen, that investigations should be avoided or -- for affordable housing projects that are limited to rehabilitation and requiring minimal ground disturbance.

We want to emphasize that this policy statement refers here to new construction. Archaeological investigations should be avoided in affordable housing projects limited to rehabilitation. This does not apply to new construction.

Once you've identified what sites there are and whether they're eligible for the National Register, you look at following the general Section 106 guidance on assessing the impacts of your project on those properties or potential properties. Here are listed the criteria of address effect. I'm sure that many of you have used these as you've looked at Section 106 reviews in the past.

So you apply the criteria of adverse effect and you come up with a finding, either there are no historic properties affected because, A, there are no historic properties or, B, there are no effects. Or you may have a project that has no adverse effects. The project will have an effect on properties, but that effect is not adverse and the project moves forward. In an adverse effect, one or more of the criteria of adverse effect apply and you need to delve into that further. But whatever a finding you make here in step three, you notify all the consulting parties. Parties have 30 days to object. And we want to note that a tribe may always ask the advisory council to review a finding or to offer guidance.

If a project will have adverse effects, you have an obligation to notice the advisory council and invite their participation. There's a set criteria, a list of required documentation that you need to provide so the advisory council understands what the project is all about, and then, the council will respond within 15 days about whether they will participate in the consultation. But the council looks at criteria for council participation that are listed in the regulations and one of those criteria is described here. If a project presents issues of concern to Indian tribes and native Hawaiian organizations, the council may choose to step in.

In resolving adverse effects, the idea is keep talking, keep consulting, look for ways to first avoid an adverse effect. And if you're successful in that, your finding may drop back to a no adverse effect finding. But if the adverse effect persists, you continue consultation to try and find ways to minimize or mitigate that adverse effect.

And if you reach an agreement on minimizing or mitigating an adverse effect, then the consulting parties confer on a memorandum of agreement and sign a memorandum of agreement. And here on the screen, you see some breakdown on who signs. A THPO representing a tribe on tribal lands is a required signatory. A tribal historic preservation officer or a tribal leader or other consulting party may also be invited to sign.

Note here that a memorandum of agreement for a project that has an adverse effect must be executed prior to the decision point for a project.

Often, an MOA may include mitigation measures, things that will be carried out in order to help balance off the loss of a resource or the damage of a resource in a project. And sometimes, as noted here, excavation of a site is sometimes undertaken as mitigation so that the information in the site is recovered before the site is lost in a construction project. But there are many other types of mitigation measures and creativity is certainly encouraged here.

An RE is responsible for making sure that mitigation is carried out and once the mitigation is -- or stipulations are completed, it's the RE's obligation to inform the parties, including tribes, that those things have been carried out.

Now, we always up that a consultation will end in agreement. Sometimes, it doesn't happen. Very rarely, it doesn't happen. And there are provisions in the law for termination of consultation may be requested by a tribal historic preservation officer on tribal lands or by the responsible entity, the state historic preservation officer or the advisory council if they are participating.

Termination generally results in final comments prepared by the advisory council on historic preservation. And a note here, tribes who are consulting about properties off tribal lands don't have the authority to terminate consultation, but they may decide to not sign an MOA. And the details about termination of consultation are spelled out in the notice and in the regulations that are hyperlinked in the notice.

Sometimes after you've completed a review, surprises do occur and in that case, if historic properties are discovered during construction, you want to stop, notify the tribes if there appear to be resources that would be of significance to tribes, and consult with tribes and other parties soon and reenter the consultation and try to resolve any adverse effects that might occur there.

If discovery includes human remains, it's very important to respectfully cover over the remains, secure them, and in addition to noting the -- in addition to notifying the consulting parties, including tribes, you should also notify local law enforcement officials. Most states have laws regarding human remains in unmarked burials and you want to make sure that whatever action you take is in compliance with those requirements.

It's always advisable in the case of a discovery condition like this to meet with consulting parties on site and if you do encounter human remains, the advisory council on historic preservation's policy statement regarding treatment of burial sites, human remains, and funerary objects gives excellent guidance in how to proceed that. That policy is hyperlinked in the notice.

So once you have successfully completed an environmental review that includes Section 106 with tribal consultation, if needed, and you've completed environmental review in the other environmental review areas, you, as a responsible entity, would file a revised request for release - - you would file a request for release of funds form, a 7015.15. And this form has been recently revised.

The old form required certification of compliance with all relevant environmental laws and regulations and that requirement is still on the form. You must certify that you complied with that. But a new certification has been added to the second page of the form. And it requires you to certify that you have complied with, specifically, the Section 106 process, including consultation with a state historic preservation officer and Indian tribes. And naturally, you keep your notes, letters, e-mails, reports, etc. that show that compliance as part of the environmental review record.

Here are listed a number of primary resources that we hope you will use and consult and we hope that they'll be helpful to you. The first one is the reference to the tribal directory assessment tool. And again, we encourage you to try that out. After the webinar, go online and try to use it. There is a lot of information about how to conduct Section 106, including tribal consultation tips on HUD's website and you can see two references here.

There's also an excellent -- a newly revised online course about working effectively with tribal governments that you can access. It's presented by the advisory council on historic preservation in collaboration with a interagency working group on Indian affairs.

And don't forget the people resources. As with all questions about environmental review in HUD projects, regional and field environmental officers are excellent sources of help with Section 106 and tribal consultation questions. My name and contact information is there on the bottom as a federal preservation officer.

And here is a page with many resources specific to the neighborhood stabilization program, the sponsor of this webinar, and you can find very helpful information at these links here.

And that's a very quick run through and I want to thank you very much for attention and interest. And now, we'd like to open it up to your questions and I turn it back to you, Kent.

Kent Buhl: Thank you very much, Nancy. That's a process with a number of steps involved and you've described them here very well. And so now, let me remind people how to ask questions. We're open for business and we will spend the rest of the session answering your questions and some are already -- have been submitted. So very good and keep on submitting them as they occur to you.

And let me -- I hope I get this name right. Sunny [ph] says, "My experience for many years is that tribes do not respond to letters or phone calls and they're not very engaged in this process. Do you know if tribes are going to be made aware of the importance to respond to our inquiries?" And also, I believe the link to the tribal letter template in the CPD notice is not reflected in the notice.

Nancy Boone: Excellent question. I can say that, yes. We are very much planning reaching out to tribes and we'll be presenting a webinar particularly focused on issues of interest to tribes later in July. It's scheduled for July 25th.

It's a situation that we have seen occur and a couple of things to include in a response, it's important to make sure that the invitation to tribes to consult is coming from an official of the responsible entity, someone who speaks for the responsible entity, and not a consultant or a grantee or a sub-grantee; something like that. It really has to come directly from the responsible entity official because they have assumed the role of the federal agency.

And it's important to make all efforts possible to communicate and understand positions of both parties, explain assumption authority. There's a memo on the topic on the ATEC website, on HUD's website. And again, look to local HUD environmental officers who may have had similar experience who can offer some advice in that kind of situation.

Kent Buhl: James says, to clarify, is it correct that the tribes listed in the TDAT, in the Tribal Directory Assessment Tool, are only those that are federally recognized?

Nancy Boone: Yes. That's correct.

Kent Buhl: And Juan asks, if an archeological investigation is performed, does that substitute for the consultation with the tribe?

Nancy Boone: No. It's Part of consultation because that really is an investigation to help identify whether there are historic properties present. And so, it's something where we'd hoped that the tribe was involved in consulting about how the investigation would occur and certainly sharing the results and helping to evaluate the results to see if any of the properties identified were eligible for the National Register of Historic Places.

Kent Buhl: Joanne [ph] asks, "In terms of repair and replacement, such as a water or sewer line, wouldn't one need to look at whether the activity will occur outside the original footprint, either deeper or wider? But the HUD checklist isn't clear."

Nancy Boone: Well, we debated about whether to include something specific what is minimal ground disturbance and what is significant ground disturbance. And it varies so much by region of the country, by area within states, that we felt that it really wasn't appropriate for a -- to put a single type of parameter in a national document.

However, there are certainly many states where tribes and responsible entities have discussed this kind of thing and have come to agreements like you're suggesting that say, oh, if you're replacing a utility line within an existing trench, because it has been previously disturbed, there's -- it's so unlikely that resources will be found there, that it's nothing that people want to consult about.

But that's something that you can and should discuss with tribes in your region to see if there are categories that would allow you to sort of fine tune that statement about -- the statement about ground disturbance.

Kent Buhl: Rhonda asks, "Did I understand correctly that, as a consultant for the responsible entity, I cannot send the initial consultation letter to the SHPO and the THPO, and that it has to be on responsible entity letterhead?"

Nancy Boone: That is correct. This is particularly important for tribal consultation.

Kent Buhl: Bob asks, "How close to the project's APE" -- and you might want to -- what is APE?

Nancy Boone: It stands for area of potential effect. Sometimes a project will have impacts that extend beyond the actual property of the project. It may have an effect on areas surrounding the project property and so you could have a larger area of potential effect for instance.

Kent Buhl: And Bob asks, "How close to the project's APE does the historic location or site have to be to be considered adversely affected? If it is outside of the APE, can you refuse to do an archaeological study?"

Nancy Boone: Hmm. I'm -- can you read that one again? I'm not quite sure that I got it.

Kent Buhl: Sure. "How close to the project's APE does the historic location or site have to be considered to be adversely affected?" Start with that.

Nancy Boone: Well, it sounds to me like you're talking about -- first all, the definition of area of potential effect. The resources that you're considering impacts on the -- where you're looking to see if a project is going to have impacts is within the area of potential effects. So if you're saying there's some area outside that that might be affected by a project, then that's telling me that maybe your area of potential effects is too small and you need to broaden it to include that area that might be affected by the project.

Kent Buhl: That makes sense. And let's see. Bob asks, "Who usually pays for these archaeological study, the responsible entity or the developer?"

Nancy Boone: Oftentimes a developer will do an archaeological study as Part of pre-project planning. They want to investigate the possibility of sites in an area and they'll do it ahead of time. If they've done some planning that indicates, in talking with the state historic preservation officer or with the consulting -- or talking with tribes, that there may be areas of concern there, they may do it ahead of time.

If a project -- and in that case, obviously, the developer -- the applicant would pay for it. In general, the project expenses that would be associated with archaeological investigations would be considered part of the project expense. So there would a discussion about the project expense coming out of the HUD award. There would be nothing to stop the developer from using other funds to also fund that.

Kent Buhl: Jennifer is interested in step one of the consultation and if the tribe does not respond to the request to accept or decline the consultation, does the response period extend beyond 30 days or does it end at the 30 days?

Nancy Boone: If there's no response at all, we're saying that it would end after 30 days. If you haven't heard anything at all -- tribes receive many requests for consultation and don't have time to respond to all of them.

Kent Buhl: Lenwood [ph] asks, "Is the impact of plowing for crop production sufficient ground disturbance to dismiss the need for an archaeological investigation?"

Nancy Boone: It varies. It depends on where that plowing takes place. And in some instances, plowing could affect resources. And in other instances, there might be resources well below the plow zone where plowing would have not harmed those resources and they could still be expected to exist.

So again, this is something where it might make sense within a region or within a state to talk with tribes and to talk with the State Historic Preservation Office about whether there are some rule of thumb types of measurements that people could use about when there's too much ground disturbance, when it's -- ground disturbance is likely to have destroyed a site.

Kent Buhl: In a related question, Catherine [ph] asks, "Could you please provide a little more information on minor ground disturbance. For example, for rehab projects where the only ground disturbance will be updating existing landscaping, is consultation needed assuming there are no other triggers?"

Nancy Boone: That would be considered minimal I would say.

Kent Buhl: "Can you provide examples of the type of tribal consultation information which could be considered to be confidential?"

Nancy Boone: In general, the -- some of the things that I have heard are locations where, for instance, materials for making tribal baskets or for gathering tribal medicine, those kinds of locations might be something that a tribe would want to hold as confidential so that people in the general public would not think that it was okay to go there and affect that resource.

There might be instances where some of ceremony or ritual was a very private thing for the tribe and they really were -- are not at liberty to give any details about what that ritual or celebration or such was all about.

Kent Buhl: Thanks for that question, Laura [ph]. Ernest says that the new 7015.15 certification form states that the responsible entity has assumed responsibilities including tribal consultation. This statement is not conditioned as appropriate. Is the certification understood to mean that the responsible entity has consulted as appropriate?

Nancy Boone: Yes.

Kent Buhl: And Bob asks, "Is there an approved list of archaeologists who are qualified to perform digs?"

Nancy Boone: Many state historic preservation offices maintain lists of qualified consultants and I -- that would be the first call I would make if I were looking for a qualified archaeological consultant.

Kent Buhl: Good. Hope that helps Bob. And Catherine [ph] asks, "On the consultation coming from the responsible entity official, can that be delegated to internal staff? Or must this certifying officer sign the consultation letters?"

Nancy Boone: I would say it would be a good idea for the actual certifying officer to be the one who signs the letter to tribes. We don't want it to be a matter of dispute whether the correct person has signed the letter. It should be the official who signs on behalf of the responsible entity.

Kent Buhl: Kara [ph] asks for a clarification on the bullet point regarding not having to go through the consultation process for construction of affordable housing.

Nancy Boone: Hmm. That bullet point is included within the advisory council's policy statement on affordable housing. And it is a narrow policy statement and it's meant to augment and give further guidance in relation to Section 106.

So basically, it says -- it is directing people that in affordable housing projects that are limited to rehabilitation, that are limited to projects with minimal ground disturbance, that archaeological investigations should not occur. And there may be exceptions to that but that is the general guidance coming from the advisory council.

Kent Buhl: And scanning here. And let me take a moment to remind people that this webinar is being recorded and will be archived on the NSP website. And I believe there will also be a link to it on other sites that Nancy works with as well. And that'll include an AV recording of this presentation and a copy -- a PDF version of the presentation and, takes a little bit longer, but there will be a transcript that's posted there, too, a written transcript of the entire webinar. So feel free to use those in the future and to refer others to that site. Might have wanted to be here and couldn't be today.

Laura [ph] asks, "When there is an adverse effect, but the project includes appropriate mitigation, is the RE allowed to make a finding of no significant impact without notice to or additional consultation with the advisory council?"

Nancy Boone: That's a question that's really outside the realm of tribal consultation and is more directly related to the environmental review process in general. So I think would defer to the regional environmental officers and program officers on that.

Kent Buhl: Terry [ph] says that, "The Indian tribe and THPO, tribal historic preservation officer, representative that we currently contact is not listed for our county on TDAT. Are we required to continue consulting this tribe?"

Nancy Boone: If they're a federally recognized tribe, please give us the information and we'll get them on TDAT. And yes. You should be consulting.

Kent Buhl: Thomas says, "We checked with the state of Virginia on the TDAT and Hampton, Virginia, is not listed. Does that mean we have no tribal properties in our area?"

Nancy Boone: Did you check since yesterday because the revised information went up yesterday. So that would be the first question that I would ask back. And in general, I mean this also relates to the previous question, if we -- there was a project in which all of the tribes were contacted and, in many cases, numerous times to confirm their counties of interest and the appropriate and accurate information for tribal contacts. And if things have changed or if something was missed in that work, we want to be aware of it. And so, if you'll alert us to the proper correct information, we'll make sure that that gets into TDAT.

If the -- and I would just say that sort of what we're thinking -- is that if the information comes in from tribes, we'll assume that it is accurate coming in. If it comes in from someone else, we will check it and confirm it with the tribe and then put it in TDAT.

Kent Buhl: David wants a clarification on ground disturbance. "So what you're saying is that ground disturbance in the guidance is truly that, regardless of whether or not there is already -- the ground has already been disturbed?"

Nancy Boone: Well, previous ground disturbance is something to be considered. And so, the extent of previous ground disturbance is something to talk about in consultation. In the area where you are located, is the previous ground disturbance that happened, has it been documented? Are people sure that it's happened? Has it been extensive? Has it gotten down far enough into the ground that it has impinged on the areas at the depths where you would expect to find sites? That kind of thing. So it's part of the local conversation about whether to undertake a survey.

Kent Buhl: Gabriel [ph] asks, "If no tribal contact is indicated within TDAT for the respective project or for the county, is it safe to assume that the tribal consultation is not necessary?"

Nancy Boone: Yes. We have to go with the assumption that we've got a complete database. Now, in the beginning, as we're transitioning into using this, if you have information that indicates that there's missing information from TDAT, we want to get it into TDAT and we want to advise you to consult with those people who you know of who are tribes with an interest in your area. But at the same time, we want to be sure to get that updated information into TDAT now.

Kent Buhl: Vern's question is, "Is the time allowing Indian tribes 30 days to respond in addition to the 30-day limitation for SHPO and THPO?"

Nancy Boone: And invitation to consult is sort of -- something that happens at the beginning of the process and you can be inviting the other consulting parties into the process at the same time. You can be beginning to gather information and checking in with the State Historic Preservation Office about what information they may have on existing sites or potential sites.

So I think what we're trying to stress is that this 30 days is specifically related to inviting tribes to consult. It may very well overlap with other timeframes, but this one, we want to make sure is understood as its own 30 days.

Kent Buhl: Let's see. I lost my place here. Give me just a second. There we are.

Bob says, "The tribes asked for an archaeological study with no information about why they think the area is significant. Is that lack of info sufficient to refuse to do the study?"

Nancy Boone: No. It's not. I think that in that kind of situation, you need to engage in a conversation so that you'll learn why they're making that recommendation and you can discuss the aspects that are -- the factors that are outlined in that new historic preservation fact sheet

number six, talk about it together with the tribe and gain a fuller understanding to be able to make an informed decision.

Kent Buhl: Okay. And finding my place again. Sorry for the pause. Here we go.

Kimberly says, "We have a few housing structures that were built in the 1920s and have been designated as blighted structures and public nuisances and ordered for demolition. They're not in a designated historic district. We would like to use CDBG funds to demo. Do we have to go through this process?"

Nancy Boone: You have to ask yourself whether you have to go through the process. And again, this is a much broader question, but, in general, if you have that kind of a project, you want to look to see if there's a programmatic agreement, for instance, that covers the project that would give you some streamlined process that you could use that might, for instance, exempt certain activities from having to go through review. That might very well be the case. It's certainly the case in a lot of the land banking activities that are going on.

So you need to establish whether you need to do a review. And then, look at whether the types of activities that you're undertaking are types of activities that may affect historic properties of religious and cultural significance. And at that point, then you'd see whether you need to consult with a tribe. It may very well be that you don't have to.

Kent Buhl: On a similar vein, Dave asks, if you can answer no to all the items under when to consult, do you still need to consult?

Nancy Boone: No. That's the point of the checklist.

Kent Buhl: James is wondering when the consultation begins. "Does the 30-day clock begin with mailing a letter or do we need to estimate when the tribe receives it?"

Nancy Boone: Thirty days from the receipt of the letter. So the notice suggests several things, suggests that you can e-mail a PDF copy of the letter and then you would assume that the person received it on the day that you sent it. You can send it certified mail, then you get a response back from the post office on the date that it was received. You can also -- if you live in an area where mail delivery is predictable, you can -- we're saying, assume that five days after you have mailed the letter, you can assume that it has been received.

Kent Buhl: Gloria mentions that the principal chief in one database is different from what's in the TDAT.

Nancy Boone: The -- I wonder -- there's certainly are other databases out there of tribal contacts. Bureau of Indian Affairs has a database and other organizations have databases. What we're trying to do is to consolidate all of the current information for our responsible entities and others. So if you find that there seems to be a conflict, let us know and we'll resolve it.

Kent Buhl: Pam says, "We have a tribe state to us that they have 60 days to respond to notices. Would we have to accept this or could we stand firm with the 30 days?"

Nancy Boone: Well, I think we're going to be talking with the tribes about the 30 days in the notice and why we've set that. And so, I mean, at this point, I think we would encourage you to talk with the tribes and say that there's this new guidance coming out and encourage them to be on the lookout for this tribal consultation webinar that we'll be putting on on July 25th, where we'll get into a lot of this information and detail in sharing.

Kent Buhl: Very good. And Laura asks, "Should we expect that since the certifying officer will need to sign the tribal consultation letter, that he or she is also required to sign the SHPO consultation letters?"

Nancy Boone: I think that in a number of programs in a number of instances, there has been past practice and task protocol in which others have sent the letters to the state historic preservation officers. And so this notice, because it's limited to tribal consultation, doesn't necessarily override that kind of previous protocol or established practice. But this is a practice that we are saying must be following for tribal consultation.

Kent Buhl: Jennifer is wondering, "If the tribe agrees to be part of the consultation process, is there a time limit they have for responding?"

Nancy Boone: No. There are not specific timeframes. I think the important thing is to keep communicating to let tribes know the deadlines that you're working in in your program and in the project and what the parameters are, what -- that affect the schedule. And I think that, in a collaborative process, people sharing that kind of information work out a schedule that can work for all the parties.

Kent Buhl: Stephanie asks, "If there are several tribes listed that have interest in projects in our county, do we consult with all of them?"

Nancy Boone: Yes.

Kent Buhl: And Zach asks, "What is the appropriate evaluation of a request for a tribal representative to be present during construction excavation especially where no archaeological investigation was determined necessary per HP fact sheet six?"

Nancy Boone: Hmm. That's an interesting question. You would expect that there was at least some expectation of sites there for someone to suggest that there be a monitor during construction.

So it sounds to me like that kind of situation might be the result of a discussion about whether to do an archaeological investigation where there seem to be perhaps not enough evidence to suggest that a survey was needed but there was still interest on the part of the parties to provide some measure of assurance that if any sites were found, they would be dealt with appropriately and quickly.

So to me, that kind of situation might come -- might be arrived at as Part of a consultation process. There isn't a guidance piece that would say, yes, you can do this. No, you can't do this. I would say that it's an option that people could discuss under consultation.

Kent Buhl: And I'll take a moment here to let you know what's coming up in terms of NSP webinars. These two are on the schedule, one next week, one in July. I know more will be added to the schedule and we hope to see you at some of those if they look like something that you could benefit from.

And also, when we are done with this webinar, you'll be automatically directed to a survey form, a short evaluation, and we'd very much appreciate you taking a couple of minutes to answer the questions there. And any written comments you have are especially helpful and thank you in advance for doing that.

And back to the questions. Joanne [ph] says, "Assuming that TDAT could be updated regularly, if a grantee contacted tribes as of a certain date, then if new tribes are added after that 30-day period, do the additional tribes need to be contacted as well?"

Nancy Boone: If you know of them, I would contact them.

Kent Buhl: And I hope I get your name right, Edkeisha [ph] says, "I am working on a neighborhood-wide project that is located within a historic district. Is there some way I could consult for the entire project? Or would I have to consult on each step/property as they come across my desk for environmental review?"

Nancy Boone: A situation like that is one that sounds ripe for consideration as a group and where you could look at the area and the kinds of impacts that you -- of the kinds of activities that were going to be undertaken, the kind of impacts that would be expected from the project, and talk about the properties as a group and consult about them as a group.

Kent Buhl: Tressa [ph] asks that you please clarify that even in the event that an area has experienced previous ground disturbance, if human remains are known, discovered, or likely to be present, they will still need to be dealt with appropriately.

Nancy Boone: Yes. Any time that human remains are discovered, it's a very special circumstance that has to be addressed respectfully, quickly with the consulting parties and with law enforcement officials.

Kent Buhl: And Maggie asks, "Is it safe to say that we should go to TDAT for all projects to ensure a tribe is covered?"

Nancy Boone: Well, I think that the checklist is meant to narrow down whether your project includes the kinds of activities that would impact properties of concern to tribes.

So I would say that the checklist is something that you do first. And if the checklist indicates yes, there are activities that are going to occur as Part of my project that might have the potential to affect historic properties of concern to tribes, then you want to ask the tribes whether, indeed, there are historic properties in the area.

Kent Buhl: Let's see. Yes. That one's been answered. Tracy [ph] says, "To be clear, is only the certifying officer that can sign the tribal invitation to consult letter? Or can the individual who consistently conducts the overall environmental review process sign the tribal invitation to consult letter if they are an RE employee?"

Nancy Boone: Yeah. And this is, I think, the fourth time that this has come up in a question one time or another. So it indicates to me that it's of great concern. And my answer was that the certifying official would be the one who should sign. And what I'm gathering from the many questions on this topic, I'm gathering that maybe people are thinking that that could be a problem. And so, I mean, it's something that we can continue to discuss, but I think in the notice, we're assuming that it would be the certifying official. And if that is problematic, then let's talk more about it.

Kent Buhl: And scanning for additional questions, let's see. Hunter, are you there?

Hunter Kurtz: Yes. I am.

Kent Buhl: Very good. There was one here that might have something to say about. Let me find it. Yeah. Will participation in this webinar be listed as eligible for CM credits with the American Institute of Certified Planners or the APA?

Hunter Kurtz: Hmm. I don't know. Sorry.

Nancy Boone: I would chime in. That's nothing that we set up ahead of time and I think that in order to get CE credit, you have to have it set up ahead of time. It's a good idea for the next time though; isn't it?

Kent Buhl: I think that that sounds right to me. Thanks for that question, Mike.

Hunter Kurtz: Sorry I couldn't help there.

Kent Buhl: That's okay. Let's see. So scanning and at the moment I see no more questions. Nancy, I wonder if you have any final remarks? Or Hunter?

Nancy Boone: I'll jump in and just thank people for participating, for showing your interest in this topic. It's something of primary concern to us here at HUD and I know to you as well. And we're hoping that this new guidance will help make it easier to consult well with tribes, to engage in meaningful consultation and discussion with tribes, and to have projects that protect cultural values as well as meeting the program goals that we all care about. So thank you for your participation and look forward to working in the future.

Kent Buhl: And in the meantime, we have gotten a couple more questions. And since we have time -- a lot of time left, let's go ahead and ask this.

Dave says, "If you can answer no to all of the items under when to consult, do you still need to consult? And as I recall, the answer to that was no because you've gone through the checklist."

Nancy Boone: Correct.

Kent Buhl: Very good. And in response to the question about credit for this, James mentions that planners can get CM credit under the self-study option through AICP. So good. Thank you for that, James.

Jennifer asks, "Do all of the individuals listed on TDAT need to be contacted? Or just the certifying individual?"

Nancy Boone: Just certifying -- the TDAT lists one or two contacts for each tribe. They always list the tribal leader; the chair or the president, etc. And sometimes, if the tribe has a tribal historic preservation officer, it lists also the tribal preservation officer. And so, you would be expected to contact both.

Kent Buhl: Gloria is wondering where can she find the sample letter?

Nancy Boone: It is hyperlinked in the notice. And I would say that if you go to the ATEC website, all the hyperlinks were effective as of yesterday. So go to the ATEC website, Google HUD ATEC, and you will find the tribal notice on that website, you'll find the Tribal Directory Assessment Tool on that website, and the notice that's placed there includes all the active hyperlinks.

Kent Buhl: Marlon's [ph] question is, "Is it possible to piggyback off the programmatic agreement we have with the SHPO as a responsible entity under Part 58 with the federally recognized tribe who has expressed an interest in our county jurisdictions?"

Nancy Boone: Yes. And I think that in some jurisdictions, there will be existing programmatic agreements that address tribal consultation that certainly come into play. And as I said at the beginning quickly, the notice does not override any existing agreements that you may have worked out. And if you want to, subsequent to the notice, work on agreements with the tribes, we'd encourage you to do that. And those agreements can be programmatic agreements in a formal sense or I know that some states work with written but less formal agreements about particular topics like extent of ground disturbance and that kind of thing.

Kent Buhl: Vern wonders if local SHPOs have been informed about the new guidelines.

Nancy Boone: They're on our list but they have not received a distribution of this yet. Our first - well, as you heard at the beginning, the notice came out on June 15th, which was last Friday. So we first wanted to relay the information to HUD staff and responsible entities and we'll be

distributing it to -- much more broadly, including state historic preservation officers and the tribes very shortly.

Kent Buhl: Terrific.

So it does look like we now have come to the end of our questions. Nancy, thank you very much for your time in helping to make this process as transparent as possible for folks in the NSP program.

And let's see. And the questions do keep coming in. Let me -- do you mind taking another one?

Nancy Boone: No.

Kent Buhl: Okay. So Pamela says, "After the initial invitation to consult signed by the RE official, can all other communication then be between delegated environmental reviewers directly?"

Nancy Boone: I think that that's Part of what you establish in that initial invitation to consult. I mean, if a consultant -- if a tribe says, yes. We do want to consult, part of the discussion is, okay. Who's going to consult on your Part and are you willing to work with so and so on our part? And just establishing who the parties will be who actually sit down together and talk or talk on the phone.

Kent Buhl: Great. Again, thanks everybody for being with us today. Hope you found this as informative as I did. Thank you, Nancy, for all your work on this.

Nancy Boone: Thank you.

Kent Buhl: And look for the webinar archive posted soon. And just a reminder to please take a moment to do the -- answer the few questions in the survey that you'll be automatically directed to when you leave or once this event is over.

So thanks, everyone, and hope to see you on another NSP webinar. Take care, everyone.