

NSP Policy Alert!

Section 106 Guidance for NSP Land Banking

Neighborhood Stabilization Program (NSP) recipients (Responsible Entities (REs) under 24 CFR Part 58) are strongly encouraged to enter into a Section 106 Programmatic Agreement with the State/Tribal Historic Preservation Officer (SHPO/THPO) covering their NSP program activities before acquiring properties under the NSP program.¹ However, where the RE does not have an executed Programmatic Agreement, the RE may determine that where residential property that has been foreclosed on is acquired by the RE or a subrecipient (or acquired by the RE and subsequently transferred to a subrecipient) for the purpose of establishing land banks, the mere acquisition of the property has “no potential to cause effects” to historic properties, in accordance with 36 CFR § 800.3(a)(1), as long as all of the following conditions are met:

- The properties to be acquired are not being acquired with intent to demolish existing structures on the property.
- The RE has completed the first tier of a tiered environmental review on its NSP program activities (see text box);

Historic Preservation and Tiering

Tiering is appropriate when there is a requirement to evaluate a proposal in the early stages of development and a more focused analysis is better done at a later date. The broad review should establish the policy, standard, or process to be followed in the site specific review. See 24 CFR 58.15.

Section 106 compliance needs to be incorporated into the tiered review as follows:

The broad review needs to describe the process for complying with Section 106 throughout the land bank program – including acquisition of properties, the identification of historic properties acquired, mitigation measures for holding historic properties, and the reuse of these properties (rehabilitation, demolition, disposition, etc).

The site specific review(s) will follow the process in the broad review and may include multiple site specific analyses for the various stages of the land bank program.

¹ See HUD’s “NSP Section 106 Toolkit”

- The completed tier of the environmental review describes the process of property-specific historic preservation consultation that will be conducted in accordance with this policy guidance;
- HUD (or the State) has approved the RE's Request for Release of Funds and certification (HUD Form 7015.15) for the use of the NSP funds;
- Immediately upon closing on the acquired property, the RE will submit to the SHPO/THPO an adequately documented finding regarding the action of holding the property (see attached sample letter) and will commence any necessary actions to prevent "demolition by neglect" of a historic property (see below); and
- When a subrecipient will acquire and/or hold the property, the RE will impose appropriate environmental controls on the subrecipient through execution of a grant agreement or similar contract, to meet the conditions herein.

In this context, acquisition or the mere transfer of title to a property into the RE's (or subrecipient's) control or ownership, in and of itself, can be determined to have no potential to cause effects to historic properties provided that the conditions above are met. Under 36 CFR § 800.3(a)(1), the RE then "has no further obligations under section 106 or [36 CFR part 800]", in regard to the acquisition itself.

The holding of property, or land banking, however, may potentially affect historic properties and is thus subject to Section 106 review per 36 CFR §§ 800.3 through 800.6. This review will entail an initial determination and consultation with the SHPO/THPO, as described above.

After its own determination or after its consultation with the SHPO/THPO, the RE may find that it has acquired some historic properties. Mitigation for the holding of property that is eligible for or listed on the National Register of Historic Places (NRHP) must include:

- Taking any actions necessary to prevent "demolition by neglect" of the property, unless and until the RE determines that the property is not historic and either the SHPO does not object to this determination or the Section 106 consultation process is otherwise completed. These preventive actions would include mothballing any vacant property per the National Park Service's *Preservation Brief 31, Mothballing Historic Buildings*. Other mothballing procedures, such as locally approved security and maintenance plans, may be employed, but the RE's decision to use them must be made only after completing consultation per 36 CFR §§ 800.3 through 800.6.
- Completing additional Section 106 review in the future with regard to reuse or disposition of the property, when the RE (or subrecipient) initiates development of reuse/disposition plans.

This guidance applies only to the NSP land banking activities described in Sec. 2301(c)(3)(C) of the Housing and Economic Recovery Act of 2008.

SAMPLE SECTION 106 LETTER

[Return address]

[Date]

[SHPO/THPO mailing address]

(See: www.ncshpo.org or www.nathpo.org)

Dear [SHPO/THPO]:

In accordance with Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470f), and its implementing regulation, 36 CFR Part 800, "Protection of Historic Properties," and as authorized by the U.S. Department of Housing and Urban Development (HUD) under 24 CFR Part 58, we are submitting for your review information regarding the proposed [xxx project] (ex. holding of 123 Elm Street, Anytown, AB). Please find enclosed the necessary documentation per § 800.11.

Based on our initial research, we have made the required determinations and findings, which we now ask you to review. Please respond in writing within the thirty-day time period as noted at § 800.3(c)(4). If we haven't heard back from you within thirty days, we will assume you concur with our findings.

If you concur with the findings in this submission, you may simply sign and date on the line below and return to the address noted above. If you do not concur, we request that you express your specific concerns and/or objections clearly in writing so that we may continue the consultation process as needed. Please also indicate in your response if there are other sources of information that we should check, and if there are other parties, Indian tribes, or members of the public we should include in the consultation process. Thank you for your prompt attention to this matter.

Sincerely,

[NSP Recipient]

CONCURRENCE: _____
State/Tribal Historic Preservation Officer Date

[See § 800.11 (d), (e) & (f) for details]

Description of the Undertaking

[xxx] (Specify federal involvement; include photographs, drawings, location map, etc).

Area of Potential Effect

We define the Area of Potential Effect for this proposed project as [xxx] (written boundary description). Please see the attached map marked with the APE boundary. We made this determination for the following reason(s): [xxx]

RE Option #1: Basis for Determining "No Historic Properties Affected"

To obtain background information on the APE and to identify any potential historic properties, we researched and contacted the following sources:

[xxx] (List surveys, National Register data, research at SHPO office or local government, etc.)

Based on our initial information search, it is our determination that no historic properties will be affected by this project. We base this finding on: [xxx].

OR

RE Option #2: Basis for Determining "Historic Properties Affected"/"No Adverse Effect"

To obtain background information on the APE and to identify any potential historic properties, we researched and contacted the following sources:

[xxx] (List surveys, National Register data, research at SHPO office or local government, etc.)

Based on our initial information search, it is our determination that historic properties will be affected by this project and that additional consultation will be required to assess/resolve effects. We base this finding on: [xxx].

OR

We have determined that the undertaking will have "no adverse effect" on historic property because we will implement the following conditions:

[See guidance above regarding "preventing demolition by neglect"]