



SOCIETY FOR AMERICAN ARCHAEOLOGY

December 3, 2020

Mr. Doug Stephens
Federal Preservation Officer
Heritage Program Manager
U.S. Forest Service
RHVR Staff, Mailstop 1125
14th and Independence Ave., SW
Washington, DC 20250-1124

Dear Mr. Stephens,

This letter offers the opinion of the Society for American Archaeology (SAA) on the revised Proposed Draft National Programmatic Agreement (PA) for Phasing Section 106 of the National Historic Preservation Act (NHPA), which we received on October 6, 2020. SAA appreciates the tremendous work of your division in responding to comments submitted earlier this year and we value the opportunity to provide our feedback on this important proposal.

The SAA is an international organization that, since its founding in 1934, has been dedicated to research about and interpretation and protection of the archaeological heritage of the Americas. With nearly 7,000 members, SAA represents professional and avocational archaeologists, archaeology students in colleges and universities, and archaeologists working at Tribal agencies, museums, government agencies, and the private sector. SAA has members throughout the U.S., as well as in many nations around the world.

This USFS Nationwide PA, should it go into effect, would become a central component of the historic preservation infrastructure for multi-year projects carried out on Forest Service land, and so we thank your agency for its thorough public consultation that the USFS has engaged upon in the drafting of this document. The SAA is also pleased to see the changes responding to suggestions by cultural resources organizations, including the National Trust for Historic Preservation's redline document.

Comments on USFS Nationwide PA

General Comments:

The new draft PA appears to link the development of Heritage Implementation Plans (HIPs) to the National Environmental Policy Act (NEPA) process as specified in 36 CFR 800.8. However, the PA is not specific as to how the relationship between the two will work. The PA, for the most part, focuses on the Section 106 aspect at the expense of how that will fit with the proposal's revised NEPA process. With respect to that NEPA process, the PA does not address the level of documentation these multi-year projects will require—categorical exclusion, environmental

assessment, or environmental impact statement. These terms are defined in Appendix A-Definitions, but are not discussed in the body of the PA. Each reflects different levels of undertaking complexity so that each has a different compliance path which, in turn, will most likely affect the development and timing of the HIP. The final PA must address the level of NEPA documentation anticipated and how and where the HIP will fit within the process. If more than one level of documentation is anticipated, that needs to be discussed. For environmental assessments and environmental impact statements, it is unclear as to whether the HIP will address all alternatives or just the preferred alternative. That difference will most likely affect the timing for the development and review of the HIP. If that is the case, we believe the development of the HIP be part of public scoping and included in environmental assessments and environmental impact statements for public review and comment.

SAA suggests adding “For MULTI-YEAR PROJECTS” to the end of the title to clarify the subject of the PA.

SAA believes the new draft must be reviewed for uses of the words “must” (n=8), “will” (n=137), “shall” (n=59), “may” (n=73), and “should” (n=11). It is essential that modal verbs are correctly used with respect to the context. Each word has a different legal connotation. According to *The Federal Register Document Drafting Handbook* (Section 3), the following definitions apply:

| | |
|----------------------------------------------------------------------------------|------------------------------------------------------------------------------------|
| Shall | imposes an obligation to act, but may be confused with prediction of future action |
| Will | predicts future action |
| Must | imposes obligation, indicates a necessity to act |
| must not | indicates a prohibition |
| should | infers obligation, but not absolute necessity |
| may | indicates discretion to act |
| To impose a legal obligation, use "must."; to predict future action, use "will." | |

SAA also suggests using the term “undertaking” instead of “project.” “project” is used 8 times in 36 CFR 800, while “undertaking” is used 144 times. More importantly “project” is subsumed under the definition of “Undertaking” in 36 CFR 800.16-Definitions. “Undertaking” has a legal definition (36 CFR 16), while “project” does not.

Specific comments (changes to document highlighted in red):

Purpose section

- 1) First paragraph, at end of second sentence—reference Appendix B, since examples of such projects are listed in the Appendix, and referencing that Appendix here will let readers know what constitutes “Projects”.

- 2) In the third sentence—“A Project is analyzed...”, it is unclear exactly what is being analyzed, or what process is being used to perform the analysis. Does this refer to the NEPA process? This needs to be explained.
- 3) Second paragraph—suggest “...completion of **the** Section 106 **process...**”
- 4) Second paragraph—Define HIP. We suggest defining what it is beyond just the means to comply with Section 106. Reference Appendix C as that provides an example of a HIP. Will the HIP be included in the NEPA document for review and comment, or just referenced? Will the PA be referenced or included in the NEPA document? Will the HIP apply to all alternatives in the NEPA document or just the preferred alternative?

Section I(C)—SAA suggests referencing Appendix B here. Also see above comment on “project” vs “undertaking.” Changing “... **a Project** refers to an applicable **Undertaking** that is subject to environmental review...” This will bring the statement in line with 36 CFR 800.16

Section II(A)(iii)—spell out ANC so readers know what the acronym means. Also add “Tribes **‘and THPOs’**”.

Section II(A)iv — “...include a copy of the HIP in the NEPA Project record...” Will the HIP be included in the NEPA document (EA, EIS) for public comment and review? The HIP is central to this PA and compliance with Section 106, but this language is not clear if it will be included in the NEPA document(s). The document elsewhere states that the HIP is to be developed prior to the NEPA decision. If that is the case, the HIP should address all of the alternatives, not just the preferred alternative, and include them in the NEPA document.

Section II(B)iv—the inclusion of the “or’s” is troubling since the different references have the same standards. We also suggest dropping 36 CFR 268.8 since that part of the CFR relates to the Archaeological Resources Protection Act (ARPA) and the definitions apply to applicants for ARPA permits. This could get confusing unless the USFS is planning on using contractors as Heritage Professionals, but elsewhere in the document Heritage Professionals are referred to as being USFS staff. We suggest instead stating “... **as defined in Appendix A to 36 CFR Part 61 and the Secretary of the Interior’s...**”

Section II(C)(i)—“The Agency Official will invite HIP consulting parties to attend public meetings...” Are these “public meetings” the NEPA public scoping meetings? Also, “...when the Agency Official determines public meetings are necessary.” If in fact the meetings are outside the NEPA public scoping, what will be their purpose and what factors will determine the necessity of such meetings? These issues need to be clarified.

Section II(C)(i)—what about training in the use and implementation of the HIPs?

Section III(D)—the first sentence is somewhat awkward. SAA suggests the following: “**A Tribe may authorize the applicability of this PA for Projects that are proposed to occur on or affect historic properties located on Tribal lands by submitting written notification of such intent to the Chief of the Forest Service or designated Agency Official and signed by the THPO or designated representative of the Tribe.**”

Section III(F)—“when applicable...” the document needs to specify what situations are applicable.

Section IV(B)(i)—“...brief summary of the developing Project proposal.” What specifically is meant by “developing Project proposal”? The phrase suggests that the USFS does not yet know the nature or extent of the undertaking and the Area of Proposed Effect (APE). Or, does this refer to a description of the undertaking and APE?

Section IV(C)—suggest altering the first sentence to “**If during the development of the HIP or implementation of the Project, parties who have not previously requested to participate as a consulting party express interest in participating, the Agency Official, in consultation with the Heritage Professional, will consider such requests in accordance with 36 CFR 800.3(f).**”

Section V(A) & (A)(i)—SAA suggests reversing these two paragraphs. Paragraph (A) refers to the first meeting, while paragraph (A)(i) refers to two meetings and it sounds as though these will be determined early in the planning process.

Section V(C)—it is unclear where and how development of the HIP fits into the NEPA process. As mentioned above, this PA appears to be the integration of the development of the HIP into the NEPA process, and this needs to be addressed succinctly. Will the HIP address the alternatives or just the preferred alternative? Also, what happens if the undertaking or APE is changed after issuance of the ROD and acceptance of the HIP? These are critical issues if this PA is to be successful.

Section V(C)(i)—this sentence suggests that it is the agency’s decision as to whether to use public scoping as part of its Section 106 consultation responsibilities.

Section V(D) – **This section is the crux of the PA.** SAA recommends that the PA include an introductory paragraph on the relationship between the PA and NEPA process, move this section to the front, expand on how the HIP fits in with the NEPA process, and detail other factors such as scoping meetings, identification of consulting parties, address alternatives, etc.

Section V(B)—we suggest starting the paragraph with “**If Tribes raise concerns regarding confidentiality and privacy with respect to cultural resources...**” since this paragraph seems to address tribal concerns. However, “protective of sensitive information” under ARPA (43 CFR 7.18) applies to archaeological resources; under NHPA, it applies to all historic properties, regardless of tribal concerns (see §307103, Access To Information Of NHPA). Further clarification is needed since it also includes resources that may not be important to tribes.

Section VI(C)(ii)—this section is about the APE and does not address project description. Also, VI(C)(ii)(1) specifies that the APE will be established “...in consultation with the HIP consulting parties...” Will the APE not be defined in the NEPA document? What happens if the consulting parties agree to a different APE than that described in the NEPA document, or will this be included as an alternative in the NEPA document? If the consulting parties identify the APE,

how will the other alternatives in the NEPA document be handled? This section also seems to imply that the consulting parties will identify the preferred alternative, rather than the USFS.

Section VI(C)(ii)(2)—If the development of the HIP and the phased approach is linked to the NEPA process, “such information” needs to be included in the NEPA document for full disclosure.

Section VI(C)(ii)(3)—again, should not the project define the APE? Also, what about alternatives in the NEPA document?

Section VI(C)(iii)(2)—change “should be informed” to “**need to be determined**” or “**must be determined**”. “Should be informed” is subjective. The nature and scale of any project determines identification efforts.

Section VI(C)(iv)(1)—“unevaluated properties”—by definition, the integrity and eligibility of unevaluated properties have not been determined. We suggest a separate section addressing the determination of the integrity and eligibility of unevaluated properties.

Section VI(C)(iv)(2)—this section references four methods (a-d) to address No Adverse Effect, but only two methods are given and (c) seems to be incomplete.

Section VI(C)(iv)(2)(a)—to reduce confusion, SAA suggests “**To avoid, minimize, or mitigate effects to historic properties and unevaluated resources or areas with the likelihood of historic properties, alter project boundaries, redesign the project or management actions;**”

Section VI(C)(iv)(3) – change to “...to review **and comment**”

Section VI(C)(v)(5)—SAA strongly suggests that language be added to mention the possibility of project redesigns to avoid adverse impacts.

Section VI(C)(viii)—this section addresses NAGPRA-related issues, but what about non-Native remains?

Section VI(C)(ix)—SAA believes that the other consulting parties should be notified of an emergency situation.

Section VII(B)(iii)—SAA suggests rewriting this language: “**If disputes persist, any HIP consulting party may refer the matter to the ACHP to comment within fifteen (15) days of receipt of all pertinent documentation. The ACHP will provide the FS comments regarding the dispute in accordance with 36 CFR 800.7 (c)(3) or request an additional fifteen (15) days. Per 36 CFR 800.7(C)(4), the Agency Official shall consider any recommendation in reaching a final decision concerning the Undertaking. The Agency Official shall notify ACHP and HIP consulting parties of the final decision.**”

Section VII(C)(i)—will the consulting parties also get a copy of the signed HIP?

Section IX(B)(i)—more clarification is needed about the input from the consulting parties.

Section IX(B)(ii)—a definition of “public-facing website” is needed. Also, could USFS headquarters accept comments from consulting parties?

Appendix A—SAA believes that any definitions not mentioned in the PA—specifically Categorical Exclusion, Environmental Assessment, and Environmental Impact Statement—should be removed.

Finally, the SAA is concerned about how this PA would be impacted by the new USFS NEPA compliance regulations published on November 19, 2020. We urge the USFS to determine how the PA would work in conjunction with the new NEPA rule, and, if necessary, delay approval until such time as the interactions between the two can be ascertained.

As before, the SAA appreciates the opportunity to provide its input on this important issue. We value your program’s ongoing commitment to preserving and protecting irreplaceable cultural heritage and we look forward to working with the USFS staff on the final stages of the NPA.

Sincerely,

A handwritten signature in cursive script that reads "Joe Watkins". The signature is written in black ink and is positioned below the word "Sincerely,".

Joe E. Watkins, Ph.D., RPA
President