

**Nationwide Programmatic Agreement
Among the National Endowment for the Arts,
National Conference of State Historic Preservation Officers, and the
Advisory Council on Historic Preservation
Regarding Implementing Section 106 of
the National Historic Preservation Act
for National Endowment for the Arts Program Grants**

WHEREAS, the National Endowment for the Arts (NEA), created in 1965 by the National Foundation on the Arts and Humanities Act, 20 U.S.C. § 951, et seq., is the primary Federal agency charged with promoting the arts and arts education for the American people, supports artistic talent and creativity in the United States and provides Americans with rich and diverse opportunities to experience art primarily through the award of grants to nonprofit organizations ("Program Grants") through its programs such as ArtWorks, Challenge America Fast-Track, Our Town and other similar programs and initiatives that may be developed in the future (the "Program"), following notification to the National Conference of State Historic Preservation Officers (NCSHPO) and the Advisory Council on Historic Preservation (ACHP); and

WHEREAS, NEA Program Grants can be used to fund undertakings (as defined by 36 CFR 800.16(y)) that have the potential to affect historic properties and thus require compliance with Section 106 of the National Historic Preservation Act (NHPA); and

WHEREAS, the NEA's Program Grants, which range from less than \$5,000 to \$250,000, and are generally awarded in the fields of music, opera, arts education, literature, museums, theater, dance, design, visual arts, presenting, research, artist communities, and folk and traditional arts, have limited potential to have an adverse effect upon properties included in or eligible for inclusion in the National Register of Historic Places (NRHP), either individually listed or as a contributing resource to a historic district, hereafter referred to as historic properties; and

WHEREAS, the NEA has further determined that when implementation of the Program may on rare occasion have the potential to affect an historic property, these effects are typically minimal and are often temporary in nature, such as when Program funds are used to support a festival, art exhibit, or install an art work in a historic place, or to create early conceptual design plans for a historic property; and

WHEREAS, the nature of NEA's Program Grants are subject to timing issues that limit the NEA's ability to follow the standard Section 106 process, such as when grants are awarded to a grantee to fund a call for artists to submit initial conceptual designs for a work of art, selection of an artist, the artist's creation of the work of art, selection of a site for the work of art, and installation of the work of art to finally complete the project; and

WHEREAS, the NEA has consulted with the NCSHPO and the ACHP pursuant to 36 CFR 800.14(b) to find an alternative method to meet its obligations under Section 106 of the NHPA; and

WHEREAS, in addition to the ACHP and the NCSHPO, the NEA invited the National Association of Tribal Historic Preservation Officers (NATHPO), interested Native Hawaiian Organizations (NHOs), and federally recognized Indian tribes (Tribes) in the United States to participate in consultation during the development of this Programmatic Agreement (Agreement); and

WHEREAS interested parties responded to the NEA with comments describing their concerns, and the NEA has taken any comments received into account; and

WHEREAS, pursuant to the consultation conducted under 36 CFR 800.14(b) and considering comments received, the signatories have developed this Agreement to establish an efficient and effective program alternative for taking into account the effects of the Program on historic properties in the United States and for affording the ACHP a reasonable opportunity to comment on undertakings covered by this Agreement; and

WHEREAS, pursuant to this Agreement, the NEA will delegate the initiation of consultation under Section 106 to its grantees, except as provided herein as relates to Tribes; and

WHEREAS, the NEA will create a web portal on the NEA's website to provide information to its grantees on the Section 106 process and the tools necessary for grantees to fulfill their duties under this Agreement;

NOW, THEREFORE, the NEA, NCSHPO, and the ACHP agree that the Program shall be carried out in accordance with the following stipulations in order to take into account the effects of the Program on historic properties in the United States and that these stipulations shall govern compliance of the Program with Section 106 of the NHPA until this Agreement expires or is terminated.

Stipulations

NEA shall ensure that the following measures are carried out:

I. Applicability

- A. This Agreement sets forth the process by which the NEA will meet its responsibilities pursuant to Section 106 for grants made to nonprofit organizations (undertakings) through its Program in the United States. The purpose of the Agreement is to improve the efficiency of Section 106 review for projects funded by NEA that have little to no potential to cause effects to historic properties, or that otherwise do not warrant case-by-case consultation

with the State Historic Preservation Officers (SHPO) or any other consulting parties as required by statute or regulation.

B. This Agreement does not apply to projects located on tribal lands.

II. Projects Exempted From Review

- A. Project types identified in Attachment 1 are those that would not typically result in any effect to historic properties regardless of the setting or surroundings where the work is undertaken. NEA's Federal Preservation Officer or its designee will determine whether or not an exemption applies.
- B. For any project of a type listed in Attachment 1, the NEA may proceed without further Section 106 consultation.
- C. The NEA may revise Attachment 1 of this Agreement (types of exempted projects and activities) without formally amending the Agreement, provided it consults with the other signatories regarding the proposed revisions, obtains the written concurrence of NCSHPO and ACHP, and provides a copy of the revised Attachment 1 to all SHPOs. NCSHPO and ACHP will respond with their concurrence in a timely fashion (30 days or less).
- D. Any dispute over the NEA's Federal Preservation Officer's application of an exemption will be resolved pursuant to Section VI.A, herein.

III. Delegation of Responsibilities by the NEA to Program Grantees

- A. Pursuant to 36 CFR 800.2(c)(4), the NEA authorizes its grantees aspects of routine Section 106 coordination for all Program projects not listed as exempt in Attachment 1. Delegation of this responsibility may not be transferred to any other agency or party. As such, except as provided for in stipulation III.B., grantees may independently perform the work and consultation described in 36 CFR 800.3 through 800.6 on behalf of the NEA except as provided in Section V.E below.
- B. The NEA will be responsible for the following actions, which may not be delegated to grantees:
 - 1. The NEA shall initiate consultation with Tribes in accordance with federal requirements for government-to-government consultation;
 - 2. In the event of a dispute that cannot be resolved within 90 calendar days, regardless of the nature (designation of Area of Potential Effect, suitability of consulting parties, phased identification, eligibility, and effects determinations), the NEA shall be involved in the resolution in accordance with Section VI, A. of this Agreement and with 36 CFR Part 800;

3. Consultation for projects where a grantee and SHPO have determined that adverse effects to historic properties are unavoidable; and
4. Resolution of adverse effects through a Memorandum of Agreement (MOA) or Programmatic Agreements.

IV. Consultation With Federally Recognized Tribes

In recognition of the unique government-to-government relationship between the Federal government and federally recognized Tribes, the NEA shall take the lead in identifying and establishing consultation with Tribes pursuant to 36 CFR 800.2(c)(2) and 36 CFR 800.3(c)-(f). The NEA shall ensure that consultation with Tribes is initiated early in project planning to identify cultural, confidentiality, or other concerns and to allow adequate time for consideration of such concerns in the planning process.

V. Review of Projects By the NEA and Program Grantees

- A. Projects will be reviewed by the NEA and its Program grantees as described below and illustrated in Attachment 2.
- B. For those projects not exempt from review under terms of Stipulation II, the NEA shall review the undertakings in accordance with 36 CFR 800.3 and determine whether an undertaking may have the potential to affect a historic property. If so, the NEA will notify the Program grantee in a grant award letter, notify the SHPO, and release the funds on the condition that the grantee:
 1. Follows the *Secretary of the Interior's Standards for the Treatment of Historic Properties* (36 CFR 68) in planning and executing the undertaking.
www.nps.gov/tps/standards/rehabilitation/guidelines/index.htm;
 2. In consultation with the SHPO, plans and designs projects in a way that avoids, to the extent practical, adverse effects on properties listed on or eligible for the National Register of Historic Places;
 3. Seeks and considers the views of other consulting parties and the public, as appropriate, in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, and the likely interest of the public in the effects on historic properties;
 4. Consults with the appropriate SHPO, NHO, as well as local government bodies and other recognized consulting parties, and notifies NEA of any outcome 30 days before taking any action that has the potential to have an adverse effect on historic property, in accordance with section V.D herein;

5. Notifies the NEA immediately if it becomes aware that the grantee's Program project has the potential to have an effect on properties of religious and cultural significance to Tribes; and
 6. Certifies at the completion of its project that it has complied with all of the foregoing conditions of funding.
- C. Program grantees shall complete the requirements of 36 CFR 800.3 and 800.4 on behalf of the NEA to initiate consultation and complete the identification and evaluation of historic properties and assessment of effects.
- D. If the grantee determines that Program activities could result in "no historic properties affected" or "no adverse effect," and the SHPO concurs with the determination, the grantee must notify the NEA and SHPO within 30 days. If there are no objections from consulting parties within the 30-day period, the grantee will notify the NEA of its intent to proceed with the undertaking.
1. If the grantee receives written objections from the SHPO, Tribe or other consulting parties during the 30-day review for findings of "no historic properties affected" or "no adverse effect," the grantee will review the matter in consultation with NEA.
 2. If NEA decides that the objection should not change the effect finding and determines it wants to support the "no historic properties affected" or "no adverse effect" finding, NEA will request the ACHP's advisory opinion in accordance with 36 CFR 800.4(d)(d(iv)) or 36 CFR 800.5(3).
- E. If the grantee determines that the undertaking could have an adverse effect on historic properties after consulting with the SHPO and consulting parties, that adverse effects can be resolved, the grantee must notify the NEA and SHPO within 30 days. If there are no objections from consulting parties within the 30-day period, the grantee will notify the NEA of its intent to proceed with the undertaking and work with the NEA, SHPO and consulting parties in the development of a Memorandum of Agreement (MOA) to resolve adverse effects, as set forth in the initial notice.
- F. If the grantee determines that the undertaking could have an adverse effect on historic properties, and there is a dispute regarding the resolution of adverse effects, the grantee must notify the NEA within 30 days. In these instances, the NEA will be responsible for making the ultimate finding of adverse effect, coordinating the consultation, and entering into a MOA to resolve adverse effects if possible. If the dispute cannot be resolved, Administrative Provision VI A. Dispute Resolution shall apply.

VI. Administrative Provisions

A. Dispute Resolution

If a Program grantee, SHPO, NCSHPO, or ACHP objects in writing to the NEA regarding any action carried out or proposed with respect to the implementation of the Agreement, then the NEA shall consult with the objecting party to resolve the objection. If after such consultation, the NEA determines that the objection cannot be resolved through consultation, the NEA shall forward all documentation relevant to the objection to the ACHP, including the NEA's proposed response to the objection. Within thirty (30) days after receipt of all pertinent documentation, the ACHP shall exercise one of the following options:

1. Advise the NEA that the ACHP concurs in the NEA's proposed response to the objection, whereupon the NEA will respond to the objection accordingly; or
2. Provide the NEA with recommendations, which NEA shall take into account in reaching a final decision regarding its response to the objection.

Should the ACHP not exercise one of the above options within thirty (30) days after receipt of all pertinent documentation, the NEA may move forward with its proposed response to the objection.

If a consulting party or a member of the public objects to actions proposed by the NEA for an undertaking carried out under this Agreement, the NEA will consult with the objecting party to resolve the objection in accordance with the requirements of 36 CFR 800.4 - 800.6.

B. Unanticipated Discoveries During Project Implementation

1. If previously unidentified historic properties or human remains are discovered during project implementation or if unanticipated effects occur on historic properties that were the subject of Section 106 reviews, the grantee will immediately halt all construction activities within the immediate vicinity of the discovery and along with the contractor shall:
 - a. Inspect the work site to determine the extent of the discovery and ensure construction activities are halted;
 - b. Clearly mark the area of the discovery;
 - c. Implement measures to avoid vandalism or looting; and
 - d. Notify NEA and the SHPO and nearest Tribe, as applicable, and other consulting parties of the discovery.
2. NEA will coordinate with the grantee and the SHPO to comply with 36 CFR 800.13.

C. Amendments

Any party to this Agreement may request that it be amended, whereupon the parties shall consult to consider such amendment. The amendment will be effective on the date a copy of the amendment is signed by all of the original signatories. Any amendments shall be filed with the ACHP.

D. Duration and Termination of Agreement

This Agreement shall become effective upon its approval and execution by all the signatory parties, and shall remain in effect until December 31, 2024. Thereafter, if the parties wish to extend its term and contents, an amendment stating the period for which the Agreement will be extended shall be executed by all parties.

Any party to this Agreement may terminate it by providing thirty (60) days written notice to the other parties, provided that the parties shall consult during the period prior to termination to seek agreement on amendments or other action that would avoid termination. If, after the 60 day period, the parties are unable to reach an amendment or other action to avoid termination, the party requesting termination shall notify the other signatories in writing and the Agreement shall be terminated. In the event of termination, the NEA shall conduct individual project reviews pursuant to 36 CFR Part 800.

E. Reporting and Evaluation of the Programmatic Agreement

1. Upon the execution of this Agreement, NEA, ACHP and NCSHPO shall meet within two years by March 1, 2016 to evaluate the effectiveness of the Agreement and the appropriateness of revising any of its stipulations. This notification may be done informally (e.g., via email).
2. The NEA will prepare an annual report that details the number of projects subject to the terms of the Agreement, and which exemptions, if any, were used. This report will be distributed to the ACHP and NCHPO to allow the parties to distribute the report as necessary and to evaluate the effectiveness of the Agreement. NEA will post the report to its open government web page for dissemination to other interested parties and the public.
3. The NEA will, by January 15, 2016, provide ACHP and NCSHPO with its recommendations on how the Agreement might be amended to best carry out the intent and purpose of this Agreement.

Execution and implementation of this Agreement evidences that the National Endowment for the Arts has satisfied its Section 106 responsibilities for all individual undertakings made pursuant to its Program Grants.

SIGNATORIES:

NATIONAL ENDOWMENT FOR THE ARTS

Joan Shigekawa June 1, 2014
Joan Shigekawa, Acting Chairman Date

NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS

Elizabeth Hughes 6.5.14
Elizabeth Hughes, President Date

ADVISORY COUNCIL ON HISTORIC PRESERVATION

M. Wayne Donaldson 20 JUN 2014
M. Wayne Donaldson, Chairman Date

Attachment 1

Categorical Exemption of Projects With Little or No Potential to Affect Historic Properties

If NEA has questions or requires technical assistance with this attachment, it may seek the counsel of appropriately trained internal staff, if those individuals are available and seeking their counsel is practicable, or contact the ACHP, relevant SHPO or the National Park Service for guidance. For any item in this Attachment, grantees may develop efficiencies with the SHPO, if they will have a number of projects that fit a specific category (or categories) of action.

1. In-kind replacement or repairs within an existing facility that is not 50 years or older, determined to be eligible or listed individually or as a contributing element on the National Register of Historic Places.
2. Public events of a limited size and duration causing no permanent effect on locations that are listed or eligible for listing in the National Register of Historic Places (e.g., book festival on the National Mall, theater production in New York City's Central Park, dance workshop at the Log Cabin in the Presidio in San Francisco).
3. Structures and installations for outdoor art and cultural festivals with minimal to no ground disturbance that are carried out in such a manner that does not preclude returning the site to its original condition.
4. Outdoor murals and other art painted on, mounted on, or adjacent to a building that is not 50 years or older, determined to be eligible listed individually or as a contributing element on the NRHP;
5. Temporary public art such as sculpture, statuary, banners, mixed-media or painting - provided it is 100% reversible, and in no way damages or necessitates the installation of hardware on a resource determined to be eligible, listed individually or as a contributing element on the NRHP.
6. Permanent wayfinding signs and other similar artistic directional installations, provided they are not installed in a location that is listed or eligible for listing either individually or as a contributing resource on the NRHP or on a building that is 50 years old or older or determined to be eligible, listed individually or as a contributing element on the NRHP.
7. Small structures such as benches, bus shelters, produce stands and similar small structures, that do not require substantial ground disturbance to be installed, provided they are not attached to or dependent upon buildings or structures listed in or eligible for listing either individually or as a contributing resource on the NRHP and do not preclude the returning the site to its original condition.

8. Maintenance and rehabilitation of a landscape consistent with the site's existing purpose and use (e.g., community garden, urban park), if not located within a known archeological site. Creation of new community gardens or addition of large-scale landscape elements are not included in this exemption.
9. Projects and programs that support conceptual planning, design and research.
 - a. Examples include:
 - i. Feasibility and planning studies;
 - ii. Early design development work, such as conceptual drawings and renderings;
 - iii. Design competitions;
 - iv. Community workshops;
 - v. Cultural asset mapping; and
 - vi. Design charrettes.
 - b. This exclusion may not be applied if the project or program phase that is being supported:
 - i. Will go beyond the planning, study, research or competition phase; or
 - ii. Is an attempt to segment the project to avoid review and result in an actual selection or decision, that limits consideration of other reasonable alternatives.
10. Information gathering, data analysis and processing, information dissemination, review, interpretation and development of documents. Examples include but are not limited to : document mailings, publication and distribution, training and information programs, historical and cultural demonstrations, and public affairs actions, studies, reports, proposals, analyses, literature reviews and computer modeling.

Attachment 2

Section 106 Process Under Nationwide Programmatic Agreement

