National Park Service

State and Local Assistance Programs

Compliance with Section 106

Land and Water Conservation Fund (LWCF)
Urban Parks Recreation and Recovery Program (UPARR)

March 15, 2024

1. Introduction

The National Park Service State and Local Assistance Programs Division is a division within the Partnerships and Civic Engagement Directorate. The Division, in partnership with States and U.S. Territories, administers the Land and Water Conservation Fund Program (LWCF Program) and the Urban Parks and Recreation and Recovery (UPARR) program. The LWCF Program currently provides federal assistance for planning, acquisition, and development of locally owned and managed outdoor recreation lands.

The LWCF currently has two distinct, but similar grant avenues through which states can apply for funding. LWCF Formula Grants and the Outdoor Recreation Legacy Partnership (ORLP) Program grants. ORLP is a nationally competitive grant program that delivers funding to urban areas with priority given to projects located in economically disadvantaged areas and lacking in outdoor recreation opportunities. An additional program, the Urban Park and Recreation Recovery Program (UPARR Program), has not been funded since 2002. Collectively, all these programs are referred to throughout this document as the LWCF Financial Assistance Programs.

2. LWCF Financial Assistance Programs

The Land and Water Conservation Fund (LWCF)

The Land and Water Conservation Fund (LWCF) Act of 1965 ("Act") (see Public Law 88- 578, 78 Stat 897) was enacted to assist in:

> *preserving, developing, and assuring accessibility to all citizens of the United States of America of present and future generations and visitors of the United States of America such quality and quantity of outdoor recreation resources as may be available and are necessary and desirable for individual active participation in such recreation and to strengthen the health and vitality of the citizens of the United States by (1) providing funds for and authorizing Federal assistance to the States in planning, acquisition, and development of needed land and water areas and facilities and (2) providing funds for the Federal acquisition and development of certain lands and other areas.*

Congress authorizes the Secretary of the Interior (Secretary), acting through the Director of the National Park Service (NPS), to administer the provisions of the LWCF Act of 1965 as amended (54 U.S.C. § 200301 et seq.) and implementing regulations at 36 CFR Part 59 ("Land and Water Conservation Fund Program of Assistance to States; Post-Completion Compliance Responsibilities"), the fund provides matching grants of up to 50% (or 100% in insular areas, i.e., American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands) to State, local and Tribal governments for planning, acquisition, and development of outdoor recreation lands, with funding provided primarily from offshore oil and gas lease revenue.

Each State must have a "State Liaison Officer" (SLO) appointed by the governor or designated by the State legislature to administer the LWCF Program at the State level. Payments for all projects are made to the State agency that is authorized to accept and administer funds for approved projects. The State may transfer funds to an eligible local entity (called *sub-recipients,* or *Project Sponsors)* with the State retaining primary grant compliance responsibility.

The LWCF Act requires project sponsors, with States bearing ultimate responsibility, to operate and maintain by acceptable standards the properties and facilities acquired or developed for public outdoor recreation use. Further, Section 6(f)(3) of the LWCF Act (now codified at 54 U.S.C. § 200305(f)(3)) and its implementing regulations at 36 C.F.R. Part 59 requires:

> *No property acquired or developed with assistance under this section shall, without the approval of the Secretary, be converted to other than public outdoor recreation uses. The Secretary shall approve such conversion only if he finds it to be in accord with the then existing comprehensive Statewide outdoor recreation plan and only upon such conditions as he deems necessary to assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location.*

Parks or recreation areas acquired or developed with LWCF assistance (in whole or part) are now referred to as "LWCF-assisted areas" and/or "LWCF boundary areas." This protection applies to all parks and recreation areas that have received LWCF grants regardless of whether for acquisition of parkland, development, or rehabilitation of outdoor recreation facilities.

LWCF, Outdoor Recreation Legacy Partnership (ORLP) Program

In 2014, Congress created the Outdoor Recreation Legacy Partnership Program, a competitive grant program administered under the authority of the LWCF Act. NPS designed the ORLP with input from Congressional Committee staff, the States, and other interested parties. As designed, the goal of the ORLP Program is to provide new or significantly improve recreation opportunities for economically disadvantaged communities in urbanized areas that are under-served in terms of parks and other outdoor recreation resources. ORLP grants are selected through an NPS-lead national competition following a solicitation and nomination by the States. Funds can be used for the acquisition and development of, or substantial renovation of, outdoor recreation areas and amenities.

Urban Park and Recreation Recovery (UPARR) Program

A 1976 amendment to the LWCF Act of 1965 directed the Secretary to study the needs, problems, and opportunities associated with urban recreation; the Urban Park and Recreation Recovery Act of 1978, as amended (54 U.S.C. § 2005 et seq.), authorized the UPARR Program and implementing regulations (36 CFR Part 72, "Urban Park and Recreation Recovery Act of 1978").

The UPARR Program was established to provide matching grants and technical assistance to economically distressed urban communities to revitalize and improve recreation opportunities through remodeling or rehabilitating existing facilities and recreation planning assistance. UPARR has not been funded since 2002 and monies for this program are no longer distributed to States. Previously assisted sites and facilities, more than 1500 in number in over 300 localities, still remain protected in public outdoor recreation use under the provisions of Sec. 1010 of the UPARR Act and require administration to ensure properties remain in outdoor recreation use in perpetuity.

Section 1010 of the UPARR Act (54 U.S.C. § 200507) requires that any recreation area that received UPARR grant assistance remain in public recreational use in perpetuity:

> *No property improved or developed with assistance under this chapter shall, without the approval of the Secretary, be converted to other than public recreation uses. The Secretary shall approve such a conversion only if the Secretary finds it to be in accord with the then-current local park and recreation recovery action program and only on such conditions as the Secretary considers necessary to ensure the provision of adequate recreation properties and opportunities of reasonably equivalent location and usefulness.*

3. LWCF Program Section 106 Undertakings

A Federal undertaking (36 CFR § 800.16(y)) requiring compliance with Section 106 includes a "project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval." The LWCF Financial Assistance Program undertakings encompass both approving federal financial assistance for new projects, and approving conversions of use taking place on existing LWCF assisted sites and generally fall within at least one of the following major categories:

- Acquisition (e.g. acquisition in fee simple to secure outdoor recreation lands, lands which will be solely and in perpetuity utilized for outdoor recreation.
- Administration (e.g. salaries, wages).
- Consultation (e.g. direct costs for hosting meetings, consultation, consensus building).
- Renovation (e.g. renovation of existing outdoor recreation facilities).
- Planning and Research (e.g. Statewide Outdoor Recreation Plan development, project planning, evaluation and systematic research for purposes of developing statewide outdoor recreation goals and plans, obtaining federal permits, federal regulations compliance and consultations).
- Construction (e.g. sports fields, playgrounds, track and field, tennis courts, pickle ball courts, splash pads, pit toilets, roadways, landscaping, supportive indoor facilities such as bathhouses, restrooms).
- Approval of Conversions of Use (e.g. boundary amendment, removing all or a portion of a LWCF or UPARR assisted site from public outdoor recreation use and ensuring provision of replacement land).

Grant elements may include acquisition of land to develop outdoor recreation areas, development of new outdoor recreation facilities, or renovation of existing outdoor recreation facilities. A detailed project scope and budget are submitted with each grant application outlining development, cost and proposed timeline for completion of the project to be funded with LWCF assistance. The Area of Potential Effects for LWCF Financial Assistance Program undertakings (APE) considers the potential direct, indirect, and cumulative effects on historic properties that would result from approval of federal financial assistance to implement the proposed scope for each grant.

Once lands are placed within outdoor recreation use with LWCF Financial Assistance Program funding, a LWCF Boundary Area encompasses the outdoor recreation area, signifying the area must remain in public outdoor recreation use in perpetuity. States are responsible for ensuring properties within their states, regardless of local ownership, remain in outdoor recreation use and open and accessible to the public. However lands continue to be managed and administered by the land owner (State, municipality, local government, tribal government, public agency) and no federal approval or oversight is required for any future outdoor recreation development unless there is a change in use from outdoor recreation or from the intent of the original grant agreement, and an amendment to the original agreement is required.

Conversions of use for LWCF and UPARR assisted properties consist of ensuring the applicable program statutory and regulatory requirements are met and formally approving the acquisition and development of any proposed replacement lands and outdoor recreation facilities to satisfy the conversion of use. State laws and local laws sometimes also apply to the public sale and re-use of lands, and NPS will ensure all applicable state and local laws are also carried out prior to its approval of the amendment (36 CFR Part 59, and 36 CFR Part 72).

4. Purpose for Evaluating the LWCF Programs Section 106 Process

Section 106 of the National Historic Preservation Act (Section 106) requires that:

> *The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking (54 U.S.C. § 306108).*

NPS is the Federal agency obligated to take into account the effects of its undertakings under Section 106 of the National Historic Preservation Act (NHPA) and the federal agency responsible for conducting government-to-government consultation with federally recognized Tribal Nations on LWCF Financial Assistance Program undertakings.

NPS is looking to improve how the Section 106 review process is carried out for the LWCF Financial Assistance Programs. NPS has been evaluating its current policy and is requesting initial feedback on current and future Section 106 process, specifically with regard to:

1. Clarifying the Federal undertaking under the LWCF Financial Assistance Programs.
2. Timing of the Section 106 process, including when NPS consults with Tribes, Native Hawaiian organizations and Alaska Native Corporations.
3. Roles and Responsibilities for NPS, States, and project sponsors, and if these responsibilities are different for new grants versus conversion of use approvals.
4. The purpose and need for a Section 106 program alternative (36 CFR § 800.14) for these undertakings, and the appropriate program alternative.

NPS will utilize this feedback as it looks to refine its guidance materials for States and project sponsors for these programs, along with considering whether and how a program alternative can best assist the NPS in improving the Section 106 process for its federal financial assistance undertakings.

5. Clarifying the Federal Undertaking under LWCF Program Authorities

The LWCF is clarifying program authority in order to develop guidance, clear roles and responsibilities and a clear process to satisfy its responsibilities under Section 106, which may also include development of a program alternative. The LWCF Program derives authority to provide federal financial assistance to States and through States to local eligible applicants from the following laws, regulations and official program policy.

A separate Attachment, *Definitions and Key Regulations*, supplements the information within this document and below and further describes NPS LWCF Program authorities under the following laws, regulations, and official program policy:

- LWCF Act of 1965, as amended, 54 U.S.C. § 2003 et seq.
- Land and Water Conservation Fund State Assistance Program Federal Financial Assistance Manual Volume 72, October 1, 2023 (herein after referred to as LWCF Manual).
- LWCF Post Completion Compliance Regulations, 36 CFR Part 59.

To illustrate the application of current LWCF Program authority, we have provided the following example scenarios which detail the types LWCF Program grants, along with NPS consideration of the scope of the Section 106 review and undertaking for these types of grants (36 CFR § 800.4(b)(1)). The scope of the undertaking and where applicable, the proposed determination of effect, would be clarified in an NPS LWCF Program Alternative or within additional guidance documents:

Example Scenario 1: **Land acquisition of existing outdoor recreation areas with no new development proposed and no change in use or increase in use anticipated after acquisition. LWCF grant supports the acquisition of parcels already in outdoor recreation use and no federal funding will be utilized for the development of outdoor recreation facilities.**

- ***Proposed Scope of Identification Efforts:*** At the recommendation of the State or project sponsor, NPS will make the Section 106 determination of no potential to cause effects on historic properties (36 CFR § 800.3(1)).

Example Scenario 2: **Land acquisition of outdoor recreation areas when development is required to make the park open and accessible for outdoor recreation, but no LWCF Program assistance is requested (LWCF Manual Chapter 3.B .7(a)).**

- ***Scope of Identification Efforts:*** If the parcel is undeveloped, and/or not already utilized for outdoor recreation, the Section 106 review must include analysis of the effects of the development that will need to take place in order for the property to be open and accessible to the public for outdoor recreation and the effects of (increased) public use/accessibility.
- The Area of Potential Effects (APE) will be established as per 36 CFR 800.16(d) and as determined by the scale and nature of the undertaking, which NPS LWCF Program defines as

"the specific development components required to make the site open and accessible for outdoor recreation".

- The NPS LWCF Program will require documentation that includes a site development plan and the necessary analysis of the effects of the proposed development on historic properties present within the APE in order to make an appropriate determination of effect.

Example Scenario 3: **Land acquisitions of outdoor recreation areas where LWCF Program assistance for development or renovation of outdoor recreation facilities is requested.**

- ***Scope of Identification Efforts:*** The APE will be established as per 36 CFR 800.16(d) and as determined by the scale and nature of the undertaking, which the NPS LWCF Program will define as "the specific development components required to make the site open and accessible for outdoor recreation".
- The State or project sponsor will in consultation with NPS, SHPO/THPO, Tribes/NHOs, and other consulting parties establish the APE and determination of effect based on the elements within the grant proposal.

Example Scenario 4**: Development of new outdoor recreation facilities.**

- ***Scope of Identification Efforts:*** The APE consists of the area defined as per 36 CFR 800.16(d) and as determined by the scale and nature of the undertaking, which NPS LWCF Program will define as the area directly and indirectly affected by the proposed development within the grant application proposal.

Authority for Conversion of LWCF lands to other than public outdoor recreation use, is defined within the LWCF Act, 54 U.S.C. § 200305(f)(3), the UPARR Act, codified at 54 U.S.C. 200507 and the post-completion compliance regulations at 36 CFR Part 59 (and UPARR 36 CFR Part 72). As shown in Section 2 above, the LWCF Act determines the authority of the NPS which is to approve a conversion provided certain conditions are met. The Section 106 undertaking therefore, for LWCF and UPARR conversions, consists of ensuring it is consistent with the State Comprehensive Outdoor Recreation Plan (SCORP), the provision of adequate replacement property (to replace what is lost from the conversion) and generally equivalent recreation amenities (36 CFR § 59.3(b)(3)(i)).

State or local needs precipitate conversions of their lands to non-outdoor recreation use. The process of a conversion begins at the local sponsor (landowner) level. States manage the conversion process until a complete application for an amendment to the original grant agreement is ready for NPS approval. Upon submission of a complete conversion application, NPS ensures conditions proscribed in the LWCF Act and regulations are met and approves an amendment to remove the LWCF/UPARR encumbrance from the converted parcel(s) and place a new LWCF Boundary on the replacement land and determines the adequacy of the provision and proposed development of the property proposed for substitution.

To illustrate the application of current LWCF Program authority, we have provided the following example scenarios illustrating the conversion process, along with NPS consideration of the scope of the Section 106 review and undertaking for these types of federal approvals (36 CFR § 800.4(b)(1)).

Example Scenario 5: **Replacement land acquisition where additional outdoor recreation development is not necessary, and no change of use is likely to occur.**

- ***Scope of Identification Efforts:*** APE will encompass the lands proposed for substitution.
- If no further development of outdoor recreation facilities is required to meet the LWCF or UPARR conversion regulations, the State will recommend, and NPS will make the final Section 106 determination of *No potential to cause effects* and no further obligations under Section 106 will be required (36 CFR § 800.3(1)).

Example Scenario 6: **Replacement land acquisition where outdoor recreation development is necessary and/or changes may occur as a result of the acquisition.**

- ***Scope of Identification Efforts:*** The Section 106 undertaking for replacement land acquisition in this case will be the same as for a grant that includes acquisition and development funds request and will include analysis of the effects of any development that will need to take place in order to replace the recreation utility lost as part of the LWCF or UPARR conversion.
- The APE will be defined as per 36 CFR § 800.16(d), and as determined by the scale and nature of the undertaking, which NPS will define as encompassing the area effected by the outdoor recreation elements required to replace what was lost in the conversion.

Example Scenario 7: **Conversion of use with delayed acquisition of replacement land.**

- ***Scope of Identification Efforts:*** The LWCF Program can approve a conversion of use with delayed replacement and to give project sponsors and/or states time to identify and acquire replacement property. The project sponsor has one year to acquire new replacement land, and three years after replacement land acquisition to develop the replacement land for public outdoor recreation, if deemed necessary. This allows the project that precipitated the conversion to move ahead while the responsible entity locates adequate replacement land. This type of approval is not typical as the NPS will be administratively amending the original grant (conversion area) and then will be approving the replacement land within a year. In this case the NPS would require Section 106 review to be conducted once the replacement land is identified. This would be done though a type of project agreement or memorandum between NPS, the State and the SHPO, and any Tribal Nations who wish to consult.
- The delayed approval of replacement land for public outdoor recreation of use would then fall under one of two categories as stated above for Section 106 effects of replacement land: Replacement Land acquisition where additional outdoor recreation development is not necessary OR Replacement Land acquisition where additional outdoor recreation development is necessary. The corresponding level of effect would be dependent on which category the replacement land falls in to.

Feedback Requested: Does this provide sufficient clarity on the NPS authority in these undertakings and how the Section 106 process is carried out? Where is additional clarification needed?

6. Roles and Responsibilities in the Section 106 Process

The LWCF Act and 36 CFR Part 59 outlines responsibilities of the States in administering Section 5 of the LWCF Act (54 USC § 200305(a), Financial Assistance to States). Currently, NPS authorizes the States to initiate the Section 106 process as outlined in 36 CFR § 800.2(c)(4) typically in a letter from the Agency Official (36 CFR § 800.2(a)) to the State or Tribal Historic Preservation Officer (SHPO/THPO). Application of this within the LWCF Program as not been consistent.

Additionally, States include or require project sponsors to be engaged in the Section 106 process in a variety of capacities, in different stages of the proposal development and selection process. Some States require project sponsors initiate the Section 106 process prior to submission of a project proposal, while other States or project sponsors initiate the process after the state selection of proposals.

As defined in the LWCF Manual, States "define the Area of Potential Effect (APE), identify historic properties within the APE, and determine whether the proposal has the potential to affect any historic properties within the APE," and States are required to recommend a determination of effect. Currently, there are multiple approaches in how NPS and the State works through the process together. Typically, the State seeks concurrence from the SHPO regarding the determinations of eligibility and findings of effect, and SHPO feedback is provided to the NPS with an application by the State.

States may also have to review project proposals under applicable State or local cultural resources laws and manage the Section 106 process for each applicant. While other states hire staff that meet the *Secretary of the Interior's Professional Qualifications Standards* to manage their cultural resources reviews for both their State funded and federally funded projects.

NPS encourages States to engage in early coordination with Tribal Nations that have an interest in a project area for a federally funded project. However, NPS is responsible for formal initiation of Tribal consultation with federally recognized Tribes and includes in its consultation efforts, any early coordination efforts from the local/state level to help reduce redundancies while providing the Tribal partners with an official opportunity to consult on the undertaking.

Feedback Requested: Do you have any comments on the current division of responsibilities between NPS and applicants for carrying out Section 106 reviews?

7. Timing of the Section 106 Process

According to the LWCF Manual effective October 1, 2023: "The NPS and States are responsible for coordinating and carrying out their responsibilities under Section 106 of the NHPA as early as possible during the formative stages of a proposal and as part of the decision-making process prior to formal submission to NPS for review and approval."

For new grants, NPS requires that the Section 106 process be completed prior to approval of funding. The Notice of Funding Opportunity (NOFO) application period for States to submit completed proposals is open throughout each fiscal year. The NPS receives applications for new grant projects during each NOFO and must begin formal government-to-government consultation and complete the Section 106 process before applications are approved for processing. The current application process does not allow sufficient time for Tribal governments, SHPOs and other stakeholders to review and respond to project proposals in a meaningful way. Formal government-to-government consultation does not occur until much later in the process and is often out of synch with earlier SHPO and stakeholder coordination.

For conversions of use, NPS requires the Section 106 process to be completed prior to the approval of the conversion. Conversion approval occurs when the NPS signs an amendment to the original grant agreement removing the LWCF 6(f) obligations from all or a portion of the original grant funded area and places that LWCF 6(f) obligation on an approved replacement parcel(s) for perpetual public outdoor recreation (36 CFR Part 59). States are responsible for initiating the Section 106 process, and NPS must initiate and complete government-to-government consultation and complete the Section 106 process prior to approval of a conversion application.

Conversions of use are triggered by local decisions and managed by States during the early stages of application development and prior to federal approval. Furthermore, the NPS must process conversions when all requirements are met leaving the federal agency with very little discretion except where the replacement property is concerned. As a result of these circumstances, it is often at a late stage in the application process that the NPS is made aware of a conversion of use, and therefore when it is able to initiate government-to-government consultation with Tribal Nations and complete the Section 106 process.

Feedback Requested: NPS welcomes feedback on the timing of Section 106 reviews on these undertakings.

8. Program Alternative for LWCF Programs

NPS is considering a program alternative to clarify its authorities, address process issues highlighted in above in this memo, consider whether and what kind of program allowances may be appropriate, and to clarify roles and responsibilities for its undertakings. 36 CFR Part 800 provides federal agencies with several program alternatives to meet their responsibilities under Section 106.

The LWCF Financial Assistance Programs are considering developing a programmatic agreement (36 CFR § 800.14(b)) to address many of the challenges the LWCF Financial Assistance Programs currently experience in applying the Section 106 process to its undertakings. NPS could pursue either a nationwide programmatic agreement or prototype programmatic agreement to address its Section 106 responsibilities. Several other program alternatives are not well suited for the LWCF Financial Assistance Programs and a brief analysis of each pathway the NPS LWCF Financial Assistance Programs is considering or has considered is provided below.

Nationwide Programmatic Agreement

As outlined in 36 CFR 800.14(b), a Nationwide program Programmatic Agreement ("Nationwide PA") for the LWCF Financial Assistance Programs would accomplish many of the recommendations to clarify roles and responsibilities, define the undertakings, improve alignment of the State project selection and Section 106 review with the federal funding process, and provide clarity to SHPO/THPOs, Tribes/NHOs, and other consulting parties.

The benefits of a Nationwide PA include NPS having one agreement document for NPS, States, project sponsors, SHPOs/THPOs, and consulting parties. Additionally, consulting at a national scale allows NPS LWCF Program staff to focus its effort on one agreement document. However, consulting at a national scale on a program that has significant differences in how States administer the program may be challenging. It may result in an agreement that may end up not working for some current State level processes or make a more simplified document. Substantial time will need to be invested in consulting with a broad range of consulting parties. A Nationwide PA approach may limit the opportunity for meaningful relationship building between NPS, States, SHPOs/THPOs, Indian Tribes/NHOs, and consulting parties.

Prototype Programmatic Agreement

36 CFR 800.14(b)(4) of the Section 106 regulations establishes the process by which the ACHP can designate a prototype agreement ("Prototype PA") for use by a federal agency. "The ACHP can designate an agreement document as a prototype that can be used for the same type of program or undertaking in more than one program or area. The benefits of a prototype agreement include expediting review of routine activities with limited potential to affect historic properties; providing predictability in the treatment of historic properties through the use of a template agreement; and allowing the federal agency and SHPO/THPO to execute such agreements without ACHP involvement. Once a prototype agreement is designated by the ACHP, agencies can use it exactly as approved for subsequent agreements with individual SHPOs/THPOs or modify the language to meet their particular needs so long as they stay within the broad parameters established by the ACHP for the prototype agreement."

Prototype PAs have been successfully implemented by several other assistance agencies such as Federal Emergency Management Agency, Department of Energy, and Natural Resources Conservation Service. These federal agencies provide assistance to State agencies, who have substantial decision-making authority, similar to the structure of LWCF.

There are significant potential benefits to NPS, States, SHPOs/THPOs, project sponsors, and consulting parties to designating a Prototype PA. First, a Prototype PA could be designated more quickly. Then, NPS could consult on State specific agreements based on the capacity, expertise, and interest by each State. While the additional State-by-state consultation to implement the Prototype PA would require more time overall, this approach would better address many of the challenges the LWCF Financial Assistance Programs have in currently meeting its Section 106 responsibilities, specifically:

- Negotiating each State agreement would facilitate improved communication and relationship building between the State, SHPO, and Indian tribes/NHOs. Consulting parties could be identified and refined for each agreement to allow a broader range of public input.
- A Prototype PA could provide some flexibility to States and NPS to tailor each agreement to account for State level differences in how they administer their LWCF apportionment, including development of lists of activity types that may be excluded from case-by-case review or that are suitable for expedited or otherwise streamlined reviews.

Feedback Requested: Do you have feedback on either of these approaches or the concept of a program alternative generally?

Programmatic Allowances

Programmatic allowances are defined as certain types of repetitive activities which would have little or no potential to cause effects to historic properties. The NPS would like to identify such activities and potentially exempt these activities from further Section 106 review. Each category of activity would need to meet certain conditions, including annual reporting to stakeholders on implementation.

Feedback Requested: The NPS would like your feedback on whether it should include programmatic allowances within its proposed program alternative. Do you have concerns with this approach? Are there any types of projects or activities that NPS should consider as a programmatic allowance? What types of projects would you recommend?

Additional Program Alternatives and Procedures NPS has considered or is considering

The four other types of program alternatives available to the NPS do not appear to meet the needs of the LWCF Financial Assistance Programs in addressing the challenges it is experiencing in applying the Section 106 review process to its undertakings. 36 CFR 800.14(a) allows an agency official to develop **alternate procedures** to implement Section 106. This program alternative is ideal for agencies with programs consistent at an agency level. NPS would not be well suited for developing alternative procedures as its undertakings are too varied.

Exempted categories (36 CFR 800.14(c)) are available for federal agencies to propose a program or category of undertakings to be exempted from further review from Section 106, while there may be types of LWCF assisted activities with no potential to cause effects to historic properties; however, the majority

of eligible activities have the potential to cause effects which can be adverse. Therefore, an exempted category does not appear to provide NPS with the greatest efficiency in addressing their Section 106 process.

Standard treatments (36 CFR 800.14(d)) can assist a federal agency in meeting its Section 106 obligations, by identifying a best practice in meeting a specific need. Standard treatments would not provide LWCF solutions to clarifying roles and responsibilities in the Section 106 process.

Program comments (36 CFR 800.14(e)) allow federal agencies to request the ACHP to comment on a category of undertakings in lieu of conducting individual reviews. LWCF's undertakings include a variety of potential activities with the potential to cause effects on historic properties. A program comment does not appear to align with the needs for the LWCF Financial Assistance Programs due to the decision-making authority provided to the States in determining how to select project proposals. Additionally, the significant number of eligible activities for LWCF assistance leads to a substantial variety in how undertakings are defined. Overall, a program comment does not meet the LWCF Program's needs in addressing the challenges it faces in conducting the Section 106 process.

Feedback Requested: The NPS would like your feedback on whether you feel any of these other program alternatives may be more appropriate to pursue.

9. Summary and Next Steps

NPS is looking for feedback on the areas identified above, specifically:

- NPS welcomes feedback on the timing of Section 106 reviews on these undertakings.
- Does this provide sufficient clarity on the NPS authority in these undertakings and how the Section 106 process is carried out? Where is additional clarification needed?
- Do you have any comments on the current division of responsibilities between NPS and applicants for carrying out Section 106 reviews?
- NPS is considering a Nationwide PA or Prototype PA to address these undertakings. Do you have feedback on either of these approaches or the concept of a program alternative generally?

NPS will utilize this feedback to develop a further consultation and timelines, refine its existing Section 106 process, determine which program alternative might be the most appropriate for the NPS to pursue, and in developing the program alternative.

Details regarding the consultation process will be provided on the NPS Planning, Environment and Public Comment (PEPC) website. Please provide your comments through the NPS PEPC website by **May 28, 2024, link:**

The NPS will continue to engage with stakeholders and partners as development and clarification of our Section 106 policy continues. The NPS will provide opportunities for Tribal Nations, Native Hawaiian organizations, Alaska Native Corporations, consulting parties and the public to learn more about and comment on the proposed program alternative options.

You may also submit comments to **lwcf_compliance@nps.gov**