

defined in the NHPA, cultural items as defined in the Native American Graves Protection and Repatriation Act, archeological resources as defined in the Archeological Resources Protection Act, sacred sites as defined in Executive Order 13007 to which access is provided under the American Indian Religious Freedom Act, and collections as defined in 36 CFR 79 Curation of Federally-Owned and Administered Collections.

3-2. National Environmental Policy Act

a. The National Environmental Policy Act (NEPA) established a decision-making process that provides for the systematic consideration of alternatives and examination of the direct, indirect, and cumulative environmental impacts associated with implementation of a proposed action. Typically, Army activities or actions that impact a cultural resource will require some level of NEPA documentation in addition to the separate documentation and compliance requirements of the applicable cultural resources statute or regulation.

b. The objectives of NEPA are—

(1) To ensure that a decision maker makes a fully informed decision by considering all relevant environmental consequences and public comments and concerns before committing resources to carry out a proposed action.

(2) To inform the public and provide for the public's participation in the decision-making process.

c. While NEPA's more detailed documentation requirements (that is, the Environmental Assessment (EA) and Environmental Impact Statement (EIS)) will not apply to all Army actions involving cultural resources, NEPA's applicability should be considered at the beginning of project planning.

(1) The applicability of NEPA and level of documentation necessary will be determined by considering several factors, including the following:

(a) The type of action proposed.

(b) Whether the action is covered by pre-existing NEPA analysis or a published categorical exclusion (CX).

(c) The type and level of impacts expected, if any.

(d) The sensitivity of the resources or issues involved.

(2) While the NEPA process provides an avenue to facilitate compliance with other statutory and regulatory requirements (for example, NHPA, NAGPRA, ARPA, AIRFA), its applicability must be considered independently of these other requirements. Compliance with NEPA does not satisfy these other applicable requirements, nor does compliance with other applicable requirements satisfy NEPA's mandates. Compliance processes under the NHPA and NAGPRA should be scheduled concurrently with the NEPA process to allow full integration of all relevant data. A final NEPA decision document (that is, FONSI or ROD) should not be signed until completion of these related compliance processes because each process is designed to focus on resource specific impacts which are necessary in reaching a fully informed decision.

d. The following framework should be applied in determining whether NEPA applies to a proposed action dealing with cultural resources, and if so, at what level (that is, CX, EA, EIS):

(1) If the proposed action will not have any conceivable impact on the physical human environment, NEPA does not apply.

(2) If the proposed action may have an impact on the human environment, but the impacts have been accounted for in a pre-existing NEPA document, a Record of Environmental Consideration (REC) should be prepared and the action implemented without further NEPA analysis.

(3) If subparagraphs 2-2d(1) and (2) do not apply, appendix A to AR 200-2 should be reviewed to determine, after application of the Screening Criteria, whether a published CX applies to the proposed action. If so, a REC should be prepared documenting the decision to use a CX. Most activities affecting cultural resources can not be categorically excluded as a result of the Screening Criteria published in appendix A, A-31 of AR 200-2.

(4) If subparagraphs 2-2d(1) through (3) do not apply, it is likely that the proposed action is a "major" Army action that must be

evaluated to determine whether projected environmental impacts will be "significant." This is done in the following manner:

(a) The proponent of the action may prepare an EA to consider the proposed impacts. If the EA discloses that the impacts will not be significant, then the proponent will document and publish that conclusion in a Finding of No Significant Impact (FONSI). The types of activities affecting cultural resources that would normally require an EA include but are not limited to:

1. Development and implementation of an ICRMP.

2. Renovation, rehabilitation, or demolition of a building or structure listed or eligible for listing in the National Register of Historic Places.

3. Projects that could impact or effect cultural resources (as defined AR 200-4).

(b) If the EA indicates that the proposed action will present significant impacts to a physical element of the human environment, then the proponent must proceed with preparing an EIS, which is initiated with publication of a Notice of Intent (NOI) to prepare the statement.

(c) If the proponent anticipates from the outset that the proposed action is of such magnitude that impacts are likely to be significant, the proponent can choose to forego preparation of an EA and proceed directly to publishing the NOI and preparing the EIS. The types of activities affecting cultural resources that may require an EIS include but are not limited to:

1. Demolition of a National Historic Landmark, or any part thereof, without mitigative measures.

2. Other unmitigated cultural resource-disturbing activity of severe adverse magnitude.

e. In determining the scope and level of NEPA documentation applicable to a proposed action, pre-existing NEPA documentation that may be relevant to the proposed action should be reviewed. Where such documentation does exist, a proponent may be able to reference and incorporate the pre-existing data and analysis. By referencing or tiering (as it is commonly known under NEPA) in appropriate circumstances, a proponent may decide to prepare a supplemental EA rather than an EIS, or a REC rather than an EA.

3-3. National Historic Preservation Act

a. The National Historic Preservation Act (NHPA) established the Federal Government's policy on historic preservation, as well as the national historic preservation program through which that policy is implemented. NHPA created a Federal system for identifying and registering "historic properties," established a Federal-State partnership to promote the preservation of such properties, and gave Federal agencies responsibility for considering such properties when planning their actions.

(1) NHPA defines historic property as any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register of Historic Places, including artifacts, records, and material remains related to such a resource.

(2) A "traditional religious and cultural property" is a special type of historic property that is eligible for inclusion in the National Register because of the location's traditional religious and or cultural importance to an Indian tribe or Native Hawaiian organization.

b. NHPA created the Advisory Council on Historic Preservation (ACHP or Council) to advise the President and Congress on historic preservation matters and to review Federal and federally assisted actions affecting historic properties. NHPA also provided for each governor to designate a State Historic Preservation Officer (SHPO) to participate in the national program. Finally, NHPA created the National Register of Historic Places, a list of historic properties important to the Nation, to the States, and to local communities that is maintained by the Keeper of the National Register under the National Park Service (NPS).

c. Federal agency responsibilities are outlined in the following sections of NHPA:

(1) Section 106 requires the consideration of effects on historic properties and ACHP comment on undertakings. Federal agencies comply with Section 106 by following the regulations issued by the Council under its rule-making authority (NHPA Section 211). The

regulations, "Protection of Historic Properties" (36 CFR 800), outline a five-step process, often called the "Section 106 process," that is designed to identify possible conflicts between historic preservation objectives and a proposed activity and to resolve those conflicts in the public interest through consultation. Neither the NHPA nor the Council's regulations require that all historic properties must be preserved. They only require the Army to consider the effects of proposed Army undertakings on historic properties. Appendix B contains procedures for compliance with 36 CFR 800. (Note: 36 CFR 800 is currently under revision and the procedures in appendix B will be superseded upon issuance of the final revised 36 CFR 800 regulation). Appendix C contains guidelines for NHPA PAs. The first PA guideline is for ongoing installation operations and the second PA guideline in appendix C is a Prototype PA for Base Realignment and Closure Program (BRAC) installations with recommended standard covenants for historic properties that will be transferred out of Army ownership.

(2) Section 110 identifies general agency responsibilities with respect to historic properties and is intended to ensure that historic preservation is integrated into the ongoing programs of Federal agencies. Army implementation of AR 200-4, DA PAM 200-4, and installation specific actions and plans for NHPA Section 106 compliance and historic property management help satisfy this general requirement. Section 110 requires Federal agencies to:

(a) Assume responsibility for preserving historic properties owned or controlled by the agency in a manner consistent with the mission, including the identification, evaluation and nomination of historic properties for listing in the National Register of Historic Places.

(b) Use, to the maximum extent feasible, historic properties.

(c) Ensure that historic properties subject to damage or other alterations are documented prior to such alteration.

(d) Carry out program and projects that further the purpose of the NHPA.

(e) Undertake, to the maximum extent feasible, such planning and actions as may be necessary to minimize harm to any formally designated National Historic Landmark (NHL). The installation should consider all prudent and feasible alternatives to avoid an adverse effect to a NHL. Where such alternatives appear to require undue cost or compromise the goal and objectives of the action, the installation must balance those goals and objectives with the intent of NHPA Section 110(F). In so doing, the installation should consider the magnitude of the proposed actions harm to the NHL, level of public interest, and the effect that a mitigation action would have on meeting the objectives of the proposed action.

(f) Although there are no regulations to implement Section 110, the Secretary of the Interior and the ACHP have issued non-regulatory guidelines for complying with Section 110.

(3) Section 111 addresses leases and exchanges of historic properties. Section 111 allows the proceeds of any lease to be retained by the agency to defray the costs of administration, maintenance, repair, and related expenses of historic properties. It also makes explicit the affirmative responsibility for Federal agencies to establish and implement alternatives for historic properties, including adaptive use, that are not needed for current or projected agency purposes.

(4) Section 101.

(a) This section provides federally recognized Indian tribes who have had their historic preservation programs approved by the Secretary of the Interior with the ability to assume SHPO NHPA functions for tribal lands (that is, for all lands within the exterior boundaries of any Indian Reservation and all dependent Indian communities.) This provision does not apply to aboriginal homelands if outside of the exterior Reservation boundaries, or to ceded lands. Such Indian tribes with approved programs may have tribal historic preservation regulations that serve in place of 36 CFR 800 for review of any Army undertakings on tribal lands.

(b) Additionally, in carrying out Section 106 responsibilities, Section 101 also requires that the installation commander consult

with any federally recognized Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to a property being considered in the Section 106 process. Such consultation must be on a government-to-government basis. Additionally, installation commanders should initiate such consultation for the identification and evaluation of properties of religious and cultural importance.

(5) Section 402 prescribes Federal agency responsibilities for historic properties in other nations and requires the head of the Federal agency to take into account the effect of an undertaking on property that is on the World Heritage List or on the applicable country's equivalent of the National Register to avoid or mitigate any adverse effect. This effort must be done prior to approval of an undertaking that may directly and adversely affect such property. Installations located in a host nation should—

(a) Obtain the World Heritage List and host nation register and determine if any such properties are present within their jurisdiction.

(b) Develop internal review procedures to determine if undertakings will cause an adverse effect to historic properties.

(c) Develop and implement measures to avoid or mitigate adverse effects caused by Department of Defense (DOD) undertakings.

(d) Notify the appropriate host nation when a potential historic property is discovered during the course of a DOD action.

(6) Section 304 calls for withholding from public disclosure information on the location, character, or ownership of a historic resource where such disclosure may cause an invasion of privacy, risk harm to the property, or impede the use of a traditional religious site by practitioners.

d. Special Topics in NHPA Compliance.

(1) WW II Era historic buildings

(a) Status of WW II Era temporary buildings:

1. A nation-wide Programmatic Agreement (PA) executed by DOD in 1986 stipulated the documentation of representative types of WWII temporary buildings and structures according to Historic American Buildings Survey/Historic American Engineering Record (HABS/HAER) standards. This comprehensive documentation effort serves as mitigation for the demolition of all WW II era temporary buildings. The PA was national in scope and addressed the entire category of WW II temporary buildings.

2. The documentation effort to meet the terms of the PA has been completed. The Army may proceed with demolition of WWII temporary buildings without restriction. No further consultation with the ACHP or SHPO, or any further documentation of WW II temporary buildings is required prior to demolition.

3. Although demolition of all WWII temporary buildings may proceed without any restriction, many WW II temporary buildings are extant and in use by the Army. The WW II PA does not cover undertakings other than demolition. Therefore, activities such as renovation and rehabilitation are undertakings that need to be considered under Section 106 of the National Historic Preservation Act (NHPA). Given the PA and extensive HABS/HAER documentation that exists for these temporary buildings, rehabilitation and renovation actions should not warrant any additional HABS/HAER documentation.

(b) WWII semi-permanent and permanent properties are not addressed by the WW II Temporary buildings PA and therefore need to be identified and evaluated for eligibility for the National Register of Historic Places if a Section 106 undertaking is planned that would effect such buildings. If properties are determined eligible, Section 106 of NHPA and 36 CFR 800 procedures must be fulfilled.

(2) Cold War Era Historic Properties.

(a) The Cold War era extends from the "Iron Curtain" speech of Winston Churchill in 1946 to the fall of the Berlin Wall in 1989. Properties that can attribute significance associated with this period are considered under the National Register Criteria of Exceptional Importance.

(b) The Criteria of Exceptional Importance is applied to properties that are less than 50 years old to evaluate the National Register eligibility pursuant to 36 CFR 60.4. A Cold War property may have significance under National Register criteria A-D, due to association with major historical events or persons, technological or scientific

design achievement, or as a fragile survivor of a class of properties. The significance of Cold War era properties may lie at the national level in association with military themes directly tied to the Cold War, or at the State or local level under other themes.

(c) Examples of properties that should be evaluated for National Register eligibility in the military Cold War theme under the criteria of exceptional importance may include but not be limited to facilities associated with; nuclear weapons, research and development laboratories, testing and proving grounds, manufacturing, storage and maintenance sites. These types may represent the direct link between the U.S. commitment to defend its territory against Soviet expansion.

(d) By contrast, base operations property types such as motor pools, administration buildings and housing are not normally types that would be considered exceptionally important under a nationwide military Cold War theme since they were merely built during the Cold War era as part of the everyday operation of the Army and are not directly associated with the Cold War in strategic or tactical terms. However, such property types, in certain instances may have had such an exceptional impact on a State or locality that they could be eligible for the National Register under other State or local themes. In Alaska for example, the military buildup after 1946 became the single largest economic activity in the State until the 1970s.

(3) Base Realignment and Closure Program (BRAC).

(a) A BRAC installation is one that will be realigned, closed or transferred through the BRAC process. Any of those actions, realignment, closure or transfer, constitutes an undertaking that may affect historic properties.

(b) Compliance with Section 106 and other applicable laws and regulations must be completed, or the terms of any NHPA PA or MOA must be fulfilled, before the BRAC action is completed. A thorough identification and evaluation of cultural resources needs to be performed so that an inventory of properties is available. Properties that are identified and evaluated as eligible for the National Register of Historic Places will require further consideration. Mitigative actions will be stipulated in a compliance agreement (Memorandum of Agreement or Programmatic Agreement). Mitigation may include, but is not limited to, documentation, marketing plans, easements, and covenants.

(c) The Army, in coordination with the Advisory Council on Historic Preservation (ACHP) has developed the Prototype BRAC PA in appendix C to streamline the agreement preparation process for closing installations. The prototype BRAC PA is intended to be a starting point for installations so that they may benefit from lessons learned during previous BRAC actions. It addresses disposal methodologies and proposed Army actions for treating historic properties during the disposal process. The prototype PA should be used as guidance to develop a situation specific agreement.

(4) Nomination of Historic Properties for Listing in the National Register of Historic Places (NRHP). NHPA Section 110 requires Federal agencies to nominate historic properties for listing in the NRHP, but establishes no compliance deadline for the requirement. NHPA Section 106 and 36 CFR 800 have no requirement for formal nomination and listing of properties on the NRHP. The formal nomination of historic properties for listing in the NRHP has no effect on the way historic properties are managed within the Army given the internal Army historic preservation program established by AR 200-4 and this pamphlet. These establish the Army's program for identifying and managing historic properties, and for making consensus determinations of NRHP eligibility IAW 36 CFR 800 between the installation and the SHPO in the Section 106 process. Therefore, formal nomination of historic properties for listing in the NRHP is not a high priority for the Army. As stated in AR 200-4, it is Army policy that only those historic properties that will be actively managed by the installation as a site of interest open to the general public be formally nominated to the NRHP. Nomination staffing procedures are defined in AR 200-4.

3-4. Native American Graves Protection and Repatriation Act of 1990

a. The intent of the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) is to ensure the protection and the rightful disposition of Native American cultural items located on Federal or Native American lands and in the Federal Government's possession or control. NAGPRA Section 2 and 43 CFR 10 provide a detailed definition of cultural items regulated under the Act. Cultural items are defined as Native American human remains, associated funerary objects, unassociated funerary objects, sacred objects, and objects of cultural patrimony. Implementing regulations for NAGPRA are 43 CFR Part 10.

b. NAGPRA applies to all Army commands, installations, and activities and places affirmative duties on the Army for the protection, inventory, and disposition of Native American cultural items. These requirements include existing collections that contain cultural items, as well as newly discovered cultural items.

c. NAGPRA requirements are as follows:

(1) Establish whether an installation has actual possession or control of existing collections. Collections may reside in installation displays, exhibits, museums, historical holding facilities, satellite installations, off-post museums and curation facilities, or universities or in a contractor's custody. NAGPRA specifies the disposition of cultural items that are property of the United States and the Army, regardless of where such cultural items are currently housed.

(2) NAGPRA Sections 5 and 6 require the Army to determine what Native American cultural items are within its possession or located at its facilities. Although the deadlines for completing inventories have passed, installations should proceed to summarize and report inventory of previously unknown collections as soon as the installation becomes aware of the location of cultural items collected prior to 16 November 1990. "Inadvertent discovery" and intentional excavation of potential cultural items discovered after 16 November 1990 are covered under NAGPRA Section 3(d) and are still under the control and in the possession of the Army. Most installation Section 5 and 6 compliance documentation was compiled by an Army-wide NAGPRA program sponsored by HQDA (AEC), installations are required to initiate any follow-on NAGPRA consultation to complete their NAGPRA compliance responsibility.

(3) NAGPRA, Section 3(c) and 43 CFR 10.3 describes procedures for the intentional archeological excavation of NAGPRA cultural items and human remains. In such instances, the installation commander must first take steps to determine if a planned activity may result in the excavation of cultural items. Prior to issuing approval or permits for such activities, the installation commander must notify in writing the Indian tribes or Native Hawaiian organizations that are likely culturally affiliated with the cultural items that may be excavated. The commander must also provide written notice to any present-day Indian tribe which aboriginally occupied the area of the planned activity or any other Indian tribe or Native Hawaiian organization that are likely to have a cultural relationship to the cultural items.

(a) The written notice must describe the planned activity, its location, the basis upon which it was determined that cultural items may be found, and the basis for determining custody pursuant to 43 CFR 10.6.

(b) The written notice must also propose a time and place for meetings or consultations to further consider the activity, the installation's proposed treatment of the cultural items, and the proposed disposition of the excavated items. Written notice should be followed by telephone contact if there is no response in 15 days. Consultation must be conducted IAW 43 CFR 10.5.

(4) NAGPRA Section 3(d), and 43 CFR 10.4 describes requirements and procedures for the inadvertent discovery of NAGPRA cultural items. These regulatory procedures are complex and it is recommended that a NAGPRA CA be developed that streamlines the procedures. Under this section, inadvertent discovery of these items on an Army facility will trigger a number of actions. The discoverer of the cultural items must provide immediate telephonic notification to the installation commander. The discoverer must then