



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY
INSTALLATIONS, ENERGY AND ENVIRONMENT
110 ARMY PENTAGON
WASHINGTON DC 20310-0110

2 July 2021

SAIE-ESO

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: National Historic Preservation Act Compliance for Deferred Maintenance on Historic Army Buildings

1. References:

- a. National Historic Preservation Act (NHPA) Title 54, U.S. Code 300101, et seq.
- b. Title 36 CFR 800 Protection of Historic Properties.
- c. Army Regulation (AR) 200-1 Environmental Protection and Enhancement.
- d. National Trust for Historic Preservation v. Blanck, U.S. District Court for the District of Columbia - 938 F. Supp. 908 (D.D.C. 1996), September 13, 1996.

2. The purpose of this memorandum is to provide Army NHPA compliance direction for deferred maintenance, relevant supplemental information, and definition of key terms.

3. NHPA Compliance Direction for Deferred Maintenance on Historic Army Buildings:

a. Army Commands and installations program and allocate resources to maintain historic Army buildings consistent with installation missions and NHPA requirements. Financial resource constraints, competing priorities, lack of a mission supporting purpose, or other reasons may lead to deferred maintenance on historic buildings. Deferred maintenance is building maintenance that was not performed when it should have been or when it was scheduled and therefore, was delayed or postponed for a future time.

b. If an installation Cultural Resource Manager (CRM) believes that deferred maintenance on a mission supporting historic Army building could lead to an adverse effect per 36 CFR 800.5, the CRM should proactively coordinate with the appropriate installation offices to address the deferred maintenance deficiency before it results in an adverse effect to the historic building. An adverse effect may be caused by deferred maintenance when it alters the characteristics that qualify a historic building for inclusion in the National Register of Historic Places in a manner that diminishes the building's design, materials, or other qualifying characteristics. Adverse effects may include reasonably foreseeable effects that may occur later in time.

c. When a historic Army building is no longer in a mission supporting operational status, with no feasible alternative use, and resources are and will remain unavailable to address deferred maintenance deficiencies that could lead to an adverse effect to the historic building, the CRM should ensure consultation is initiated under 36 CFR 800.6 for a Memorandum of

SAIE-ESO

SUBJECT: National Historic Preservation Act Compliance for Deferred Maintenance on Historic Army Buildings

Agreement (MOA) for undertakings to either mothball, cease maintenance, or demolish the historic building, and conduct appropriate mitigation. Where resources are and will remain unavailable to maintain, mothball, or demolish such a historic Army building, the CRM should ensure that consultation under 36 CFR 800.6 is initiated for a MOA for an undertaking to cease maintenance on the historic building, and conduct appropriate mitigation.

d. Commands should ensure installations maintain a record of the resources allocated and expended on maintenance, repair, and renovation of each historic building.

e. Commands should ensure that NHPA compliance related components of installation Integrated Cultural Resources Management Plans (AR 200-1) are current and operational.

f. Commands should expeditiously investigate and correct any potential NHPA compliance deficiencies and potential foreclosures of the Advisory Council on Historic Preservation's opportunity to comment per 36 CFR 800.9, due to deferred maintenance or any other action.

4. Supplemental Information:

a. Deferred maintenance on historic Army buildings was the subject of a NHPA-related legal action against the Army at Walter Reed Army Medical Center (WRAMC) by the National Trust for Historic Preservation (NTHP) (reference 1.d.). The NTHP suit focused on WRAMC's National Park Seminary Historic District and alleged the Army violated NHPA Section 110 (54 USC 306101) by allowing the National Park Seminary Historic District to decay and deteriorate. The US District Court for the District of Columbia reviewed this case under the Administrative Procedures Act (APA). The Army prevailed in this case and NTHP's motion for a preliminary injunction was denied. The District Court Judge concluded:

"While the Army could and, in a perfect world, should have done more to preserve the Historic District, the APA does not permit this Court to substitute its judgment for that of the agency with respect to resource allocations, so long as those allocations are not arbitrary or capricious, an abuse of discretion or contrary to law. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. at 415, 91 S. Ct. at 823. While the Court may disagree with the Army's decisions individual and cumulative to permit the buildings of the Historic District to deteriorate, the Court finds that the Army's expenditure of nearly two million dollars in repairs and maintenance since 1992 was not insignificant, consistent with Walter Reed's mission and mandate.[19] The Court concludes that the Army's level of expenditure, although low in relation to the expensive preservation needs of the Historic District, did not constitute an abuse of discretion or an arbitrary and capricious response to the dictates of Section 110, the Secretary of the Interior's Guidelines and Army Regulation 420-40. The Army's course of conduct since 1992 therefore was permissible under the NHPA and the Court finds no basis in law on which to require the Army to invest any more funds in the District."

b. Regarding NHPA Section 110, the court viewed the requirements of Section 110 as limited and did not view Section 110 as adding substantive obligations on a Federal agency. According to the court, as based on Congressional intent and precedent, when Section 110 was added in 1980, it "was not intended to expand the preservationist responsibilities of federal agencies beyond what the NHPA already required." The court interpreted Section 110 as an elucidation and extension of the NHPA Section 106 process (54 USC 306108), but not its replacement by new and independent substantive obligations of a different kind. The court

SAIE-ESO

SUBJECT: National Historic Preservation Act Compliance for Deferred Maintenance on Historic Army Buildings

determined that Section 110 did not require the Army to undertake preservation beyond the requirements of Section 106 and its own historic preservation plan.

5. Definition of Key Terms:

a. Historic Army Building – An Army-owned building or structure that is 50 years old or older and subject to the requirements of the NHPA and 36 CFR 800. Buildings that have been determined to be not eligible for listing in the National Register of Historic Places are no longer subject to the NHPA and the direction in this memorandum.

b. Deferred maintenance - Deferred maintenance is building maintenance that was not performed when it should have been or when it was scheduled and therefore, was delayed or postponed for a future time.

c. Mothballing - Mothballing is an action to close up and deactivate a historic Army building for a long period, with the intent that the building would be brought back to a mission supporting operational status at a future time. Mothballing historic buildings may involve a minimal to a significant initial level of effort, and recurring maintenance requirements (see for example National Park Service Preservation Brief 31 *Mothballing Historic Buildings*).

d. Cease maintenance - Cease maintenance is an action to permanently halt maintenance and repair of a historic Army building when: the building is no longer in a mission supporting operational status; resources are and will remain unavailable to maintain, mothball, or demolish the building; and there is no foreseeable alternative use, or intent to bring the building back to operational status at a future time.

6. Point of contact for this memorandum is the undersigned at david.b.guldenzopf.civ@mail.mil.

David Guldenzopf, Ph.D.
Army Federal Preservation Officer

DISTRIBUTION:

Office of the Army General Counsel
Office of the Deputy Assistant Secretary of the
Army for Installations, Housing and Privatization
Deputy Chief of Staff G-9
Commander
Army Materiel Command
Installation Management Command
Army Environmental Command
Chief, US Army Reserve
Director, Army National Guard