AASHTO

PRACTITIONER'S HANDBOOK

06

February 2007

CONSULTING UNDER SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT

This Handbook provides recommendations for complying with Section 106 of the National Historic Preservation Act during the environmental review process for transportation projects.

Issues covered in this Handbook include:

- Preparing for Section 106 consultation
- Defining an area of potential effects (APE)
- Inviting consulting parties
- Evaluating eligibility for the National Register of Historic Places
- Determining adverse effects
- Resolving adverse effects
- Developing memoranda of agreement (MOAs) and programmatic agreements (PAs)
- Using alternative procedures to satisfy Section 106 requirements

The Practitioner's Handbooks are produced by the AASHTO Center for Environmental Excellence. The Handbooks provide practical advice on a range of environmental issues that arise during the planning, development, and operation of transportation projects.

The Handbooks are primarily intended for use by project managers and others who are responsible for coordinating compliance with a wide range of regulatory requirements. With their needs in mind, each Handbook includes:

- key issues to consider;
- a background briefing;
- practical tips for achieving compliance.

In addition, key regulations, guidance materials, and sample documents for each Handbook are posted on the Center's web site at http://environment.transportation.org

AASHTO Center for Environmental Excellence

American Association of State Highway and Transportation Officials

Overview



Section 106 of the National Historic Preservation Act of 1966 (NHPA) requires Federal agencies to take into account the effects of their actions on historic properties. The NHPA created the Advisory Council on Historic Preservation (ACHP) and authorized the ACHP to issue regulations governing the implementation of Section 106. These regulations are set forth in *36 C.F.R. Part 800.* Cross-references to the Section 106 regulations are included throughout this Handbook.

The Section 106 process seeks to incorporate historic preservation principles into project planning through consultation between a Federal agency and other parties with an interest in the effects of the Federal agency's action on historic properties. The goal of Section 106 consultation is to: identify historic properties that could be affected by a project, assess the project's potential effects to such properties, and seek ways to avoid, minimize or mitigate any adverse effects to historic properties.

The intent of this Handbook is to clarify and provide information to project managers on the successful integration of Section 106 and the National Environmental Policy Act (NEPA). This Handbook focuses specifically on Section 106 as it applies to transportation projects for which the project applicant is a state department of transportation (DOT). Many of the suggestions in this Handbook also can be applied to other types of projects.

This Handbook is not intended to serve as *beginner* introduction to the Section 106 process, nor is it intended to be an exhaustive technical guide for Section 106 practitioners. The *References & Additional Information* section included at the end of the Handbook includes information on other sources for introductory and advanced information on Section 106.

Key Issues to Consider

Agency Roles

- What is the Federal action that requires Section 106 compliance for this project?
- If two or more Federal agencies have Section 106 responsibilities for this project, which Federal agency will take the lead in the Section 106 process?
- What tasks will be the lead Federal agency's responsibility and what tasks will be the responsibility of the project applicant (e.g., state DOT or local agency)?
- Who is responsible for initiating and conducting consultation with Indian Tribes and Native Hawaiian Organizations?

State-Specific Requirements

- Is there a statewide Section 106 programmatic agreement (PA)? If so, how do procedures under the statewide PA differ from standard Section 106 procedures? For example, does the statewide PA transfer some of the Federal agency and/or SHPO roles to a state DOT?
- Are there state, local, or tribal cultural resource laws that must be addressed? How do these laws mesh with the Section 106 process?
- Are there any state-specific manuals or other guidance documents (e.g., guidance issued by the SHPO, FHWA Division Office, or state DOT) that must be used in the Section 106 process for this project?

Consulting Parties

- Who are the Section 106 consulting parties that, by regulation, have a right to be involved in the consultation on this project?
- What process will be used to invite other agencies, organizations, or individuals to participate as consulting parties in the Section 106 process?
- How will requests for consulting party status be reviewed and decided?
- How will the consulting parties be involved in the Section 106 process?
- What methods will be used to communicate with consulting parties?
- Besides identifying and involving consulting parties, what other steps will be taken to inform the general public about the Section 106 process?
- Are there any ongoing controversies or disputes that are likely to affect the Section 106 process? If so, how should they be handled?
- Should the ACHP be invited to participate in the Section 106 process for this project?

Area of Potential Effects

- When will the Area of Potential Effects (APE) be determined and what will it encompass?
- What factors will be used to define the APE?
- Have the SHPO/THPO or other consulting parties raised any specific concerns about the designation of the APE? If so, how are they being addressed?
- If the APE has changed during the course of the project, have the change and the reasons for it been adequately documented?

Evaluation of Eligibility for the National Register of Historic Places

- What methods will be used to identify and evaluate properties that may be eligible for the National Register of Historic Places (NRHP)?
- When will field surveys to identify historic resources be undertaken and who will undertake them?
- Are there any issues that may justify using a *phased approach* to identify and evaluate historic properties?
- Are any National Historic Landmarks present in the project area?
- If there are disagreements about eligibility determinations, how are they being addressed and documented?

Assessment of Effects

- What methods will be used to assess the project's effects on historic properties?
- Are there any issues that may justify using a *phased approach* to assess effects (e.g., lengthy corridor or difficulty gaining access to private property)?
- How will effects on historic properties be documented?
- When will effects findings be made? How does the timing of the effects findings relate to other key milestones in the NEPA process?
- If there are disagreements about effects determinations, how are they being addressed? Will elevation to the ACHP be required?

Documentation of Eligibility and Effects

- What are the SHPO/THPO's expectations regarding the Section 106 documentation?
- What is the timing of these determinations in relation to the major NEPA milestones?
- Who will review and comment on the Section 106 documentation?
- How will Section 106 compliance be addressed in the NEPA document?

Resolution of Adverse Effects

- Has the ACHP been notified of any adverse effect findings (by providing the documentation specified in Section 800.11(e) of the Section 106 regulations)?
- If potential adverse effects are identified, have avoidance and minimization options been thoroughly developed, considered and documented?
- Will the undertaking cause adverse effects on a National Historic Landmark (NHL)?
- What mitigation measures are being considered for properties that will be adversely affected and who will be involved in the development of such measures?

Memorandum of Agreement

- Who will be responsible for drafting the Section 106 Memorandum of Agreement (MOA)?
- Is a Programmatic Agreement (PA) appropriate for this project, rather than an MOA? For example, a PA may be appropriate if a tiered NEPA document is being prepared.
- Who are the *signatories* to the MOA and who will be invited to concur in the MOA?
- What needs to be done with the executed MOA?
- Who will follow up on implementation of the stipulations contained in the MOA?

Background Briefing

Procedural Requirements. Section 106 establishes a consultation process that Federal agencies must follow before taking or approving actions that have the potential to affect historic properties. The law promotes historic preservation by ensuring that historic properties are considered—along with other factors—as part of a Federal agency's decision-making process. As long as an agency follows the required procedures, it has satisfied the requirements of Section 106.

The Section 106 Process. The Section 106 regulations define a consultation process that includes a series of steps. These include:

- initiating consultation, which includes inviting *consulting parties* to participate in the process;
- identifying any historic properties within the project's area of potential effects (APE) that are listed in or eligible for the National Register of Historic Places;
- determining whether the project will have an *adverse effect* on any historic properties that are listed in or eligible for the National Register; and
- resolving any adverse effects on those resources, often through execution of a Memorandum of Agreement (MOA).

In general, these steps are completed sequentially. The Section 106 regulations do provide some flexibility to combine steps, as long as the Federal agency and SHPO/THPO agree, and members of the public still have an adequate opportunity to express their views on the undertaking. *See 36 C.F.R. § 800.3(g).*

Definition of *Consultation*. The concept of consultation is at the heart of the Section 106 process. *Consultation* is defined in the Section 106 regulations as a *process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. See 36 C.F.R. § 800.16(f).* Many different kinds of activities fall within this broad definition. Consultation on some projects may involve numerous face-to-face meetings; on others, it may rely more heavily on an exchange of documents. The Section 106 regulations state that consultation methods should be *appropriate to the scale of the undertaking and the scope of Federal involvement* in that undertaking.

Definition of *Undertaking*. Section 106 applies to any Federal *undertaking.* The Section 106 regulations define an undertaking as *a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including [1] those carried out by or on behalf of a Federal agency; [2] those carried out with Federal financial assistance; and [3] those requiring a Federal permit, license or approval.* A transportation project that is federally funded, or requires any Federal permit or approval, meets the definition of an undertaking and therefore requires Section 106 consultation.

Listed vs. Eligible Properties. Section 106 consultation is required for all historic properties that are listed in or eligible for the National Register of Historic Places. Listed properties can be identified by reviewing a database maintained by the National Park Service. Properties previously determined eligible can also be identified by reviewing existing records, typically in the office of the SHPO/THPO. But research also is needed to identify eligible properties that may exist but have not been previously identified and evaluated. For purposes of Section 106, there is no distinction between listed and eligible properties; properties are not presumed to have greater significance simply because they are listed in the National Register.

Review Times. The Section 106 regulations establish 30-day periods for the SHPO/THPO to review findings or determinations at various points during the Section 106 process. The review period is measured from the SHPO/THPO's receipt of the request for its review of the finding or determination. If the SHPO/THPO fails to respond within this 30-day period, the Federal agency can proceed in accordance with its own finding, or can choose to consult with the ACHP in lieu of the SHPO/THPO. *See 36 C.F.R. § 800.3(c)(4).* The regulations also define periods for the ACHP itself to provide comments. Specific review periods are discussed below in the context of individual steps in the Section 106 process.

Consultation vs. Concurrence. The Section 106 regulations do not require a Federal agency to obtain *concurrence* (approval) from the SHPO/THPO in eligibility or effects findings. Rather, the regulations require the Federal agency (e.g., FHWA) to make eligibility and effects findings *in consultation with* the SHPO/THPO. The regulations prescribe steps that should be followed when a SHPO/THPO disagrees with a Federal agency's findings. (See Parts 5 and 6 in the Practical Tips section below.) If there is a disagreement between a Federal agency and a SHPO on an eligibility issue, the final decision rests with the Keeper of the National Register.

Timing of Consultation. Section 106 consultation must be initiated *early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.* Section 106 consultation must be completed before the Federal agency issues any required license, approval, or permit, and before the Federal agency approves the expenditure of funds for implementation of the project. The Federal agency can approve the expenditure of funds only for *non-destructive planning activities* prior to completion of the Section 106 process. *See 36 C.F.R. § 800.1(c).*

Confidentiality of Historic Resource Information. Section 304 of the NHPA states that information about the *location, character, or ownership* of a historic resource *shall be* withheld from public disclosure if the Federal agency or SHPO/THPO finds that disclosure may (1) cause a significant invasion of privacy; (2) risk harm to the historic resource; or (3) impede the use of a traditional religious site by practitioners. The Federal agency must consult with the Secretary of Interior in reaching a decision to withhold information under this provision. When a Federal agency decides to withhold information from the public, the Secretary of the Interior then decides who (in particular) may have access to that information for the purpose of carrying out the NHPA. If the information has been developed in the course of Section 106 consultation, the Secretary of the Interior must consult with the ACHP in making this decision. *See 36 C.F.R. § 800.11(c).*

Staff Qualifications for Implementing Section 106. Section 112 of the NHPA requires that Federal agency employees and contractors responsible for historic resources meet the Secretary of Interior's Professional Qualification Standards. This requirement does not necessarily require all of those involved in preparing Section 106 documents to meet the Secretary's standards. For example, some Section 106 work can be carried out by staff under the supervision of persons meeting the qualifications standards. *See 36 C.F.R. § 800.2(a)(1).*

Exemption for Elements of Interstate Highway System. In March 2005, the ACHP exempted the majority of the Interstate System from being considered a historic property for purposes of Section 106. The only exceptions to this exemption are historically significant features—e.g., numerous bridges and tunnels—that have been specifically designated by FHWA in accordance with a process established by the ACHP in the exemption. Projects on the Interstate System still must comply with Section 106 to the extent that they have potential impacts on other historic properties. The exemption simply means that the Interstate System itself is not considered to be a historic property, except for those individual elements identified by FHWA. Please refer to the *Reference Materials* section for additional information about this exemption.

Practical Tips

This section describes each step of the Section 106 consultation process and provides suggestions for carrying out the required consultation activities. Cross-references to the Section 106 regulations are included throughout this section.

1 | Agency Roles

Agencies Involved in Section 106 Consultation. Several different agencies—Federal as well as state—have responsibilities within the Section 106 process. The Section 106 regulations define roles for the following agencies in the process:

- The **Federal Agency** that proposes an undertaking—such as FHWA—is responsible for considering the effects of its actions on historic properties. This Federal agency makes the findings of eligibility and findings of effect that are required in the Section 106 process.
- The **Advisory Council on Historic Preservation (ACHP)** is responsible for issuing the Section 106 regulations and overseeing compliance with Section 106. The ACHP generally does not participate in Section 106 consultation for individual projects, but has the right to do so, and can submit comments at any time.
- The **Keeper of the National Register of Historic Places**—an office within the National Park Service (NPS) of the U.S. Department of the Interior—establishes the criteria for determining eligibility for the National Register, and is the ultimate arbiter of disputes about eligibility.
- The **State Historic Preservation Officer (SHPO)** consults with Federal agencies and provides comments at multiple points in the Section 106 process.
- The **Tribal Historic Preservation Officer (THPO)** serves in the role of the SHPO for projects occurring on or affecting properties located on tribal lands, if a tribe has assumed the SHPO's responsibilities. If there is no recognized THPO, the Federal agency should consult with an official designee of the Tribe in addition to the SHPO for such projects.

The agency roles defined in the Section 106 regulations can be modified in a programmatic agreement (PA). *See 36 C.F.R. § 800.14(b).* Under this authority, several state DOTs have entered into statewide PAs that allow significant responsibilities of the SHPO and/or the Federal agency to be carried out by state DOT staff. In states where such PAs apply, the PA should be consulted to determine agency roles.[1]

Designation of Lead Federal Agency. For most transportation projects, the lead agency is within the U.S. Department of Transportation, for example, the FHWA for highway projects. If more than one Federal agency is involved, some or all of the agencies may consult and designate a lead Federal agency, often the agency with the greatest involvement in the project. The lead agency will then fulfill the Federal agencies' collective Section 106 responsibilities. For example, if a highway project requires approval from both FHWA and the U.S. Army Corps of Engineers, FHWA can serve as the lead agency and thereby satisfy Section 106 requirements for both agencies. If no lead agency is designated, each agency is individually responsible for complying with Section 106. *See 36 C.F.R. § 800.2(a)(2).*

Role of the Project Applicant. The Federal lead agency may use the services of project applicants, such as a state DOT, to *prepare information, analyses, and recommendations* as part of the Section 106 process. In addition, the Federal agency may authorize an applicant to initiate the Section 106 process on the Federal agency's behalf. The Federal agency, however, remains responsible for all findings and determinations. *See 36 C.F.R. §§ 800.2(a)(3), 800.2(c)(4).* Within a given state, the specific Section 106 responsibilities of both the Federal agency and state DOT are often well-defined by practice or through a formal agreement. In addition, some state DOTs (such as Vermont) have entered into statewide programmatic agreements under which the state DOT can handle certain tasks that otherwise would be carried out by the SHPO/THPO and/or the lead Federal agency. It is prudent at the outset of the process for an applicant to meet with the Federal agency, review specific tasks, and determine which can be handled by the applicant and which will be performed by the Federal agency.

[1] In SAFETEA-LU, Congress provided new authority for state DOTs to assume responsibilities of FHWA in the environmental review process for transportation projects. Section 6004 of SAFETEA-LU allows any state to assume FHWA responsibilities for environmental reviews for projects that qualify for categorical exclusions under NEPA. Section 6005 of SAFETEA-LU allows five specific states to assume nearly all FHWA responsibilities in the environmental review process for all types of transportation projects. Under both programs, the state DOT would assume FHWA responsibilities under Section 106—and thus would be considered *the Federal agency* for purposes of the Section 106 regulations and this handbook.

Federal Agency Role in Report Preparation. Project applicants and their consultants often prepare Section 106 documentation. But, under the Section 106 regulations, all findings must be made by the Federal agency. Since the findings of all Section 106 reports represent the views of the Federal agency, the Federal agency officials may require that they accept or review the findings before they are sent to the SHPO/THPO and consulting parties. Before initiating Section 106 consultation, project applicants should coordinate with Federal agency officials to determine or confirm the specific points at which the Federal agency will be involved in reviewing and approving Section 106 reports.

Government-to-Government Relationship with Tribes. Consultation with Indian tribes *must recognize the government-to-government relationship between the Federal government and Indian tribes*. Specifically, the Federal agency must (1) consult with the representatives designated by the Indian tribe or Native Hawaiian organization and (2) conduct consultation *in a manner sensitive to the concerns and needs* of the tribe or organization. *See 36 C.F.R. § 800.2(c)(2)(ii)(C).* This requirement does not preclude direct communication between project applicants and Indian tribes and Native Hawaiian organizations, as long as it is done with the consent of the tribe or organization. However, Tribes always have the option of consulting directly with the Federal agency if they so choose. Some state DOTs have entered into agreements with Indian tribes that allow the state DOT to undertake tribal coordination on transportation projects.[2]

2 | State-Specific Requirements

State-Specific Documentation Standards. The Section 106 regulations contain general standards for Section 106 documentation. *See 36 C.F.R. § 800.11.* These standards are often further defined by state-specific agreements, regulations, handbooks or manuals. Individual SHPO/THPOs also may have expectations that are based on customary practices in that state, which may not be formally documented. While the customs of a SHPO/THPO are not binding on a Federal agency, compliance with those practices can help to facilitate expeditious reviews. If a project extends into two or more states, the applicant and lead Federal agency should consult with the applicable SHPO/THPOs to determine the documentation standards that will be followed for the project.

State, Local, and Tribal Laws. Many states have specific laws patterned after the NHPA. Some of these state laws impose additional requirements and procedures, above and beyond those required by Section 106. For example, some state laws require permits for undertaking archeological fieldwork. Local governments and Indian tribes also may have applicable historic preservation laws or other requirements. Project applicants should be familiar with any applicable state, local, or tribal requirements, in addition to the procedures required under Section 106. In addition, certain Federal laws may apply to specific states, such as Federal laws that define Indian tribal lands in Alaska.

Statewide Programmatic Agreements. Several state DOTs have statewide programmatic agreements (PAs) that establish alternative procedures for meeting Section 106 requirements for transportation projects. For example, some states (such as Vermont) have PAs that allow historic preservation professionals within the state DOT to carry out some of the responsibilities assigned to the SHPO/THPO in the Section 106 regulations. For projects in a state with this type of statewide PA, project applicants and consultants should follow the procedures in the PA. The recommendations in this Handbook may not be applicable to projects governed by a statewide PA.

[2] The Section 106 regulations define the terms *Indian tribe*, *Native Hawaiian organization*, and *tribal land*. *See 36 C.F.R. § 800.16(m), (s), (x).*

3 | Consulting Parties and Public Involvement

Process for Involving Consulting Parties. The Federal agency is required to involve consulting parties in making the findings required in the Section 106 process. The regulations do not prescribe specific methods of consultation; rather, they require consultation *appropriate to the scale of the undertaking and the scope of Federal involvement* in the undertaking. *See 36 C.F.R. § 800.2(a)(4)*. Project applicants should meet with the Federal agency and the SHPO/THPO early in the process to discuss the methods that will be used to involve consulting parties. If desired, Section 106 consultation activities can be integrated into an overall public involvement plan for the project.

Types of Consulting Parties. The Section 106 regulations specify some entities that are entitled to be consulting parties; they are sometimes called *by-right* consulting parties. Others with an interest in the project can be designated as consulting parties by the Federal lead agency if they have a *demonstrated interest* in the undertaking. *See 36 C.F.R. § 800.2(c).*

- ***By-Right* Consulting Parties.** Certain parties are entitled to be designated as consulting parties in the Section 106 process. *See 36 C.F.R. § 800.2(c)(1) to (c)(4).* It is the Federal agency's responsibility to identify and invite these parties to participate. These parties include:
  - the applicable SHPO and/or THPO;
  - Native American tribes and Native Hawaiian organizations that attach religious and cultural significance to historic properties that may be affected by an undertaking (whether on or off tribal lands);
  - representatives of local governments with jurisdiction over areas that may be affected by the project; and
  - applicants for Federal assistance, licenses and other approvals.

  These entities are not required to serve as consulting parties; they are required to be invited, and they are entitled to serve as consulting parties if they wish to do so.[3]

- **Other Consulting Parties.** Individuals and organizations with a *demonstrated interest in the undertaking* also may be designated by the Federal lead agency as consulting parties. *See 36 C.F.R. § 800.2(c)(5).* These other entities may include local historic preservation officials, historic preservation groups, community organizations, individual property owners, and other stakeholders. These invited consulting parties have the right to receive information and make their views known at various points in the process, but do not have the right to veto a project decision.

Identifying Potential Consulting Parties. Early in project planning, the Federal agency should consult with the SHPO/THPO to identify any additional parties that may have an interest in becoming a consulting party and invite them to participate in the Section 106 process. As the process proceeds, the agency official may designate other consulting parties. *See 36 C.F.R. § 800.3(f).* As part of this process, the Federal agency must make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that may attach religious and cultural significance to historic properties in the area of potential effects, and invite them to be consulting parties. *See 36 C.F.R. § 800.3(f)(2).*

Inviting Consulting Parties. Potential consulting parties should be invited to participate early in the Section 106 process. The invitations may be sent by the Federal lead agency, or by the project applicant on the Federal agency's behalf. The SHPO/THPO is usually the first party to be contacted and is generally sent a letter informing them of the project and initiating Section 106 consultation. Other parties generally are invited by letter to serve as consulting parties. Invitations to potential consulting parties should be given in writing; there should also be documentation confirming that the invited party has accepted the invitation—or has not accepted, in which case they are not considered a consulting party. Invitations to Federally recognized Indian tribes must come from the Federal lead agency, unless otherwise agreed-to by the tribes.

Decisions on Requests for Consulting Party Status. The Federal agency must consider all written requests for participation as consulting parties, and in consultation with the SHPO/THPO, determine which requests should be granted. *See 36 C.F.R. § 800.3(f)(3).* All groups or individuals requesting consulting party status should be notified of the agency's determination. Decisions about whether to approve a request for consulting party status are made by the Federal agency (e.g., FHWA).

[3] The regulations contain detailed provisions regarding the involvement of Native American tribes and Native Hawaiian organizations as consulting parties in the Section 106 process. These regulations should be carefully reviewed by project applicants and Federal agency officials when inviting consulting parties. See 35 C.F.R. § 800.2(c)(2).

Methods for Communicating with Consulting Parties. Often the first step in opening communication with consulting parties is a written invitation from the Federal agency to serve as a Section 106 consulting party. Subsequent communication may be done by letter, e-mail, meetings, personal communication or field reviews involving agency staff and representatives of the consulting parties. All communication should be documented for the project files.

Involving the Public. In addition to involving consulting parties, the Federal agency also must *provide the public with information about an undertaking and its effects on historic properties and seek public comment.* In consultation with the SHPO/THPO, the agency should plan for involving the public in the planning process, identifying the appropriate points for seeking public input and for notifying the public of agency actions related to the project at a scale commensurate with the undertaking. *See 36 C.F.R. § 800.2(d), 800.3(e).*

- **NEPA Public Outreach.** Public outreach conducted for purposes of NEPA can be used to satisfy the public involvement requirements of Section 106. *See 36 C.F.R. § 800.2(d)(3)*, as long as the NEPA document contains adequate information about a project's potential effects on historic properties.
- **Methods for Involving the Public.** Information about historic resources can be provided through a variety of project outreach tools, such as newsletters, fliers and the project website. At public meetings, information on historic resources, and about the public's role in the Section 106 process, can be included in the meeting presentation and/or on presentation boards. It also can be useful to provide a space on the meeting comment card for attendees to raise questions or concerns about historic resources.
- **Confidentiality Concerns.** As discussed above in the *Background Briefing* section of this handbook, Section 304 of the NHPA authorizes Federal agencies to withhold historic resource information from public disclosure in some circumstances. *See 36 C.F.R. § 800.11(c)*. It usually is not necessary to include confidential information directly in Section 106 reports. But if confidential issues are included, it is useful to include them in a *confidential appendix,* which can be easily separated from the rest of the document. This approach helps to reduce the potential for inadvertent disclosure, while also facilitating disclosure of non-confidential materials.

OPPORTUNITIES FOR CONSULTING PARTY INVOLVEMENT IN SECTION 106

The Section 106 regulations outline specific points at which consulting parties must be involved:

- ***During Historic Property Identification:*** If no historic properties are found, the agency provides appropriate documentation to the SHPO/THPO and notifies consulting parties of the finding of *No Historic Properties Affected*.
- ***During the Determination of Effect:*** If historic properties are found but will not be adversely affected, the agency provides appropriate documentation to the SHPO/THPO and notifies consulting parties of the finding of *No Adverse Effect*.
- ***In Case of SHPO/THPO Objection:*** If the SHPO/THPO objects to the *No Historic Properties Affected* or *No Adverse Effect* finding, the documentation is forwarded to the ACHP for their advisory opinion, and concurrently, the agency must notify all consulting parties and invite their views.
- ***On the Determination of an Adverse Effect:*** If the agency makes a determination that a property will be adversely affected under the Section 106 regulations, the agency must notify the ACHP and the consulting parties to invite their views. This notification must be accompanied by documentation of the finding of Adverse Effect. The agency will consider the views of the consulting parties, as well as the public, in seeking ways to avoid, minimize, or mitigate adverse effects to historic properties. A consulting party may also request the ACHP to join the consultation,
- ***During Development of Mitigation Measures:*** The agreed-upon measures to address the adverse effect are incorporated into an MOA developed by the agency in consultation with the SHPO/THPO and other consulting parties.

Addressing Controversial Issues. If controversy related to a project's potential effects on historic properties is identified early in project planning process, it is important to involve dissenting parties as early as possible. Some effective tools for allowing these parties to voice their concerns and for the agency to consider these concerns include: using the context sensitive solutions process; holding a design workshop; and/or meeting, as needed, with the parties, possibly with the assistance of a third-party facilitator or professional mediator.

4 | Area of Potential Effects (APE)

Who Decides the APE. The Federal lead agency (e.g., FHWA) is responsible for defining the APE in the Section 106 process. The Federal agency must make this determination in consultation with the SHPO/THPO. *See 36 C.F.R. § 800.4(a).*

What the APE Should Include. The area of potential effects, or APE, is defined as the portion of a project study area in which the project may *directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist.* The APE *may be different for different kinds of effects*. For example, there could be a broader APE for indirect effects than for direct effects. *See 36 C.F.R. § 800.16(d).*

When to Define the APE. The APE can be defined, at least preliminarily, when project alternatives have been developed to a conceptual level—i.e., the general location and type of facility. The earlier the APE is defined, the earlier that identification and evaluation of historic properties can begin.

Factors to Consider in Defining the APE. The definition of the APE will be dictated by the character and scope of the proposed project and the topography in the surrounding area. There is a single APE for the project, but it is defined differently for above-ground resources and archeological resources.

- **APE for Above-Ground Resources.** For purposes of above-ground resources (historic structures, historic districts, cultural landscapes, etc.), the APE is often defined as a corridor of a given width. Where the alternatives are close together, there could be a single APE for all alternatives; where the alternatives are geographically dispersed, there could be a distinct APE for each alternative. The boundaries of the APE may be affected by factors such as the topography, view sheds, noise/vibration, potential changes to traffic or development patterns, and other factors.
- **APE for Archeological Resources.** For purposes of archeological properties, the APE is generally limited to the area of direct physical disturbance. Broader investigations for archeological resources may be conducted on a case-by-case basis. The APE for archeological resources may also be defined in terms of its depth (the distance beneath the ground surface).

Some states have agreements or policies that standardize the width of the APE for certain types of projects. If applicable and consistent with Section 106, the guidelines in those agreements should be followed in developing the APE.

Documenting the APE. The justification for the APE should be documented, so that agency reviewers, consulting parties, and the public can understand the factors taken into account in defining the APE. The boundaries of the APE should be graphically depicted in the Section 106 documentation. This can be done by using aerial photographs, maps or drawings, with the extent of the project study area projected on the base graphic (map or aerial photograph), with the APE superimposed on that same graphic.

Revising the APE. It may be necessary to modify the APE as the study progresses. Changes to the APE may be warranted because alternatives have been added, modified, or dropped, or because new information is developed about the potential impacts of alternatives. Any changes to the APE should be developed in consultation with the SHPO/THPO. The revised APE should be documented, along with a justification for the change.

5 | Identifying and Evaluating Historic Properties

The Federal agency must make a *reasonable and good faith effort* to identify historic properties within the APE. *See 36 C.F.R. § 800.4(b)(1).* This work must be performed by historic preservation professionals who meet the professional standards established by the Secretary of Interior. *See 36 C.F.R. § 800.2(a)(1).* Key steps in this process are outlined below.

Definition of *Historic Properties.* The Section 106 regulations define the term *historic property* to include *any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places. See 36 C.F.R. § 800.16(l)(1).* Therefore, the term *historic property*—as used in the Section 106 regulations—includes resources from the *prehistoric* as well as *historic* periods, and includes archeological as well as non-archeological resources.

Process for Identifying Historic Properties. The Section 106 process requires an effort to identify potential historic properties; reviewing existing records is not sufficient. Compliance with this requirement typically involves a records check, public input, and field investigations.

- **Records Check.** A review must be conducted of existing information—for example, checking the records at the SHPO/THPO office or at other locations that contain records on previous surveys and NRHP-listed properties. These resources may be available on-line and/or in a Geographic Information System (GIS) database. *See 36 C.F.R. § 800.4(a)(2).*
- **Input from Consulting Parties and Others.** The input of consulting parties should be sought, to determine if they have information on historic properties in the project area. Information about historic resources also should be gathered from *other individuals or organizations likely to have knowledge of, or concerns with, historic properties in the area*—for example, local government officials, community organizations, and individual residents. *See 36 C.F.R. § 800.4(a)(3).*
- **Input from Indian Tribes.** Indian Tribes and Native Hawaiian organizations also should be contacted for assistance in identifying properties of religious and cultural significance to them (both on and off reservation lands). *See 36 C.F.R. § 800.4(a)(4).*
- **Field Investigations.** The level of effort required for field investigations will vary from project to project. Sometimes, a *windshield survey* is done in conjunction with the records check; in other cases, a comprehensive field survey may be undertaken. In addition, the DOTs and SHPOs in every state have different survey standards. For example, some states recommend that a survey form be filled out for every potential historic property in the APE (usually those over 50 years of age); others do not. Also, some state DOTs recommend that all survey work be done from the public right-of-way, while others permit surveyors to enter onto the private properties (after appropriate property owner notification). The applicable SHPO/THPO and state DOT cultural resource staff should be knowledgeable of local policies in place, and can provide guidance on the appropriate procedures for field surveys. In addition, the Section 106 regulations list factors to consider in determining the appropriate level of effort for identifying historic properties. *See 36 C.F.R. § 800.4(b)(1).*

Timing of Identification Efforts. The Section 106 historic property identification phase should be done early as possible in project planning, so that its findings can be used to refine alternatives. Sometimes two survey phases are conducted—a records check and *windshield survey* is done early in project planning, in order to inform the initial development and screening of alternatives, and then later a more comprehensive survey is conducted for the alternatives carried forward for detailed study. The timing and level of detail of historic property surveys should be determined on a case-by-case basis.

Using a *Phased Approach.* The Section 106 regulations allow *phased* identification of historic properties when alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted. If a phased approach is used, the process should focus on establishing the *likely presence* of historic resources within the APE for each alternative or inaccessible area—rather than determining National Register eligibility and boundaries for each individual property. For example, a phased approach is often appropriate in a tiered NEPA study; the Tier 1 study could involve a records check and windshield survey, while determinations of National Register eligibility and boundaries would be made in Tier 2. In all cases where final identification of properties is to be deferred until after completion of NEPA, the process for subsequent identification, effects evaluation and treatment should be formally recorded in an MOA or PA. *See 36 C.F.R. § 800.4(b)(2).* Section 4(f) requirements also should be considered when adopting a phased approach. For example, if a Tier 1 EIS is being prepared, FHWA will need to determine whether the level of detail developed in Tier 1 is sufficient for Section 4(f) compliance.

Eligibility Criteria for the National Register. The Section 106 regulations themselves do not define the eligibility criteria for the National Register. Rather, these criteria are defined in separate regulations issued by the Keeper of the National Register. Under these regulations, a property must meet one of four significance criteria, as summarized below, and also must retain *integrity of location, design, setting, materials, workmanship, feeling, and association.* The significance criteria are:

- Criterion A—association with important historic events or broad patterns of history;
- Criterion B—association with the life of a historically significant person;
- Criterion C—architectural, engineering, or artistic significance or *a significant and distinguishable entity whose components may lack individual distinction*; or
- Criterion D—has yielded, or is likely to yield, information important in history or prehistory (this generally is understood to refer to archeological significance).

These significance criteria are defined in more detail in the regulations. *See 36 C.F.R. § 60.4.* In addition, the Keeper issues guidance documents (known as *bulletins*) that address eligibility issues for specific types of properties, such as rural historic landscapes and historic battlefields. These include the National Register Bulletin, *How to Apply the National Register Criteria for Evaluation*.[4]

Applying the Eligibility Criteria. The Federal agency is responsible for making eligibility findings in the Section 106 process, in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified properties. In practice, eligibility determinations typically will involve (not necessarily in this exact sequence):

- Development of recommended findings by historic preservation professionals, who may be employed by the project applicant or consultants;
- Review of the recommended findings by the Federal agency;
- Consultation with the SHPO/THPO, often followed by correspondence from the SHPO/THPO concurring in the recommended findings;
- Consultation with other consulting parties, including consultation with any Indian tribes or Native Hawaiian organizations that ascribe cultural and religious significance to the property;
- Approval of the findings by the Federal agency;
- Notification to all consulting parties informing them of the findings.

Consultation regarding eligibility determinations can be conducted in many different ways; there is no prescribed process. Consultation can include one or more public meetings, or can be conducted by circulating a technical report for review and comment. If meetings are used, the meeting discussion should be documented and shared with consulting parties and the public. As always, the confidentiality requirements—as specified in Section 800.11(c)—should be followed when determining the extent to which information is publicly disclosed.

Boundary Determinations. For properties that are found to be eligible for the National Register, it also is necessary to determine the National Register boundary—that is, the geographic extent of the area that is considered eligible for the National Register. The National Register boundary generally should encompass but not exceed the extent of the significant resources and land areas comprising the property. More specific guidance for determining boundaries can be found in a National Register Bulletin, *Defining Boundaries for National Register Properties*.[5] The National Register boundaries are frequently important for purposes of compliance with Section 4(f), as discussed below under Part 8, *Coordination with Other Requirements*). Therefore, careful attention should be given to determining National Register boundaries.

Properties Previously Determined Eligible or Ineligible for the National Register. Properties in the APE that were previously determined eligible or ineligible for the National Register may need to be reassessed. *See 36 C.F.R. § 800.4(c)(1).* For eligible properties, it also may be necessary to reassess the National Register boundary to determine whether the

[4] A link to this document is available on the Center's web site, http://environment.transportation.org, in the Practitioner's Handbooks section under the *Resource Materials* for this Handbook.

[5] A link to this document is available on the Center's web site, http://environment.transportation.org, in the Practitioner's Handbooks section under the *Resource Materials* for this Handbook.

boundary should be modified. A recommendation should be made to the SHPO/THPO on whether the property is still eligible and whether any modifications are needed to the boundaries or other aspects of the eligibility determination. Any change to a listing in the National Register would require action by the Keeper of the National Register. For purposes of Section 106 consultation, a larger boundary may recognized as eligible, without making a formal change to the National Register listing.

National Historic Landmarks. Properties designated as National Historic Landmarks (NHLs) possess national significance and are protected under Section 110 of the NHPA. Section 110(f) states that Federal agencies must *to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic Landmark that may be directly and adversely affected by an undertaking.* The Section 106 regulations include special requirements for considering NHLs in the Section 106 process. *See 36 C.F.R. § 800.10.* The regulations require the ACHP and the Secretary of the Interior to be invited to participate in Section 106 consultation whenever a project has an adverse effect on an NHL.

Disagreements about National Register Eligibility. If the SHPO/THPO disagrees with an eligibility finding, the Federal agency must either resolve the disagreement or submit the issue to the Secretary of the Interior—specifically, the Keeper of the National Register within the National Park Service—for a final determination of eligibility (DOE). *See 36 C.F.R. § 800.4(c).* The Keeper's decision on an eligibility issue is binding on the Federal agency. A DOE may address any aspect of an eligibility finding. For example, a DOE could be used to resolve a disagreement about the National Register boundary of a property.

Determinations of Eligibility by the Keeper. The Federal agency must obtain a DOE by the Keeper if the Federal agency disagrees with the SHPO on an eligibility issue, or if the ACHP or the Secretary of the Interior directs the agency to obtain a DOE. *See 36 C.F.R. § 800.4(c).* The Federal agency also can request a DOE at any time on its own initiative. The procedures for obtaining a DOE from the Keeper are separate from the Section 106 regulations. *See 36 C.F.R. § 63.* The eligibility documentation prepared in the Section 106 process often can be used as the application for a DOE, or a separate report or National Register nomination form can be completed. The final decision on the DOE is made by the Keeper. *See 36 C.F.R. § 63.4.* A determination of eligibility made by the Keeper does not mean that the property is listed on the National Register; listing requires a separate nomination process. Section 106 requirements apply equally to listed and eligible properties.

Properties of Religious or Cultural Significance to Tribes. The Section 106 regulations require Federal agencies, in making eligibility findings, to acknowledge that Indian tribes and Native Hawaiian organizations have *special expertise in assessing the eligibility of historic properties that possess religious and cultural significance to them. See 36 C.F.R. § 800.4(c)(1).*

Documentation of Eligibility Findings. The Section 106 regulations state that, in general, a finding made under Section 106 should be *supported by sufficient documentation to enable any reviewing parties to understand its basis. 36 C.F.R. § 800.11(a).* Compliance with Section 106 typically involves preparation of reports that compile the survey forms or other documentation for each property evaluated during this phase of the Section 106 process. In those documents, it generally is advisable to:

- Depict the area within which historic property surveys were completed;
- Describe the methods used to identify historic properties, including the records check, outreach to consulting parties and others, and field surveys;
- Include a completed survey form (consistent with the standards of the applicable SHPO) for each property that is found to be eligible for the National Register;
- Specifically identify the National Register criteria under which each property was found to be eligible, as well as the characteristics that contribute to the historic significance of the property, and assess; and
- For any properties that were specifically evaluated and found to be non-eligible, provide a brief description of the property and a justification for the finding of non-eligibility, which typically involves a lack of significance and/or a lack of integrity.

These suggestions are offered only as a general guide for developing documentation of eligibility findings. The appropriate documentation for each individual project will be determined by the Federal agency responsible for Section 106 compliance. More specific guidance for determining eligibility and boundaries can be found in a National Register bulletin, *How to Apply the National Register Criteria for Evaluation.*[6]

[6] A link to this document is available on the Center's web site, *http://environment.transportation.org*, in the Practitioner's Handbooks section under *Resource Materials* for this Handbook.

Finding of *No Historic Properties Affected*. After the identification and evaluation of historic properties, the Section 106 process can be concluded by the Federal agency with a finding of *no historic properties affected.* This finding can be made if the Federal agency determines that:

- There are no historic properties within the APE; or
- There are historic properties within the APE, but the undertaking will have *no effect* upon those properties.

The regulations define an *effect* as an *alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register. See 36 C.F.R. § 800.16(i).* Documentation for a finding of *no historic properties affected* must describe the undertaking, the efforts made to identify historic properties, and the basis for the finding. *See 36 C.F.R. § 800.11(d).*

Concluding This Stage of Section 106 Consultation. If the Federal agency makes a finding of *no historic properties affected,* submits it to the SHPO/THPO and other consulting parties, and the SHPO/THPO does not object within 30 days of receipt of an adequately documented finding; the Section 106 process is complete. The Federal agency must also make the documentation available to the public before approving the undertaking. If this finding is not made, the process moves forward to assess effects on historic properties within the APE.

6 | Assessing Effects on Historic Properties

The Federal agency is responsible for assessing effects to historic properties. This stage of Section 106 consultation focuses on identifying any *adverse effects* on historic properties. The regulations define a detailed process for making this decision. *See 36 C.F.R. § 800.5.* Key elements of this process are outlined below.

Definition of *Adverse Effect.* The Section 106 regulations state that an *adverse effect* occurs when *an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association.* Thus, an adverse effect finding focuses on the potential to *alter historically significant characteristics and diminish the integrity* of a historic property. The regulations provide two additional guidelines for determining whether there is an adverse effect:

- **May Need to Re-Assess Significant Characteristics.** The regulations require this finding to consider *all qualifying characteristics of a historic property, including those that may have been identified subsequent t o the original evaluation* of the property. *See 36 C.F.R. § 800.5(a)(1).* This means that it may be necessary, as part of the Section 106 process, to re-assess the significant characteristics of properties that were listed or determined eligible prior to the beginning of the study.
- **Consider Indirect Effects.** The regulations state that *[a]dverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative. See 36 C.F.R. § 800.5(a)(1).* This means that a project's reasonably foreseeable effects on development patterns may need to be considered in determining whether there is an adverse effect.

Information Needed for Assessing Effects. To undertake the assessment of effects, the evaluator must know why the property is significant; this information should be available in the survey reports conducted for the project, or in the National Register nomination forms (for properties that are listed on the Register). The evaluator also must have a developed project concept and should know the project limits and the locations of features such as bridges and interchanges. Information produced for the NEPA analysis can support the Section 106 effects analysis, such as noise, vibration, visual and land use impact studies. Other potentially useful studies include secondary and cumulative impact analyses.

Timing of Effects Findings. The Section 106 regulations do not specify a particular point in the NEPA process by which effect findings must be made. However, the regulations do state that the Federal agency *should coordinate the steps of the section 106 process, as appropriate, with the overall planning schedule for the undertaking and with any reviews required under other authorities such as the National Environmental Policy Act* and other laws. *See 36 C.F.R. § 800.3(b).* For projects involving an environmental impact statement (EIS), preliminary adverse effect findings are typically included in the draft EIS; final effect findings are typically included in the final EIS (for the preferred alternative only).

Phased Approach for Assessing Effects. For projects involving corridors or large land areas, or where access to property is restricted, a phased approach can be used for assessing effects. The regulations state that a phased process for assessing effects should be consistent with the phased process for identifying and evaluating historic properties. *See 36 C.F.R. § 800.5(a)(3).* The regulations do not provide further guidance on how to implement a phased approach to assessing effects. Therefore, the Federal agency has discretion to determine how best to phase the assessment of effects. As with other Section 106 decisions, a decision about phasing should be made in consultation with the SHPO/THPO and other consulting parties. Decisions on phasing should take into account any complications presented by the requirements of Section 4(f).

Finding of No Adverse Effect for a Project. The Section 106 regulations prescribe a multi-step process for making a finding of no adverse effect for a project as a whole. *See 36 C.F.R. § 800.5(c).* The process involves the following steps:

- The Federal agency *proposes* a finding of no adverse effect, in consultation with the SHPO/THPO. The proposed finding can be based on (a) a finding that the undertaking as proposed has no adverse effects or (b) a commitment to modify the undertaking, or to impose conditions, in order to avoid adverse effects. (The latter scenario is often referred to as a *mitigated finding of no adverse effect.*)
- The Federal agency provides the proposed finding, together with supporting documentation, to the SHPO/THPO and to other consulting parties for a 30-day review period. The contents of the supporting documentation are specified in the regulations. *See 36 C.F.R. § 800.11(e).* For more on this, see *Documenting Effects Findings*, below. As always, the confidentiality requirements—as specified in Section 800.11(c)—should be followed when determining the extent to which information is publicly disclosed.
- If the SHPO/THPO agrees with the finding of no adverse effect, or does not respond within the 30-day review period, and if no other consulting party has objected within the 30-day period, the Federal agency can proceed with the undertaking. (This does not apply if the ACHP is reviewing the proposed finding.)
- If the SHPO/THPO or any consulting party objects in writing to the proposed finding, the Federal agency is required to (1) consult with the party to resolve the disagreement or (2) request the ACHP to review the finding and provide its comments. Thus, if the disagreement with the SHPO/THPO or a consulting party cannot be resolved, the Federal agency must seek comment from the ACHP on the disputed issue.
- If a disputed finding is submitted to the ACHP, the ACHP will review it and provide its comments to the Federal agency. The Federal agency must consider the ACHP's comments, but is not required to accept the ACHP's position; the Federal agency remains responsible for determining whether a project will have adverse effects on historic properties.
- If, at the end of this process, the Federal agency makes a final finding of no adverse effect for a project, the Section 106 process is concluded. The Federal agency can then proceed with the project.

Additional details regarding the process for making a finding of no adverse effect are provided in the regulations. These regulations should be carefully reviewed when making this finding, especially where there is a disagreement that may require elevation to the ACHP. *See 36 C.F.R. § 800.5(c).*

Findings of Adverse Effect. There is no prescribed process for finding that a project does have adverse effects on historic properties. However, the steps generally parallel those for making a finding of no adverse effect: the Federal agency proposes a finding, consults with the SHPO/THPO and other consulting parties, and then makes a final decision. Although the Federal agency must apply the criteria of adverse effect to each historic property in the area of potential effects, there should be one finding of effect made for the entire undertaking. If there is a finding of adverse effect for at least one affected property, the agency develops a Memorandum of Agreement to cover agreed-upon measures to mitigate adverse effects to all properties in the APE. Adverse-effect findings for individual properties may be made; such findings can be used to support FHWA's compliance with Section 4(f). For additional discussion of Section 4(f), *see Coordination with Other Requirements, below.*

Documentation of Effect Findings. The Section 106 regulations specifically describe the documentation that must be prepared for effect findings. *See 36 C.F.R. § 800.11(e).* This documentation must explain the basis for the findings of adverse effect or no adverse effect; it also should include copies or summaries of views provided by consulting parties and the public. Specific techniques that may be useful in this report include:

- visual depictions of the project in relation to the historic properties;
- an aerial photograph with the alignment overlain on it, the APE shown, and the location and boundaries of historic resources shown;
- photographs keyed to an aerial photograph or used in the text to support the discussion;
- conceptual drawings and photo simulations, if warranted, to depict the proposed project's appearance in the vicinity of the historic property.

As discussed below, this documentation must be provided to the ACHP if any adverse-effect finding is made for the project. The ACHP then reviews this information in making its decision about whether to enter the Section 106 consultation process for the project.

Concluding This Stage of Section 106 Consultation. If the Federal agency makes a finding of *no adverse effect* for the project as a whole, has provided an adequately documented finding to the SHPO/THPO and consulting parties, and has considered and addressed any objections to that finding, the Section 106 process is completed. The documentation must also be made available to the public. If the Federal agency makes an *adverse effect* finding, the process moves to the next step—resolving adverse effects.

7 | Resolving Adverse Effects

If adverse effects are identified, the Federal agency must consult with the SHPO/THPO and other consulting parties to resolve the adverse effects. This does not mean the Federal agency must resolve the adverse effects *to the satisfaction of* the consulting parties; the Federal agency is ultimately responsible for deciding what actions, if any, should be taken to avoid, minimize, or mitigate the adverse effects.[7] The process for resolving adverse effects in the Section 106 process is outlined below.

Section 800.11(e) Documentation. The Federal agency must submit the adverse effect documentation—as specified in Section 800.11(e)—to the ACHP and the consulting parties; the documentation also must be made available to the public. *See 36 C.F.R. § 800.6(a).* Confidentiality requirements under Section 800.11(c) should be taken into account in releasing this information.

ACHP Participation. As noted above, the Federal agency must notify the ACHP of any adverse effect finding and submit the adverse effect documentation. If the project will have an adverse effect on a National Historic Landmark, or if a programmatic agreement will be prepared, the Federal agency also must invite the ACHP to participate in consultation to resolve the adverse effects. The ACHP also may be invited to participate by the SHPO/THPO or by other consulting parties. If the agency does not receive a response from the ACHP within 15 days of their notice, it may assume the ACHP is not participating and proceed with the process; however, the ACHP may enter the process at any time at its discretion. *See 36 C.F.R. § 800.6(a)(1).* The Section 106 regulations list criteria that the ACHP considers in deciding whether to enter Section 106 consultation for an individual project. *See 36 C.F.R. Part 800, Appendix A.*

Avoiding or Minimizing Adverse Effects. The Federal agency must consult with the SHPO/THPO and other consulting parties to develop and evaluate alternatives or modifications to the undertaking that could avoid or minimize adverse effects to historic properties. *See 36 C.F.R. § 800.6(a).* For highways and other transportation projects, such options may include, but are not limited to, alignment shifts, design changes, and developing landscaping or screening for visual impacts. For purposes of demonstrating compliance with Section 106, NEPA, and Section 4(f), it is important to document consideration of avoidance and minimization options. This analysis can be fully documented in a report or memorandum, and then summarized in the historic resources section of the NEPA document.

[7] For projects on tribal lands, issues must be resolved to the satisfaction of the tribal government. This requirement is based on the tribe's sovereignty over its own land, not on a requirement of Section 106.

Mitigation for Adverse Effects. Mitigation measures also must be considered as ways to resolve adverse effects. Mitigation measures include any actions that help to offset or compensate for a project's negative impacts on historic properties. Some state DOTs, SHPOs/THPOs and Federal agencies have implemented standard mitigation measures for specific types of properties, either through formal agreement or through practice. Consulting parties should not, however, be discouraged from developing creative approaches to the mitigation of adverse effects in order to address the interests of all parties. Examples of mitigation include: relocating a historic bridge to a new site; conducting archeological data recovery or intensive historic building documentation; providing interpretive or educational material; and documenting and/or salvaging materials (if a property is to be demolished).

Inviting Additional Consulting Parties. The Federal agency, in consultation with the SHPO/THPO, may invite additional individuals or organizations to join in the process as consulting parties, after an adverse effect finding is made. *See 36 C.F.R. § 800.6(a)(2).* For example, if there is a property owner whose property may be adversely affected, and mitigation for that property is being considered in the consultation, that owner could be invited to become a consulting party.

Involving Consulting Parties. Consulting parties should be given the opportunity to be involved in the development of the MOA, including the development of mitigation measures. Sometimes, the most effective way to involve them is for the agency to develop proposed commitments for the MOA, and then meet with the consulting parties to present and get input on those measures. In other situations, it would be more appropriate to first solicit ideas from the parties or parties that ascribe value to the property, and then propose specific measures. Meetings to discuss the MOA may be useful, but are not required; consultation on the MOA also can be accomplished through written correspondence from the Federal agency requesting parties to comment on proposed mitigation.

Drafting and Executing an MOA. An MOA is an agreement that commits a Federal agency to carry out measures to mitigate adverse effects on historic properties; it also may include programmatic elements, such as a plan for addressing archeological resources. Only one MOA should be developed and executed for the undertaking, and it should include all measures that have been agreed upon to avoid, minimize or mitigate adverse effects to historic properties (including, for example fencing the right-of-way to ensure avoidance of an archeological property). While it is possible to terminate consultation without executing an MOA, that is rare; in most cases where adverse effects are found, an MOA is executed. Key points to consider in preparing an MOA include:

- **Required Signatories.** The Section 106 regulations require two signatories for any MOA: the Federal agency (e.g., FHWA) and the SHPO/THPO. The ACHP also must be a signatory to the MOA if the ACHP has joined the consultation process. *See 36 C.F.R. § 800.6(c)(1).* The required signatories must sign for the MOA to take effect, and their approval also is needed for the agreement to be amended or terminated.
- **Invited Signatories.** Other parties, such as the state DOT as a project applicant, also may be invited to be signatories. The refusal of an invited signatory to sign does not prevent the MOA from taking effect. If an invited signatory does sign the MOA, that party's approval is needed to amend or terminate the MOA. *See 36 C.F.R. § 800.6(c)(2).*
- **Concurring Parties.** The Federal agency may ask others that have participated in the Section 106 process to sign the document as *concurring parties*. Concurring parties do not have the rights of signatories; their approval is not needed to execute, amend or terminate the MOA. Signing as a concurring party is primarily a way to express agreement with the contents of the MOA and acceptance of the outcome of the process. *See 36 C.F.R. § 800.6(c)(3).*
- **Drafting the MOA.** The ACHP has developed model language for use in MOAs; many states also have previous MOAs that can be used as models for developing new MOAs. These models can be helpful in expediting the preparation of an MOA, but do not constrain innovative approaches.
- **Filing the MOA with ACHP.** When the MOA has been fully executed, a copy should be sent to the ACHP for their records, along with other documentation specified in the regulations. *See 36 C.F.R. §§ 800.6(b)(1)(iv), 800.11(f).* Copies of the agreement also should be sent to all consulting parties. *See 36 C.F.R. § 800.6(c)(9).*

Project-Level Programmatic Agreements. In a project where final identification of historic properties and/or effects to such properties cannot be fully assessed before a decision is reached in the NEPA process, an agreement that sets forth the process for an agency to follow to fulfill its responsibilities under Section 106 is warranted. This usually is a PA, as it lays out a compliance process for subsequent evaluation, determination of appropriate treatment and other agreed-upon mitigation measures.

Terminating Consultation without an MOA. The Section 106 regulations give Federal agencies, the SHPO/THPO, and the ACHP the option of terminating consultation after consulting to resolve adverse effects, if they determine that further consultation would not be productive. The option of terminating consultation is rarely exercised. Specific procedures for terminating consultation are provided in the regulations. *See 36 C.F.R. § 800.7(a).*

8 | Coordination with Other Requirements

Compliance with Section 106 should be coordinated with other environmental requirements that also apply to the development of the undertaking. For transportation projects, it is especially important to coordinate Section 106 compliance with the requirements of the National Environmental Policy Act (NEPA) and Section 4(f) of the U.S. Department of Transportation Act.

Coordination of Section 106 with NEPA Process. The Section 106 regulations encourage Federal agencies to *consider their section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner. See 36 C.F.R. § 800.8(a).* The regulations also encourage SHPOs/THPOs and other consulting parties to participate early in the NEPA process, when purpose and need is being determined and a wide range of alternatives are under consideration. *See 36 C.F.R. § 800.8(a)(2).*

Documentation of Section 106 Compliance in the NEPA Process. The eligibility and effects findings that are made in the Section 106 process, along with any commitments to avoid, minimize, and mitigate impacts, should be summarized in the NEPA document for the project. The consultation process—including coordination with the SHPO/THPO—also should also be summarized in the NEPA document. The appendices to the NEPA document should include relevant correspondence with the SHPO/THPO and other consulting parties. The executed MOA should be included in the appendices to the final NEPA document.

Using Section 106 to Facilitate Compliance with Section 4(f). The Section 106 process can be used in several ways to facilitate compliance with Section 4(f). These include:

- **Identifying Historically Significant Characteristics.** For purposes of Section 4(f) compliance, it is important for National Register eligibility determinations to identify the historically significant characteristics of each eligible property. This information is important because the historically significant features must be considered by FHWA when making *findings of no constructive use* and *de minimis impact findings* under Section 4(f). This information also can be important when determining the *least harm* alternative under Section 4(f). If this information is not developed in the Section 106 process, it will be more difficult to make these Section 4(f) findings.
- **Determining National Register Boundaries.** For purposes of Section 4(f), it is often necessary to determine the exact boundary of a Section 4(f) resource. The boundary is important because Section 4(f) is triggered by any direct use of land within the boundary of a Section 4(f) resource. Therefore, in developing Section 106 eligibility findings, boundary determinations should be made—and carefully mapped—for any properties located in proximity to the alternatives. It may not be necessary to determine the entire boundary of a large resource, such as a historic district, when only a portion of the property is located near the alternatives.
- **Identifying Non-Contributing Resources Within Historic Districts.** The FHWA has determined that Section 4(f) applies, within a historic district, to (1) those properties that are considered *contributing* to the eligibility of the historic district, and (2) any *individually eligible* property within the district. Properties contained within a historic district are assumed to be contributing unless specifically determined otherwise. Therefore, if a historic district contains non-contributing elements, it is helpful to identify those elements specifically in the Section 106 process. Non-contributing areas within a historic district are not considered Section 4(f) property.

- **Determining if Archeological Resources Warrant Preservation in Place.** FHWA has determined that archeological resources are protected under Section 4(f) only if they are eligible for the National Register *and* warrant preservation in place; even if eligible, they are not protected under Section 4(f) if they are valuable chiefly because of what can be learned through data recovery. Therefore, determining whether an archeological site warrants preservation in place is essential to determining whether it is protected under Section 4(f).
- **Making Findings of No Adverse Effect.** As noted above, Section 106 requires a single overall finding of adverse effect or no adverse effect for a project. However, findings of *no adverse effect* can be made on a property-by-property basis in the Section 106 process. If property-specific findings of no adverse effect are made under Section 106, they provide the basis for two important findings under Section 4(f).
  - ***De Minimis Impact Findings.*** Where a project directly uses a historic property, a finding of no adverse effect in the Section 106 process justifies a finding of *de minimis impact* for that property under Section 4(f), which enables FHWA to satisfy its Section 4(f) obligations with more limited analysis.
  - ***Findings of No Constructive Use.*** Where a project has indirect (noise or visual) impacts on a historic property, a finding of *no adverse effect* in the Section 106 process automatically means there is *no constructive use* of that property for purposes of Section 4(f).

Considering Section 4(f) Requirements in the Section 106 Process. Unlike Section 106, Section 4(f) is a substantive law that limits a Federal agency's choice among alternatives. Specifically, it prohibits the use of a Section 4(f) resource if there is a prudent and feasible avoidance alternative and, if avoidance is not possible, it requires *all possible planning to minimize harm* to those resources. These mandates are distinct from Section 106, but they can greatly affect the outcome of the Section 106 process. Therefore, it is valuable to familiarize all participants in the Section 106 process with the mandates of Section 4(f), so that they all understand how Section 4(f) will influence project decisions.

9 | Alternative Methods for Section 106 Compliance

Using NEPA to Satisfy Section 106 Requirements. The Section 106 regulations allow Federal agencies to use the NEPA process, in lieu of the Section 106 process, to consider the potential effects of their actions on historic properties. *See 36 C.F.R. § 800.8(c).* This alternative method can be used only if the Federal agency notifies the SHPO/THPO and ACHP in advance, and if the NEPA procedures meet standards for documentation and opportunity for consulting party participation that closely parallel the requirements of the normal Section 106 process. This approach has been used infrequently, but may be worthwhile to consider as an option for streamlining project reviews.

Program Alternatives. The Section 106 regulations allow Federal agencies to use *program alternatives* instead of following the usual Section 106 process. The regulations list five types of program alternatives, including (a) alternate procedures, which can be adopted by an agency in lieu of the Section 106 regulations; (b) programmatic agreements; (c) exempted categories of activities; (d) standard treatments for certain types of resources and impacts; and (e) program comments. *See 36 C.F.R. § 800.14.* Of these, the method most commonly used for highway projects is the programmatic agreement.

10 | Reference Materials

Statutes, regulations, and handbook documents cited in this Handbook, along with additional materials and sample documents, are available on the AASHTO Center for Environmental Excellence website, *http://environment.transportation.org/center/.*

REFERENCES

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The AASHTO Center for Environmental Excellence's Technical Experts are available to provide strategic environmental and focused environmental management technical advice. For more information the Center Technical Assistance Program (CTAP), please visit: *http://environment.transportation.org/center/tech_experts/*

ADDITIONAL RESOURCES

PRACTITIONER'S GUIDES AVAILABLE FROM AASHTO CENTER FOR ENVIRONMENTAL EXCELLENCE:

01 Maintaining a Project File and Preparing an Administrative Record for a NEPA Study
02 Responding to Comments on an Environmental Impact Statement
03 Managing the NEPA Process for Toll Lanes and Toll Roads
04 Tracking Compliance with Environmental Commitments/Use of Environmental Monitors
05 Utilizing Community Advisory Committees for NEPA Studies
06 Consulting Under Section 106 of the National Historic Preservation Act

For additional Practitioner's Handbooks, please visit the AASHTO Center for Environmental Excellence web site at: **http://environment.transportation.org**

Comments on the Practitioner's Guides may be submitted to:
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