AASHTO

PRACTITIONER'S HANDBOOK

06

August 2016

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 includes:

- 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 Center for Environmental Excellence by AASHTO. 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; and
- a list of reference materials.

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.

Center for Environmental Excellence by AASHTO

American Association of State Highway and Transportation Officials

This material is based upon work supported by the Federal Highway Administration under Cooperative Agreement No. DT-FH61-07-H-00019. Any opinions, findings, and conclusions or recommendations expressed in this publication are those of the Author(s) and do not necessarily reflect the view of the Federal Highway Administration.

Overview



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

Section 106 of the NHPA requires Federal agencies to take into account the effects of their actions on historic properties.[1] 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 CFR 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. Section 106 consultation includes four main steps: initiating consultation; identifying historic properties that could be affected by the undertaking; assessing the undertaking's effects on historic properties; and seeking ways to avoid, minimize, or mitigate any adverse effects on those properties.

The intent of this Handbook is to assist project managers and Section 106 practitioners in carrying out Section 106 consultation in coordination with the National Environmental Policy Act (NEPA) for transportation projects. This Handbook focuses primarily on Section 106 consultation for highway, transit, and passenger rail projects that involve funding or other approvals by the Federal Highway Administration (FHWA), Federal Transit Administration (FTA), or Federal Railroad Administration (FRA). Many of the suggestions in this Handbook also can be applied to other types of projects.

The Reference Materials section at the end of the Handbook includes additional sources of introductory and advanced information on Section 106.

Background Briefing

This section provides an overview of key terms and concepts used in Section 106 consultation under the NHPA. The topics covered in this section are discussed in more detail in the Practical Tips section.

Agencies Involved in Section 106 Consultation. The Section 106 regulations define roles for various agencies in the Section 106 consultation process.

- The **Federal Agency** is the agency with the responsibility to carry out Section 106 consultation for an undertaking. In this handbook, the term "Federal agency" also includes any state that has assumed responsibilities of a U.S. Department of Transportation (USDOT) agency for Section 106 compliance as part of an assignment agreement pursuant to 23 USC 326 or 327.
- The **State Historic Preservation Officer (SHPO)** is an official appointed or designated by the Governor of a state to administer the state's historic preservation program. The SHPO consults with Federal agencies and provides comments at multiple points in the Section 106 process.
- The **Tribal Historic Preservation Officer (THPO)** is a tribal official appointed or designated by a federally recognized Indian tribe to carry out the responsibilities of the SHPO for purposes of Section 106 compliance on tribal lands. Not all tribes have designated a THPO. Where a THPO has not been designated and approved to act in lieu of the SHPO pursuant to Section 101(d)(2) of the NHPA, the Federal agency consults with the SHPO and with the tribal official responsible for historic preservation consultation.
- The **Advisory Council on Historic Preservation (ACHP)** is an independent Federal agency with responsibility

1 54 USC 306108. Prior to December 19, 2015, Section 106 was codified at 16 USC 470f.

for issuing the Section 106 regulations and overseeing compliance with Section 106. The ACHP does not routinely participate in Section 106 consultation for individual projects, but the ACHP 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. The Keeper also is responsible for resolving disputes about eligibility.

Consulting Parties. The Section 106 process involves consultation with the SHPO/THPO as well as other consulting parties. Entitles that are entitled to serve as consulting parties (often called "by-right" consulting parties) include:

- the applicable SHPO and/or THPO;
- Indian 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.[2]

In addition, the Federal agency may invite other entities with a "demonstrated interest in the undertaking" to participate as consulting parties.[3] Examples include local historic preservation officials, historic preservation groups, community organizations, individual property owners, and other stakeholders.

Steps in Section 106 Consultation. The Section 106 consultation process includes four main steps:

- initiating consultation, which includes inviting consulting parties to participate in the process;
- determining the project's area of potential effects (APE) and identifying any historic properties within the 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, typically through execution of a Memorandum of Agreement (MOA) or a Programmatic Agreement (PA).

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.[4]

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."[5] Many different kinds of activities fall within this broad definition. Consultation on some projects involves 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.[6]

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 those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.[7] 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.

Definition of "Historic Property." Section 106 requires consultation regarding the effects of the undertaking on historic properties. The term "historic property" is defined to include "any prehistoric or historic district, site, building, structure, or

2 36 CFR 800.2(c)(1)-(4).

3 36 CFR 800.2(c)(5).

4 36 CFR 800.3(g).

5 36 CFR 800.16(f).

6 36 CFR 800.2(a)(4).

7 36 CFR 800.16(y).

object included in, or eligible for inclusion in, the National Register of Historic Places," including "properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization."[8] Thus, this term includes:

- properties from the prehistoric era, as well as the historic era;
- archeological resources, as well as above-ground resources;
- properties that are eligible for the National Register, as well as those that are listed in the National Register; and
- properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization, if those properties are listed in or eligible for the National Register.

Definition of "Eligible." The term "eligible" includes properties that have been formally determined eligible by the Keeper of the National Register, as well as all other properties that meet the National Register criteria for eligibility.[9] 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.

Definitions of "Indian Tribe" and "Native Hawaiian Organization." Section 106 includes specific requirements regarding consultation with Indian tribes and Native Hawaiian organizations.[10] An Indian tribe is defined as an "Indian tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation... which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." A Native Hawaiian organization includes "any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians."[11] For simplicity, this handbook uses "Indian tribe" or "tribe" to include both Indian tribes and Native Hawaiian organizations.

Review Times. The Section 106 regulations establish time periods for the SHPO/THPO to review findings or determinations at certain 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 the time period defined in regulation, 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.[12] 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 require the Federal agency to make eligibility and effects findings in consultation with the SHPO/THPO; they do not require the Federal agency to obtain the SHPO/THPO's concurrence in those findings. The regulations prescribe steps that should be followed when a SHPO/THPO disagrees with a Federal agency's findings. (See Practical Tips.) If there is a disagreement between a Federal agency and a SHPO on an eligibility issue, the issue can be elevated to the Keeper of the National Register for a final decision.

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.[13]

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.[14] Pursuant to Section 304, this type of information normally is withheld from any Section 106 documents that are intended to be made public. If the Federal agency receives a request for information that the agency has withheld from disclosure, and the agency still wishes to keep the information confidential, a process defined in the Section 106 regulations is used to resolve the issue. Under this process, the Federal agency consults with the Secretary of Interior about whether to withhold the information from the public. If the Federal agency decides to withhold information, the

8 36 CFR 800.16(l).

9 36 CFR 800.16(l).

10 36 CFR 800.2(c)(2).

11 36 CFR 800.16(m) and 800.16(s).

12 36 CFR 800.3(c)(4).

13 36 CFR 800.1(c).

14 54 USC 307103.

Secretary of the Interior then decides who 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.[15]

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.[16] Similarly, the Section 106 regulations require the Federal agency to ensure that all actions taken by its employees or contractors meet the Secretary's standards.[17] This requirement does not necessarily require all of those involved in supporting the development of Section 106 documents to meet the Secretary's standards. For example, environmental specialists who do not meet the Secretary of the Interior's qualification standards can play a role in reviewing and commenting on Section 106 documents that have been prepared under the direction of historic preservation professionals who do meet the Secretary of the Interior's standards.

Exemptions and Program Comments. Under the Section 106 regulations, the ACHP can exempt specific categories of undertakings from individual Section 106 consideration, and ACHP also can issue "program comments" that avoid the need for individualized consultation on specific types of resources.[18] Exemptions and program comments have exceptions that must be considered in determining whether they apply to the specific facilities involved in a project. Activities that are excluded from the exemption or program comments must undergo the normal Section 106 review process. For discussion of specific exemptions and program comments, see the Practical Tips section of this Handbook.

Section 4(f). Section 4(f) of the USDOT Act includes protections for historic properties that are listed in or eligible for the National Register, as well as publicly owned parklands, recreation areas, and wildlife and waterfowl refuges.[19] Section 4(f) prohibits USDOT from approving the use of these resources for a transportation project unless the agency finds that the use results in a "de minimis impact" or the agency determines that (1) there is no feasible and prudent alternative that avoids the use of the Section 4(f) resource and (2) the project includes all possible planning to minimize harm resulting from the use. FHWA and FTA have jointly issued regulations for carrying out Section 4(f) requirements.[20] Section 106 plays a key role in supporting compliance with Section 4(f), because the Section 106 process is used to identify listed and eligible historic properties and to assess effects on those properties.

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?
- Is the project applicant a state that has assumed USDOT responsibilities for Section 106 compliance under an assignment agreement (pursuant to 23 USC 326 or 327)? If so, does the assignment agreement include specific requirements regarding Section 106 consultation?
- Who is responsible for initiating and conducting consultation with Indian tribes?

State-Specific Requirements

15 See 36 CFR 800.11(c).

16 54 USC 306131.

17 36 CFR 800.2(a)(1).

18 Exemptions and program comments are two types of "program alternatives" authorized by 36 CFR 800.14. Other types of program alternatives include: alternate procedures, programmatic agreements, standard treatments, and program comments.

19 23 USC 138 and 49 USC 303(c).

20 See 23 CFR Part 774.

- Is there a statewide Section 106 programmatic agreement (PA)? If so, how do procedures under the statewide PA differ from standard Section 106 procedures?
- 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 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 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 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 will they be 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?

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 and invited to participate in the consultation (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?

Memoranda of Agreement and Programmatic Agreements

- Will an MOA be prepared, and if so, who will be responsible for drafting the MOA?
- Is a PA appropriate for this project, rather than an MOA? For example, a PA may be appropriate for a large-scale project that will be built over a long time period.
- Who are the signatories to the MOA and who will be invited to concur in the MOA?
- Who will receive copies of the executed MOA?
- Who will follow up on implementation of the stipulations contained in the MOA?

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

Designation of Lead Federal Agency. For most transportation projects, the lead agency is within the USDOT. 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.[21] The agreement regarding lead agency designation often is confirmed in an exchange of correspondence between the two Federal agencies.

Role of the Project Applicant. The Federal lead agency may use the services of project applicants to prepare information, analyses, and recommendations as part of the Section 106 process.[22] 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.[23] 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.

21 36 CFR 800.2(a)(2).

22 The term "applicant" is used in the Section 106 regulations to refer to the project sponsor, such as a state DOT.

23 36 CFR 800.2(a)(3), 800.2(c)(4).

Federal Agency Role in Report Preparation. Project applicants and their consultants often prepare Section 106 documentation under the direction of the Federal agency with responsibility for compliance with Section 106. 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. For example, the Federal agency officials may require that they review all reports before they are sent to the SHPO/THPO and consulting parties. Ultimately, the Federal agency—not the project applicant or consultants—is responsible for making the findings and approving all reports produced in the Section 106 process.

2 | State-Specific Requirements

State-Specific Documentation Standards. The Section 106 regulations contain general standards for Section 106 documentation.[24] These standards are often further supplemented 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 historic preservation 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 historic preservation laws or other requirements. Project applicants should be familiar with any applicable state, local, or tribal requirements. In addition, certain Federal laws may apply to specific states, such as Federal laws that define Indian tribal lands in Alaska.

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

State-Specific Practices. Within a given state, there may be customary practices that are widely followed without necessarily being documented in a specific agreement or set of procedures. These practices may involve issues such as the working relationship between the Federal agency and the project sponsor; the format of documents submitted from review by the SHPO (including paper vs. electronic); terminology and abbreviations used in Section 106 reports; and the amount of time allowed for review of various reports. Awareness of these state-specific practices will help to build a strong relationship with the SHPO and avoid unnecessary delays.

3 | Tribal Consultation

Duty to Consult with Tribes. Section 106 requires Federal agencies to consult with any Indian tribe that "attaches religious and cultural significance to historic properties that may be affected by an undertaking." This requirement applies *even if the historic property is located outside tribal lands*.[25] The Federal agency must ensure that the tribe has "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects."[26] Specifically, the agency's responsibilities include:

- Identifying Indian tribes that may attach religious and cultural significance to historic properties in the vicinity of the project.[27]

24 36 CFR 800.11.

25 36 CFR 800.2(c)(2).

26 36 CFR 800.2(c)(2)(ii)(A).

27 36 CFR 800.3(f)(2).

- Gathering information from Indian tribes to assist in identifying properties that may be of religious and cultural significance to them and may be eligible for the National Register.[28]
- Addressing any concerns raised by Indian tribes regarding confidentiality.[29]
- Consulting with the tribe regarding the identification of potential historic properties and the evaluation of the properties' eligibility for the National Register, taking into account the tribes' "special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them."[30]
- Inviting tribes to participate in assessing effects.[31]
- Notifying an Indian tribe of a no-adverse-effect finding made with respect to a historic property of religious and cultural significance to the tribe, and seeking the tribe's concurrence in that finding.[32]
- Consulting with the tribe regarding the resolution of any adverse effects on historic properties of religious and cultural significance to the tribe.[33] The agency also may invite a tribe that attaches religious and cultural significance to historic properties to be a signatory to an MOA concerning such properties.[34]

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 tribe and (2) conduct consultation in a manner sensitive to the concerns and needs of the tribe.[35] This requirement does not preclude direct communication between project applicants and Indian tribes, as long as it is done with the consent of the tribe. 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 DOT to undertake coordination with tribal representatives on transportation projects.

Role of the THPO. Section 101(d)(2) of the NHPA allows an Indian tribe to assume the responsibilities of the SHPO for undertakings that occur on tribal land. When this has been done, the Federal agency consults with the THPO in lieu of the SHPO for all undertakings on the tribe's land.[36]

Historic Properties of "Religious and Cultural Significance" to a Tribe. As with other historic properties, the Section 106 consultation process itself should be used to identify historic properties that may be of religious and cultural significance to Indian tribes (including tribes that are not present in the project area but have some past connection to that area). For example, practitioners should consider whether the undertaking may affect places such as archaeological sites, burial grounds, sacred landscapes or features, ceremonial areas, or plant and animal communities.[37] The term "traditional cultural property" or "traditional cultural landscape" is sometimes used to describe properties of religious and cultural significance to tribes.[38] Federal agencies are required to acknowledge that tribes have special expertise in evaluating the eligibility of historic properties that may possess religious and cultural significance to them.[39]

States with NEPA Assignment. States that have assumed responsibility for Section 106 consultation under an assignment program (23 USC 326 or 327) are precluded from assuming the responsibility for government-to-government consultation with tribes.[40] Therefore, if tribal consultation is required, the Federal agency must remain available for direct government-to-government consultation with the tribes.

28 36 CFR 800.4(a)(4).

29 36 CFR 800.4(a)(4).

30 36 CFR 800.4(c).

31 36 CFR 800.4(d)(2).

32 36 CFR 800.5(c)(2)(iii). If the tribe does not concur, it may request that the ACHP review and object to the finding.

33 36 CFR 800.6(a).

34 36 CFR 800.6(c)(2).

35 36 CFR 800.2(c)(2)(ii).

36 36 CFR 800.2(c)(2) and 800.3(c)(1).

37 See ACHP, "Consultation with Indian Tribes in the Section 106 Review Process: A Handbook" (Nov. 2008), p. 14.

38 See ACHP, "Native American Traditional Cultural Landscapes and the Section 106 Review Process: Questions and Answers" and National Park Service, "National Register of Historic Places - Traditional Cultural Properties (TCPs): A Quick Guide for Preserving Native American Cultural Resources."

39 36 CFR 800.4(c)(1).

40 23 USC 326.

4 | 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.[41] 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. The Section 106 regulations set out the rights of consulting parties to receive documentation for consultation and to be provided with an opportunity to comment within specific timeframes of the process. If desired, Section 106 consultation activities can be integrated into an overall public involvement plan for the project.

Identifying Potential Consulting Parties. Consulting parties "by right" should be invited automatically. [42] In addition, 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.[43] As part of this process, the Federal agency must make a reasonable and good faith effort to identify Indian tribes that may attach religious and cultural significance to historic properties in the area of potential effects, and invite them to be consulting parties.[44]

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.[45] All groups or

41 36 CFR 800.2(a)(4).

42 Consulting parties "by right" include the applicable SHPO/THPO; tribes that attach religious and cultural significance to historic properties that may be affected by the undertaking; representatives of local governments with jurisdiction over areas that may be affected by the undertaking; and the project applicant. 36 CFR 800.2(c).

43 36 CFR 800.3(f).

44 36 CFR 800.3(f)(2).

45 36 CFR 800.3(f)(3).

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 and Eligibility Evaluation:** The agency seeks information from consulting parties and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area. 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 or PA developed by the agency in consultation with the SHPO/THPO and other consulting parties.

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.

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, project website, 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 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 notifying the public of agency actions related to the project.[46]

- **NEPA Public Outreach.** Public outreach conducted for purposes of NEPA can be used to satisfy the public involvement requirements of Section 106, if they provide adequate opportunities for public involvement consistent with the Section 106 regulations.[47]
- **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.

Addressing 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.[48] Confidential information normally should not be included in Section 106 reports intended to be available to the public. If confidential information is included, consider placing it in an appendix that is clearly marked as confidential and is separate from the rest of the document. This approach helps to reduce the potential for inadvertent disclosure of confidential information.

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 a 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.

5 | Area of Potential Effects (APE)

Who Decides the APE. The Federal lead agency is responsible for defining the APE in the Section 106 process. The Federal agency must make this determination in consultation with the SHPO/THPO.[49] The SHPO/THPO's concurrence in the APE may be requested but is not required.

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."[50] The APE may be different for different kinds of effects.[51] For example, there could be a broader APE for indirect effects than for direct effects. If the alternatives are widely dispersed in location, the APE may consist of a series of 'bands' centered on each of the alternatives, rather than a single contiguous area that encompasses all of the alternatives.

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. It is appropriate, and often necessary, to refine the APE as the study progresses.

46 36 CFR 800.2(d), 800.3(e).

47 36 CFR 800.2(d)(3).

48 36 CFR 800.11(c).

49 36 CFR 800.4(a).

50 36 CFR 800.16(d).

51 36 CFR 800.16(d).

The size of the APE could be expanded or reduced as alternatives are refined and as additional information is developed regarding the potential impacts of the alternatives on historic properties.

Factors to Consider in Defining the APE. The definition of the APE will be determined based on the character and scope of the proposed project and the topography in the surrounding area. The APE may be 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 for a linear transportation project 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, and the potential changes to traffic or development patterns.
- **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 provide criteria or dimensions for defining 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), and 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.

6 | Identifying and Evaluating Historic Properties

Reasonable and Good-Faith Effort. The Federal agency must make a "reasonable and good faith effort" to identify historic properties within the APE.[52] In deciding what work is needed to meet this standard, the agency must take into account:

- past planning, research, and studies,
- the magnitude and nature of the undertaking,
- the degree of Federal involvement in the undertaking,
- the nature and extent of the undertaking's potential effects on historic properties, and
- the likely nature and location of historic properties within the area of potential effects.[53]

This work must be performed by historic preservation professionals who meet the professional standards established by the Secretary of Interior.[54] Key steps in this process are outlined below.

Process for Identifying Historic Properties. Compliance with the "reasonable and good-faith effort" requirement typically involves more than a review of existing records; public input and field investigations also are needed in most cases. For archeological resources, additional measures may include steps such as predictive modeling and remote sensing. Keep in mind that there may be state-specific agreements, policies, and procedures that relate to the specific methods used for identification and evaluation of historic properties.

52 36 CFR 800.4(b)(1).

53 Id. See also ACHP, "Meeting the 'Reasonable and Good Faith' Identification Standard in Section 106 Review."

54 36 CFR 800.2(a)(1).

- **Records Check.** A review should 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.[55] These resources may be available on-line and/or in a Geographic Information System (GIS) database. These information sources should be checked before conducting fieldwork and, in some cases, can be used in lieu of field work. The level of effort needed is determined on a case-by-case basis.
- **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.[56] Indian tribes also should be contacted for assistance in identifying properties of religious and cultural significance to them (both on and off reservation lands).[57]
- **Field Investigations.** The level of effort required for field investigations will vary from project to project. Sometimes, a reconnaissance-level survey is done in conjunction with the records check; in other cases, a comprehensive field survey may be undertaken. In addition, SHPOs in different states may have different survey standards or guidelines. The SHPO/THPO staff can provide guidance on the appropriate procedures for field surveys. Similarly, for projects on Federal, state, or tribal lands may be subject to survey standards set by the agency with responsibility for managing those lands.
- **Predictive Modeling.** Agencies may use predictive models to identify areas within the APE where archeological resources are more likely to be present. The ACHP has recognized that predictive models, if tested and found to be reasonably efficient, can also assist Federal agencies in meeting the "reasonable and good faith" identification standard.[58]
- **Remote Sensing.** Remote sensing refers to a range of non-invasive technologies that can be used to identify areas with a higher potential for the presence of archeological resources. For example, one emerging technology is LiDAR, which involves the use of a laser to measure topographic surfaces and create a highly detailed and accurate model of the earth's surface over a wide area.

Timing of Identification Efforts. The Section 106 historic property identification phase should be done as early as possible in project planning, so that its findings can be used to refine alternatives. This work can be conducted in stages, with the level of detail increasing as the number of alternatives under consideration is reduced. For example, a records check and reconnaissance-level survey could be done early in project planning, followed by a more comprehensive investigation for the alternatives carried forward for detailed study, and potentially an even more detailed survey just for the preferred alternative. The timing and level of detail of this work should be determined on a case-by-case basis in consultation with the applicable SHPO/THPO. Section 4(f) requirements also should be considered because, in some cases Section 4(f) compliance will require an assessment of the relative impacts of different alternatives on Section 4(f) resources, including historic properties.

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. In all cases where final identification of properties is to be deferred until after completion of an ongoing NEPA process, the process for subsequent identification (as well as effects evaluation and treatment) should be recorded in an MOA or a PA.[59] Section 4(f) requirements also should be considered when adopting a phased approach.

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.[60] Under these regulations, a property must meet one of four significance criteria, as summarized below, and also must retain adequate integrity of location, design, setting, materials, workmanship, feeling, and association to convey its significance. The significance criteria are:

55 36 CFR 800.4(a)(2).

56 36 CFR 800.4(a)(3).

57 36 CFR 800.4(a)(4).

58 ACHP, "Meeting the 'Reasonable and Good Faith' Identification Standard in Section 106 Review," p. 2.

59 See 36 CFR 800.4(b)(2).

60 36 CFR 60.4.

- 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).

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*.[61]

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 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 any Indian tribes that ascribe cultural and religious significance to the property;
- approval of the findings by the Federal agency; and
- 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 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 should be followed when determining the extent to which information is publicly disclosed.[62]

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*. 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.[63] For eligible properties, it also may be necessary to reassess the National Register boundary to determine whether the 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 be recognized as eligible, without making a formal change to the National Register listing. Keep in mind that there may be state-specific agreements and policies regarding the time period within which eligibility determinations must be re-evaluated to assess whether the property remains eligible and whether there have been any changes in the features that contribute to its historic significance.

Historic Districts. Historic districts vary widely in size and can involve many different types of resources, from rural landscapes to historic neighborhoods in urban areas. In the Section 106 process, practitioners should always be alert to the possibility

61 A complete listing is available at https://www.nps.gov/Nr/publications/index.htm.

62 See 36 CFR 800.11(c).

63 36 CFR 800.4(c)(1).

that a cluster of historic properties may comprise a historic district, even though the properties may not each be individually eligible. When a potential historic district is identified, an important issue to consider is whether it is necessary to determine the entire boundary of the historic district or just the boundary for the portion of the district near the alternatives or within the APE. One possible reason to assess the entire district is that an overall understanding of the resource may be needed to determine which resources are 'contributing' to the significance of the district as a whole.

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.[64] 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.[65]

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 Keeper of the National Register for a final determination of eligibility (DOE).[66] 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.[67] 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.[68] 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.[69] 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 and Cultural Significance to Tribes. As noted earlier, the Section 106 regulations state that the term "historic property" includes "properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria."[70] The regulations require Federal agencies, in making eligibility findings, to acknowledge that Indian tribes have "special expertise in assessing the eligibility of historic properties that possess religious and cultural significance to them."[71] Because of migration or forced removal, Indian tribes may now be located far away from historic properties that still hold religious and cultural significance for them.[72] Practitioners should keep in mind that *properties of religious and cultural significance to an Indian tribe may be present even when that tribe does not have any tribal lands in the vicinity of the project*.[73]

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.[74] 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;

64 36 CFR 800.10.

65 See ACHP, "Section 106 Consultation Involving National Historic Landmarks."

66 36 CFR 800.4(c).

67 36 CFR 800.4(c).

68 36 CFR Part 63.

69 36 CFR 63.4.

70 36 CFR 800.16(l)(1).

71 36 CFR 800.4(c)(1).

72 ACHP, "Consultation with Indian Tribes in the Section 106 Review Process: A Handbook" (2009), p. 7.

73 Id., p. 9.

74 36 CFR 800.11(a).

- 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.
- keep in mind confidentiality considerations. If information may be sensitive, consult with the applicable SHPO/THPO about whether that information should be included in public documents or kept confidential.

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.*

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."[75] 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.[76] 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.[77] This finding is made for the project as a whole; it is a finding that the project does not have *any* effects on *any* historic properties.

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.[78] 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.

7 | 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.[79] Key elements of this process are outlined below.

Determining Whether There Is an 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."[80] Thus, an adverse effect finding focuses on the potential to "alter" historically significant characteristics and diminish the integrity of a historic property; if integrity is not diminished, there is no adverse effect. But keep in mind that an effect may be adverse even if the magnitude of the effect is not large.

The regulations provide two additional guidelines for determining whether there is an adverse effect:

- The Federal agency must take into account characteristics "identified subsequent to the original evaluation" of the

75 Under some statewide Section 106 programmatic agreements, a finding of "No Historic Properties Affected" can be made by FHWA and the state DOT on their own, without engaging in consultation with the SHPO or other consulting parties.

76 36 CFR 800.16(i).

77 36 CFR 800.11(d).

78 The SHPO/THPO's concurrence is not required for this finding; a lack of objection within the 30-day period is sufficient. 36 CFR 800.5(c)(1).

79 36 CFR 800.5.

80 36 CFR 800.5(a)(1).

property.[81] This means that the effects assessment should take into account significant characteristics of the historic property that were identified after the property was initially listed or determined eligible for the National Register.

- Adverse effects "may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance, or be cumulative."[82] For example, a project's reasonably foreseeable effects on development patterns normally should be considered in determining whether the project would cause an adverse effect.

The criteria of adverse effect normally are applied to each historic property in the area of potential effects. If the Federal agency makes a finding of adverse effect for at least one affected property, the agency must make a finding of adverse effect for the project as a whole.

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 indirect 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 NEPA and other laws.[83] 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.[84] 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. In all cases where the final assessment of effects is to be deferred until after completion of an NEPA process, the process for subsequent effects evaluation and treatment should be formally recorded in an MOA or a PA.[85] Section 4(f) requirements also should be considered when adopting a phased approach.

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.[86] 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 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.[87] For more on this, see *Documentation of Effect 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.)

81 36 CFR 800.5(a)(1).

82 36 CFR 800.5(a)(1).

83 36 CFR 800.3(b).

84 36 CFR 800.5(a)(3).

85 See 36 CFR 800.4(b)(2).

86 36 CFR 800.5(c).

87 36 CFR 800.11(e).

- 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.[88] These regulations should be carefully reviewed when making this finding, especially where there is a disagreement that may require elevation to the ACHP.

Findings of "Adverse Effect." The Section 106 regulations do not prescribe a 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. The Federal agency must apply the criteria of adverse effect to each historic property in the area of potential effects. If the agency makes a finding of "Adverse Effect" for at least one affected property, the agency must make a finding of "Adverse Effect" for the project as a whole.

Documentation of Effect Findings. The Section 106 regulations specifically describe the documentation that must be prepared for effect findings.[89] 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; and
- 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.

8 | Resolving Adverse Effects

If adverse effects are identified, the Federal agency must notify the ACHP and 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. The process for resolving adverse effects is outlined below.

Section 800.11(e) Documentation. The Federal agency must submit the adverse effect documentation in accordance with

88 36 CFR 800.5(c).

89 36 CFR 800.11(e).

Section 800.11(e) to the ACHP and the consulting parties; the documentation also must be made available to the public.[90] Confidentiality requirements under Section 800.11(c) should be taken into account in releasing this information. For example, it sometimes is necessary to redact portions of a document that include confidential information before releasing the document to consulting parties as a whole or to the public at large.

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 can be notified electronically via the ACHP's "e106" system.[91] 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.[92] The Section 106 regulations list criteria that the ACHP considers in deciding whether to enter Section 106 consultation for an individual project.[93]

Avoiding or Minimizing Adverse Effects. When adverse effects have been found, 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 and minimize those adverse effects.[94] 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 technical report or memorandum, and then summarized in the historic resources section of the NEPA document.

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 SHPOs/THPOs and Federal agencies have adopted standard mitigation measures for specific types of properties, either through formal agreement or through practice. Consulting parties should not 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). To be eligible for Federal funding, the mitigation normally must have some reasonable nexus to the effects of the proposed action.[95]

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.[96] 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 party or parties that ascribe value to the property, and then propose specific measures. Often, a draft of the MOA is provided to consulting parties that are actively participating in the Section 106 process. 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

90 36 CFR 800.6(a).

91 See ACHP, "Notice of Availability: Electronic Section 106 Documentation Submittal System (e106)."

92 36 CFR 800.2(b)(1).

93 36 CFR Part 800, Appendix A.

94 See 36 CFR 800.6(a).

95 See, e.g., 23 CFR 771.105(d)(2) (a mitigation measure is eligible for FHWA funding only if the measure "represents a reasonable public expenditure after considering the impacts of the action and the benefits of the proposed mitigation measure").

96 36 CFR 800.6(a)(2).

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 (or a PA) is executed. Key points to consider in preparing an MOA include:

- **Required Signatories.** The required signatories for an MOA include the Federal agency and the SHPO/THPO.[97] The ACHP also must be a signatory to the MOA if the ACHP has joined the consultation process. 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 project applicant or an Indian tribe, also may be invited to be signatories; in addition, a party that assumes an obligation under the MOA *should* be invited to sign the MOA.[98] 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.
- **Concurring Parties.** The Federal agency may ask others that have participated in the Section 106 process to sign the document as "concurring parties."[99] 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.
- **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.[100] 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.[101] Copies of the agreement also should be sent to all consulting parties.[102]

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.[103]

9 | 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 NEPA and Section 4(f). In addition, for transportation projects involving an EIS, Section 106 compliance should be included as part of the environmental review process required under 23 USC 139 (Section 139).

Section 139 Compliance. Section 139 establishes an environmental review process that is required for all highway, transit, and multimodal projects for which an EIS is prepared. Railroad projects requiring an EIS must comply with Section 139 "to the greatest extent feasible."[104] Section 139 requires lead agencies to invite agencies that may have an interest in the proposed action to be "participating agencies" in the environmental review process, and it requires the lead agencies to give all participating agencies an opportunity for involvement in defining the purpose and need, and determining the range of

97 36 CFR 800.6(c)(1). If the SHPO terminates consultation, the Federal agency and the ACHP can sign the MOA. 36 CFR 800.7(a)(2).

98 36 CFR 800.6(c)(2).

99 36 CFR 800.6(c)(3).

100 See ACHP, "Guidance on Section 106 Agreement Documents."

101 36 CFR 800.6(b)(1)(iv), 800.11(f).

102 36 CFR 800.6(c)(9).

103 36 CFR 800.7(a).

104 49 USC 24201(a).

alternatives.[105] Section 139 also requires the lead agency to establish a project schedule, with concurrence of all participating agencies. The SHPO normally is invited to be a participating agency if a project is expected to require Section 106 consultation.

Coordination of Section 106 with the 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.[106] 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.[107]

Substitution of NEPA for Section 106. As an alternative to the normal Section 106 process, a Federal agency may "substitute" the NEPA process for Section 106 consultation. With substitution, NEPA procedures are used to satisfy Section 106 requirements in lieu of the procedures established in the Section 106 regulations. The steps required with substitution closely mirror the steps required under the Section 106 consultation.[108] This approach requires early notification of all consulting parties that the Federal agency intends to pursue the NEPA substitution for Section 106 and the documentation must fulfill the provisions of the Section 106 regulations.

Addressing Section 106 Compliance in the NEPA Document. 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 itself 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).[109] These include:

- **Identifying Historically Significant Characteristics.** Section 106 consultation is used to identify the historically significant characteristics of each eligible property. Under Section 4(f), this information is important because the USDOT agency must consider the property's historically significant characteristics when making findings of no constructive use, de minimis impact findings, and determination of the least-harm alternative.
- **Determining National Register Boundaries.** Section 106 consultation is used to determine the National Register boundary of each historic property that is listed in or eligible for the National Register. 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.
- **Identifying Non-Contributing Resources within Historic Districts.** Section 106 consultation also can be used to identify the "contributing" and "non-contributing" resources within a historic district. This information is important because Section 4(f) normally applies only to *contributing* resources within a historic district. Moreover, 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.
- **Determining if Archeological Resources Warrant Preservation in Place.** Section 106 consultation can be used to assess whether archeological resources are exempt from Section 4(f) protection. Under FHWA and FTA's Section 4(f) regulations, archeological resources are exempt from Section 4(f) if they are "important chiefly because of what can be learned by data recovery and [have] minimal value for preservation in place."[110] To assist in making this determination, the eligibility evaluation for an archeological resource should state whether the resource warrants preservation in place. This determination is distinct from an assessment of National Register eligibility; it involves a judgment about whether the resource is important "chiefly" for data recovery and has "minimal" value for preservation in place.
- **Making Findings of "No Adverse Effect."** Section 106 normally involves findings of "Adverse Effect" or "No

105 23 USC 139(d)(2), (f)(1), (f)(4)(A).

106 36 CFR 800.8(a).

107 36 CFR 800.8(a)(2).

108 See ACHP & CEQ, "A Handbook for Integrating NEPA and Section 106" (March 2013).

109 See FHWA's "Section 4(f) Policy Paper" (July 2012).

110 23 CFR 774.13(b).

Adverse Effect" for each historic property within the APE. If findings of no adverse effect are made for individual properties in the Section 106 process, those findings provide the basis for findings under Section 4(f), including:

- **De Minimis Impact Findings.** 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), if the project directly uses a historic property. A de minimis impact finding enables FHWA to satisfy its Section 4(f) obligations with more limited analysis.[111]
- **Findings of "No Constructive Use."** Where a project has proximity impacts on a historic property (e.g., noise, visual, vibration), 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).[112]
- **Improvements to Historic Transportation Facilities.** The restoration, rehabilitation, or maintenance of a historic transportation facility is exempt from Section 4(f) if FHWA or FTA agency finds that those improvements would have no adverse effect on that transportation facility and the official with jurisdiction does not object to that finding.[113]
- **Temporary Occupancy Exception.** A "temporary occupancy" of Section 4(f) land does not constitute a use if FHWA/FTA finds that the temporary occupancy meets four criteria and the SHPO agrees that all four criteria have been met.[114] A finding of "No Adverse Effect" in the Section 106 process can help to support the findings required for a temporary occupancy exception.

- **Satisfying the Minimization-of-Harm Requirement.** Section 4(f) was recently amended to include a new optional process under which a USDOT agency can—under some circumstances—use a Section 106 MOA or PA to satisfy the minimization-of-harm requirement in Section 4(f).[115]
- **Applying Section 4(f) Programmatic Evaluations.** FHWA has issued five Section 4(f) programmatic approvals, which provide a streamlined process for approving the use of a Section 4(f) resources when a finding of de minimis impact is not made. For example, one of the programmatic evaluations applies to projects with a "net benefit" to Section 4(f) resources.[116] The programmatic evaluations relating to historic properties all require the SHPO's concurrence in certain findings when the programmatic evaluation is applied.

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. Section 4(f) requirements are distinct from Section 106, but they can greatly affect the outcome of the Section 106 process. All participants in the Section 106 process should be familiar with the mandates of Section 4(f), so that they understand how Section 4(f) will influence project decisions.

10 | 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.[117] 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.[118] Of these, the method most commonly used for highway projects is the programmatic agreement.

111 23 CFR 774.5(b)(1)(ii).

112 23 CFR 774.15(f)(1).

113 23 CFR 774.13(a)(1).

114 23 CFR 774.13(d).

115 23 USC 138(c).

116 FHWA, "Section 4(f) Evaluation and Approval for Transportation Projects That Have a Net Benefit to a Section 4(f) Property" (April 20, 2005).

117 36 CFR 800.8(c).

118 36 CFR 800.14.

11 | Additional Issues

Tiered NEPA Studies. When a Tier 1 NEPA study is prepared, the lead agency needs to determine whether Section 106 consultation will occur at the Tier 1 stage of the NEPA process. The CEQ has stated that "where a Federal agency's broad decision will narrow the opportunities for adverse effects in future specific proposals, then the agency may initiate the Section 106 process as part of the programmatic review. This will allow the agency to complete that process by establishing steps for meeting its responsibility as it implements the broad decision and prior to subsequent project- and site-specific proposals."[119] When Section 106 consultation occurs during a Tier 1 NEPA process, a phased approach can be used in accordance with the CEQ regulations. With phasing, the Section 106 process during Tier 1 involves an assessment of the potential presence of historic properties and the potential for adverse effects on those properties.[120]

Planning–Environmental Linkage. As an alternative to tiering, a state or MPO can use the process known as planning–environmental linkage (PEL). With PEL, a transportation planning study is used to develop decisions or analyses that are later adopted in the NEPA process for a project. Because the planning study itself is not a Federal action, Section 106 consultation does not take place during the planning study. Nonetheless, the planning study can include data-gathering and analysis to assess the potential presence of historic properties and potential impacts on those resources, which may help to expedite Section 106 consultation in the NEPA process.

Emergency Response. The Section 106 regulations encourage Federal agencies to develop special procedures for Section 106 consultation in officially declared emergency conditions. If an agency has not developed such procedures, the Section 106 regulations allow the agency to satisfy Section 106 in an officially declared emergency situation by providing a seven-day period for comment to the ACHP, the appropriate SHPO/THPO and any Indian tribe that may attach religious and cultural significance to historic properties likely to be affected prior to the undertaking. If the emergency response situation does not allow for a seven-day comment period, the regulations simply require the agency to provide notice and to invite comment "within the time available." See 36 CFR 800.12(b). The agency also may follow any special procedures established in an applicable PA regarding Section 106 consultation in emergency conditions.[121]

Exemptions and Program Comments. Practitioners should take into account the following exemptions and program comments for specific types of historic properties. For all three property types, a corresponding exemption from Section 4(f) has been established in statute.

- **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.[122] 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. There is a separate Section 4(f) exemption that applies to the same Interstate System elements that are covered by the Section 106 exemption.[123]
- **Exemption for Railroad Rights-of-Way.** In December 2015, Congress passed a law requiring USDOT to request and ACHP to issue an exemption from Section 106 for "railroad rights-of-way ... consistent with the exemption for interstate highways."[124] The USDOT must request this exemption by December 4, 2016, and the ACHP must issue the final exemption within 180 days after receiving the request. Therefore, the final Section 106 exemption should take effect by mid-2017. In parallel with this Section 106 exemption, Congress enacted a separate Section 4(f) exemption for certain improvements to existing rail and transit lines.[125] As of publication of this Handbook, USDOT had issued only preliminary, informal guidance interpreting these provisions.[126]
- **Program Comment for Post-1945 Concrete and Steel Bridges.** In November 2012, the ACHP issued a program comment for post-1945 common steel and concrete highway bridges.[127] The program comment eliminates the need

119 CEQ, "Effective Use of Programmatic NEPA Reviews" (Dec. 2014), p. 28.

120 36 CFR 800.4(b)(2) and 800.5(a)(3).

121 See ACHP, "Role of Section 106 in Disaster Response – Frequently Asked Questions." (last updated April 16, 2014).

122 70 Fed. Reg. 11928 (March 10, 2005).

123 23 USC 103(c)(5).

124 49 USC 24202.

125 23 USC 138(f).

126 For current guidance, see https://www.fhwa.dot.gov/fastact/guidance.cfm.

127 See 77 Fed. Reg. 68790 (Nov. 16, 2012).

for case-by-case of review of certain types of post-1945 bridges, including various forms of reinforced concrete slab bridges, reinforced concrete beam and girder bridges, steel multi-beam bridges or multi-girder bridges, and culverts and reinforced concrete boxes. The program comments do not apply to:

- bridges that are already listed in or eligible for the NRHP;
- bridges that are located in or adjacent to a historic district;
- arch bridges, truss bridges, bridges with movable spans, suspension bridges, cable-stayed bridges, or covered bridges; and
- bridges identified in a statewide list prepared by the FHWA Division Office as having exceptional significance for association with a person or event, being a very early or particularly important example of its type in a state or the nation, having distinctive engineering or architectural features that depart from standard designs, or displaying other elements engineered to respond to a unique environmental context.

In December 2015, Congress enacted a Section 4(f) exemption covering all post-1945 concrete and steel bridges that are covered by the Section 106 program comments.[128] The program comments and Section 4(f) exemption can be applied only in states in which the FHWA Division Office has completed a statewide list identifying specific post-1945 bridges that are excluded from the program comments and exemption.

128 23 USC 138(e).

Reference Materials

Statutes, regulations, and guidance documents cited in this Handbook are available on the AASHTO Center for Environmental Excellence website: http://environment.transportation.org.

In addition, ACHP guidance documents and other materials regarding the Section 106 process are available on ACHP's website at http://www.achp.gov/usersguide.html.

Statutes and Regulations

54 USC 306108 (Section 106 of NHPA)

36 CFR Part 800 (Section 106 regulations)

23 CFR Part 774 (Section 4(f) regulations)

36 CFR Part 63 (National Register eligibility criteria)

Key Guidance Documents

ACHP and CEQ, "NEPA and NHPA—A Handbook for Integrating NEPA and Section 106" (March 2013)

ACHP, "Meeting the 'Reasonable and Good Faith Identification' Standard in Section 106 Review" (undated)

ACHP, "Guidance on Agreement Documents" (last updated Aug. 18, 2015)

ACHP, "Prototype Programmatic Agreement Guidance" (Feb. 3, 2012)

ACHP, "Consultation with Indian Tribes in the Section 106 Review Process: A Handbook" (Nov. 2008)

ACHP, "Section 106 Consultation Involving National Historic Landmarks" (last updated Feb. 12, 2015)

ACHP, "Role of Section 106 in Disaster Response—Frequently Asked Questions" (last updated April 16, 2014)

ADDITIONAL RESOURCES

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

1 Maintaining a Project File and Preparing an Administrative Record for a NEPA Study
2 Responding to Comments on an Environmental Impact Statement
3 Managing the NEPA Process for Toll Lanes and Toll Roads
4 Tracking Compliance with Environmental Commitments/Use of Environmental Monitors
5 Utilizing Community Advisory Committees for NEPA Studies
6 Consulting Under Section 106 of the National Historic Preservation Act
7 Defining the Purpose and Need and Determining the Range of Alternatives for Transportation Projects
8 Developing and Implementing an Environmental Management System in a State Department of Transportation
9 Using the SAFETEA-LU Environmental Review Process (23 U.S.C. § 139)
10 Using the Transportation Planning Process to Support the NEPA Process
11 Complying with Section 4(f) of the U.S. DOT Act
12 Assessing Indirect Effects and Cumulative Impacts Under NEPA
13 Developing and Implementing a Stormwater Management Program in a Transportation Agency
14 Applying the Section 404(b)(1) Guidelines in Transportation Project Decision-Making
15 Complying with Section 7 of the Endangered Species Act

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

Comments on the Practitioner's Handbooks may be submitted to:
Center for Environmental Excellence by AASHTO
444 North Capitol Street, NW, Suite 249 Washington, DC 20001
Telephone: 202-624-5800
Email: environment@aashto.org
Web site: http://environment.transportation.org

Center for Environmental Excellence

American Association of State Highway and Transportation Officials
AASHTO