

Section 106: Frequently Asked Questions and Answers

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The National Historic Preservation Act (NHPA), as amended, was passed in 1966 in reaction to the loss or alteration of many historic properties resulting from large scale urban renewal and the development of the interstate highway system in the late 1950's and early 1960's. The NHPA is intended to preserve the cultural and historical foundations of our nation. Section 106 of the NHPA seeks to accommodate historic preservation concerns with the needs of federal projects. The implementing regulations, 36 CFR Part 800 – Protection of Historic Properties, establish procedures for the Section 106 process.

Question: What is Section 106?

Answer: Section 106 is a specific section of the National Historic Preservation Act (NHPA) that requires federal agencies to take into account the effects of their undertakings on historic properties and to afford the Advisory Council on Historic Preservation (ACHP) and other consulting parties an opportunity to comment on the undertaking.

Questions: Does Section 106 apply to my project?

Answer: Section 106 of the National Historic Preservation Act (NHPA) applies when a project, activity, or program is 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.

Question: Who is the Advisory Council on Historic Preservation (ACHP)?

Answer: The ACHP is an independent federal agency that promotes the preservation, enhancement, and productive use of our nation's historic resources, and advises the President and Congress on national historic preservation policy.

Question: What is 36 CFR § 800 – Protection of Historic Properties?

These are the Code of Federal Regulations authored by the staff of the Advisory Council on Historic Preservation (ACHP). These are the regulations that spell out how Section 106 works. The regulations can be found at <https://www.achp.gov/digital-library-section-106-landing/section-106-regulations>.

Questions: What is a federal undertaking?

Answer: An undertaking is 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.

Question: What is a historic property?

Answer: A historic property is any prehistoric or historic district, site, building or structure included in or eligible for inclusion in the National Register of Historic Places. Properties of traditional religious and cultural importance to Indian tribes may also be eligible for inclusion in the National Register of Historic Places.

Question: How is a property determined to be “historic”?

Answer: A property must meet at least one of the National Register Criteria, must generally be at least fifty years of age, and retain integrity.

National Register Criteria:

- A. Properties that are associated with events that have made a significant contribution to the broad patterns of history; or
- B. Properties that are associated with the lives of persons significant in our past; or
- C. Properties that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master or that possess high artistic values or that represent a significant and distinguishable entity whose components may lack individual distinction; or
- D. Properties that have yielded, or may be likely to yield, information important in prehistory or history.

Question: What is the National Register of Historic Places?

Answer: The National Register is the official list of properties recognized by the Secretary of the Interior as worthy of preservation. It is honorary and does not, by itself, afford properties any protection. Listing does not prevent property owners from remodeling, repairing, altering, selling, or even demolishing the property. Property owners are not obligated to make any repairs or improvements to the property.

The National Register of Historic Places is not a complete list of all historic properties; such properties are continually added. A historic property may never be listed in the National Register, and for this reason it is necessary to consider properties that are eligible for inclusion in the National Register during the Section 106 review process.

Question: When should I start the Section 106 process?

Answer: The Section 106 process must be completed prior to the approval of the expenditure of any federal funds on the undertaking or prior to the issuance of any license. The federal agency must ensure that the Section 106 process is initiated early in the planning process so that a broad range of alternatives may be considered, if needed.

Question: Why is the federal agency, and not State Historic Preservation Office (SHPO), responsible for gathering documentation for Section 106 review?

Answer: First, Section 106 is a section in the National Historic Preservation Act, which is a federal law. It is the statutory obligation of the federal agency to fulfill the requirements of Section 106.

Second, the SHPO is not a regulatory agency, but is a consulting party in the Section 106 process that reflects the interests of the state and its citizens in the preservation of their cultural heritage. The SHPO's role in the process is to advise and assist federal agencies in carrying out their Section 106 responsibilities.

Question: Who gets to be a consulting party in the Section 106 process?

Answer:

1. State Historic Preservation Officer (SHPO)
2. Tribal Historic Preservation Officer (THPO)
3. Indian tribes
4. Representatives of local governments
5. Applicant for federal assistance, permits, licenses and other approvals
6. Individuals and organizations with a demonstrated interest in the project
7. The Public

Question: What is a Tribal Historic Preservation Officer (THPO)?

Answer: A THPO is the tribal official appointed by the tribe's chief governing authority or designated by a tribal ordinance or preservation program who has assumed the responsibilities of the SHPO for purposes of Section 106 compliance on tribal lands. In South Dakota, eight of the nine tribal governments have THPOs.

Question: How are non-Tribal Historic Preservation Office (THPO) tribes involved in the Section 106 process as consulting parties?

Answer: When an Indian tribe has not assumed the responsibilities of the State Historic Preservation Office (SHPO) for Section 106 on tribal lands, the federal agency must consult with a representative designated by the Indian tribe in addition to the SHPO for undertakings occurring on or affecting historic properties on tribal lands. Indian tribes have the same rights of consultation and concurrence that the THPOs are given except that consultations shall be in addition to and on the same basis as consultation with the SHPO.

Question: Why can't the State Historic Preservation Office (SHPO) consult with Indian tribes or Tribal Historic Preservation Office (THPOs) on behalf of the federal agency for Section 106 reviews?

Answer: Consultation with Indian tribes and THPOs must recognize the government-to-government relationship between the federal government and Indian tribes. As a state agency the SHPO does not represent the federal government.

Question: What is consultation under Section 106?

Answer: Consultation is the 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. Additional information concerning consultation with Indian tribes can be found on the website of the Advisory Council on Historic Preservation (ACHP) at <https://www.achp.gov/digital-library-section-106-landing/guidance-indian-tribes-and-native-hawaiian-organizations-what>.

Question: What is the role of a contractor in the Section 106 process?

Answer: The federal agencies may use the services of applicants, consultants, or a designee to prepare information, analyses, and recommendations. However, the federal agency remains legally responsible for all required findings and determinations as outlined in the regulations. If a document or study is prepared by a non-federal party, the federal agency is responsible for ensuring that its content meets applicable standards and guidelines.

Question: Can I coordinate my responsibilities under the National Environmental Policy Act (NEPA) with my responsibilities under Section 106?

Answer: Federal agencies are encouraged to coordinate compliance with Section 106 with any steps taken to meet the requirements of NEPA. Agencies should consider their Section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis and review in a way that can meet the purposes and requirements of both.

The standards for developing environmental documents to comply with Section 106 can be found at https://www.achp.gov/integrating_nepa_106, 36 CFR part 800 – Protection of Historic Properties, part 800.8 Coordination with the National Environmental Policy Act.

Question: What is the area of potential effects (APE)?

Answer: The APE is the geographic area or areas within which an undertaking may directly or indirectly cause changes in the character or use of a historic property. The APE is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking or project. In many instances, the APE is not simply the project's physical boundaries, but should include visual effects, atmospheric effects, etc... For example the placement of a cell tower vs. placement of a water line.

Question: What is a determination of effect and why can't the State Historic Preservation Office (SHPO) make the determination for my project?

Answer: A “determination of effect” is the effect of the undertaking (project) on historic properties. The “determination of effect” is based on the results of the identification and evaluation of properties (for listing on the National Register of Historic Places) located in the project area of potential effects (APE). The federal agency must submit a “determination of effect” that best represents the undertaking’s (project) impact on properties located within the APE that are eligible for listing on the National Register of Historic Places.

Option 1) No Historic Properties Affected: if the federal agency finds that either there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them.

Option 2) Adverse Effect: an adverse effect is found 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. An adverse effect may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance, or be cumulative.

Option 3) No Adverse Effect: the federal agency, in consultation with the SHPO/Tribal Historic Preservation Office (THPO), may propose a finding of no adverse effect when the undertaking’s effects do not meet the criteria established as an adverse effect or the undertaking is modified or conditions are imposed to ensure consistency with the Secretary of Interior’s *Standards for the Treatment of Historic Properties* and other applicable guidelines.

SHPO cannot make a determination of effect for the federal agency because, as a consulting party in the process, it is the SHPO’s responsibility to advise and assist the federal agencies in carrying out their Section 106 responsibilities.

Question: What is an adverse effect?

Answer: An adverse effect is found 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.

Adverse effects on historic properties include, but are not limited to:

- a. Physical destruction of or damage to all or part of the property
- b. Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation and provision of handicapped access that is not consistent with the Secretary's *Standards for the Treatment of Historic Properties* (36 CFR Part 68) and applicable guidelines
- c. Removal of the property from its historic location
- d. Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance
- e. Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features
- f. Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization, and
- g. Transfer, lease, or sale of property out of federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.

Question: What information do I need to submit for a Section 106 review?

Answer: Documentation standards can be found in the regulations 36 CFR § 800 – Protection of Historic Properties, part 11(a). The federal agencies or federally delegated authorities must ensure that sufficient documentation is submitted to enable any reviewing parties to understand its basis for the determination of effect.

Documentation for a finding of no historic properties affected should include:

- A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, drawings, as necessary;
- A description of the steps taken to identify historic properties; and
- The basis for determining that no historic properties are present or affected.

Documentation for a finding of no adverse effect or adverse effect should include:

- A description of the undertaking, specifying the federal involvement and its area of potential effects, including photographs, maps, drawings as necessary
- A description of the steps taken to identify historic properties
- A description of the affected historic properties, including information on the characteristics that qualify them for the National Register
- A description of the undertaking's effects on historic properties
- An explanation of why the criteria of adverse effect were found applicable or inapplicable, including any conditions or future actions to avoid, minimize, or mitigate adverse effects, and
- Copies or summaries of any views provided by consulting parties and the public.

The State Historic Preservation Office (SHPO) has also developed a form entitled “Section 106 Project Review Form” and the worksheet entitled “Information Needed for Section 106 Project Review” both are available at <https://history.sd.gov/Preservation/laws.aspx>.

Question: What is a memorandum of agreement (MOA)?

Answer: An MOA is the document that records the terms and conditions agreed upon by the federal agency and consulting parties to resolve an adverse effect on a historic property.

Question: What is a programmatic agreement (PA)?

Answer: PAs are used to establish federal agency program alternatives that streamline the Section 106 process.

Question: How can my agency enter into a programmatic agreement (PA) with the SHPO?

Answer: The federal agency must consult with the Advisory Council on Historic Preservation (ACHP) and the State Historic Preservation Office (SHPO) to develop an agreement document that will establish alternative procedures to Section 106.

Question: Who should I contact with questions?

Answer: Please contact the South Dakota State Historical Society at (605) 773-3458 or <https://history.sd.gov/Preservation/>.