

Back to the Basics: Understanding the Components of Section 106 Compliance

Section 106 of the National Historic Preservation Act (NHPA) of 1966 requires Federal agencies to take into account the effects of their undertakings on historic properties, which include any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in, the National Register of Historic Places (National Register). NHPA also requires Federal agencies to afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment. Federal agencies are encouraged to integrate the Section 106 process into the earliest stages of planning.

This issue of *Successes in Stewardship* outlines the four basic steps an agency may take to comply with Section 106. Following this process ensures agencies comply with the regulations implementing Section 106 (i.e., 36 CFR Part 800) from the outset of a project. This saves time and resources that can incur in later stages of the project if Section 106 is not properly considered from the start.

The steps include:

1. Initiate the Section 106 Process;
2. Identify Historic Properties;
3. Assess Adverse Effects; and
4. Resolve Adverse Effects.

Initiate the Section 106 Process

An agency initiating the Section 106 process is required to identify the appropriate State Historic Preservation Officer (SHPO) and/or Tribal Historic Preservation Officer (THPO)—if the project is on or affects tribal lands—to consult on a project. If a tribe has assumed the SHPO's responsibilities for Section 106, the agency will consult with the THPO in lieu of the SHPO. If the respective tribe has not assumed SHPO responsibilities for Section 106, FHWA consults with the tribe and the SHPO.

Agency officials decide how to involve the public in the Section 106 process. A formal plan is not required, though one may be appropriate depending upon the scale of the undertaking and the magnitude of its effects on historic properties. An agency may use their National Environmental Policy Act public involvement procedures. Agency officials also consult with the SHPO/THPO to identify organizations and individuals with a demonstrated interest in the undertaking that will have the right to be consulting parties under the terms of the regulations. They may participate because they have a legal or economic relationship with the undertaking or affected properties or because they are concerned with the undertaking's effects on historic properties.

Consulting parties may include local governments, Indian tribes, Native Hawaiian organizations, and applicants for Federal assistance or permits. Others may request to be consulting parties, but that decision is ultimately up to the agency officials.

If the agency determines that there is no undertaking (i.e., State funds are used instead of Federal funds and thus Section 106 is no longer applicable), or there is an undertaking but it does not have the potential to affect historic properties, the agency has no further obligations under Section 106. Agencies are strongly advised to keep appropriate records of such findings if questions are raised by members of the public or other parties at a later date.

When the agency has determined that the proposed project has the potential to impact historic properties, the agency can begin to identify properties that might be affected. At this stage in the process, though, the agency official does not need to know whether there are historic properties present.

Identify Historic Properties

At the beginning of the identification process, agency officials consult with the SHPO/THPO on the scope of its identification efforts. Identifying historic properties typically includes:

- Preliminary work (i.e., defining the area of potential effect);
- Efforts to identify properties; and
- An evaluation to determine whether the identified properties are historic.

The standard for identification is a "reasonable and good faith effort" to identify historic properties. Meeting this standard depends on previous identification work, and may include background research, a consultation, oral history interviews, a sample field investigation, and a field survey. An agency may conduct phased identification when the scope of an undertaking and its effect have not been completely defined because the undertaking includes corridors or large land areas, or access to properties is restricted. Final identification and evaluation may also be deferred if it is outlined in an agreement with the SHPO/THPO. The ACHP provides additional guidance on other program alternatives.

Federal agencies are required to apply the National Register Criteria to properties identified and to acknowledge the special expertise of Indian tribes and Native Hawaiian organizations when assessing the eligibility of a property to which they attach religious and/or cultural significance. Previous determinations of eligibility may need to be re-evaluated due to the passage of time or other factors such as a change in regulations or policy from the original determination.

Agency officials make determinations of eligibility in consultation with the SHPO/THPO. If there is disagreement or the ACHP or Secretary of Interior so requests, the agency refers the matter to the Keeper of the National Register.

Assess Adverse Effects

The SHPO/THPO and Indian tribes or Native Hawaiian organizations attaching religious and cultural significance to identified historic properties must be consulted when agencies apply the criteria of adverse effect. The agency also needs to consider the views of consulting parties and the public. Adverse effects occur when an undertaking may directly or indirectly alter characteristics of a historic property that qualify it for inclusion in the Register. Reasonably foreseeable effects that may occur later in time, are farther removed in distance, or are cumulative also need to be considered.

Examples of adverse effects include physical destruction or damage; alteration not consistent with the [Secretary of the Interior's Standards](#); relocation of a property; change of use or physical features of a property's setting; visual, atmospheric, or audible intrusions; neglect resulting in deterioration; or transfer, lease, or sale of a property out of Federal ownership or control without adequate protections. If a property is restored, rehabilitated, repaired, maintained, stabilized, remediated or otherwise changed in accordance with the Secretary's Standards, then it will not be considered an adverse effect (assuming that the SHPO/THPO agrees).

Where properties of religious and cultural significance to Indian tribes or Native Hawaiian organizations are involved, neglect and deterioration may be recognized as qualities of those properties and thus may not necessarily constitute an adverse effect. Alteration or destruction of an archaeological site is an adverse effect, whether or not recovery of archaeological data from the site is proposed.

The SHPO/THPO may suggest changes in a project or impose conditions so that adverse effects can be avoided and thus result in a no adverse effect determination. If a SHPO/THPO does not respond to an agency finding within the 30-day review period, then the agency can consider the SHPO/THPO to be in agreement with the finding.

Agencies must retain records of their no adverse effect determinations and make them available to the public. A finding of adverse effect requires further consultation to resolve it.

Resolve Adverse Effects

When adverse effects are identified, the consultation continues among FHWA, the SHPO/THPO, and consulting parties to attempt to resolve them. The agency notifies ACHP when adverse effects are identified and invites them to participate in the consultation, and ACHP will decide on its participation within 15 days of receipt of a request. A consulting party may also request that ACHP join the consultation.

The agency provides project documentation to all consulting parties at the beginning of the consultation to resolve adverse effects, and FHWA provides sufficient time and information for the public to provide meaningful comments. A new public notice is only required if all pertinent information was not provided throughout the process or if new information is available.

When resolving adverse effects without ACHP, the agency consults with the SHPO/THPO and other consulting parties to develop a Memorandum of Agreement (MOA). If this is achieved, the agreement is executed and filed with ACHP. This filing is the formal conclusion of the Section 106 process and must occur before the undertaking is approved.

If the terms of an MOA are not followed, the agency reopens the Section 106 process and brings it to suitable closure as prescribed in the regulations. The roles and responsibilities of signatories to an agreement are described, along with who is required to sign the agreement under specific circumstances. The term "signatory" refers to the ability to terminate or agree to amend the MOA. It is particularly desirable to invite signatories who assume obligations under the agreement. Once invited signatories sign a MOA, they have the same rights to terminate or amend the MOA as the other signatories. Other parties may be invited to concur in agreements, but they cannot amend or terminate an MOA.

Section 106 Planning Saves Time and Resources

Planning for Section 106 early in a project enables all consulting parties to be appropriately identified and involved throughout the process. Frequent communication with consulting parties, ACHP, and the public is also essential. It will help avoid unforeseen circumstances and could reduce the time and resources spent on Section 106 consultation. Statewide Section 106 [programmatic agreements](#) (PAs) and related agreement documents are one way that FHWA can improve decisionmaking and advance environmental streamlining. PAs can administratively delegate some responsibility for Section 106 to a State DOT, provide expedited timeframes in specified situations, and identify activities that have little or no potential to affect historic properties.

For additional guidance, see the following resources:

- [FHWA Historic Preservation](#)—This webpage provides information geared to the Federal-aid highway program and its related projects. It offers guidance, recommendations, and successful practices to help address historic preservation, environmental resource issues during the transportation project planning and development process.
- [ACHP Section 106 Assistance for Users](#)—This webpage provides publications designed to aid Section 106 users as they apply the regulations, including related rules, policy issues, opinions, and guidance documents.
- [American Association of State Highway and Transportation Officials' Practitioner's Handbook Consulting Under Section 106 of the National Historic Preservation Act](#)—This handbook provides recommendations for complying with Section 106 of the NHPA during the environmental review process for transportation projects.

Successes in Stewardship is a Federal Highway Administration newsletter highlighting current environmental streamlining and stewardship practices from around the country. [Click here to subscribe](#), or call (617) 494-3719 for more information.

Look What's New!

- The Federal Highway Administration Office of Project Development and Environmental Review publishes guidance on the authorities and requirements stipulated in Fixing America's Surface Transportation Act (FAST Act) on the Environmental Review Toolkit. Check the site for new guidance or subscribe for updates.
- The U.S. Fish and Wildlife Service released a revised Habitat Conservation Planning Handbook. The handbook describes how landowners can expedite their Endangered Species Act (ESA) permit reviews by describing the process for implementing habitat conservation plans.
- The American Association of State Highway and Transportation Officials issued a practitioner's handbook on how to comply with Section 7 consultation under the ESA for transportation projects.

What Is an Undertaking?

An undertaking is a project, activity, or program funded in whole or in part under jurisdiction of a Federal agency

What Is the ACHP?

The Advisory Council on Historic Preservation (ACHP) is an independent Federal agency that promotes the preservation, enhancement, and productive use of the Nation's historic resources, and advises the President and Congress on national historic preservation policy.

What Is a SHPO?

A State Historic Preservation Officer (SHPO) administers the national historic preservation program at the State or territory level, reviews the National Register nominations, maintains data on historic properties that have been identified but not yet nominated, and consults with Federal agencies during Section 106 review. SHPOs are designated by the governor of their respective State or territory.

What Is a THPO?

A Tribal Historic Preservation Officer (THPO) is officially designated by a federally-recognized Indian tribe to direct a program approved by the National Park Service (NPS) and the THPO must have assumed some or all of the functions of the SHPO on tribal lands. This program was made possible by Section 101(d)(2) of NHPA. The NPS maintains a list of THPOs.

What Does the FHWA Federal Preservation Officer (FPO) Do?

Each Federal agency designates a qualified officer, also known as the agency's "preservation officer," who is responsible for coordinating the agency's activities. The FPO is responsible for providing policy guidance to FHWA on Section 106, as well as archaeology, architectural history, and historic preservation.

Who Is the FHWA FPO?

David Clarke became the FPO in summer 2016 and has been a Historic Preservation Specialist for over 15 years. He has worked in academia and the private sector, and for the past 10 years he has worked at a State Department of Transportation (DOT) managing Section 106 compliance. David has a Bachelor's in Anthropology/Archaeology from Mercyhurst University and a Master's in Anthropology/Archaeology from the University of Montana. In addition to the FPO, FHWA Headquarters and Resource Center have staff with expertise in Section 106 and Section 4(f) compliance, including:

- Archaeology, Dr. Owen Lindauer (HQs)
- Tribal Consultation, Stephanie Stoermer (RC)
- 4(f) Policy, David Grachen (RC)

Additional NRHP Resources

[Guidelines for Evaluating and Documenting Traditional Cultural Properties](#)—This bulletin is intended to be an aid in determining whether properties thought or alleged to have traditional cultural significance are eligible for inclusion in the National Register.

[Guidelines for Evaluating and Registering Archeological Properties](#)—This bulletin provides specific guidance on how to prepare National Register nomination forms for archeological properties. This guidance applies also to the preparation of the individual nominations that accompany multiple property National Register nominations.

CONTACT

David Clarke
Federal Preservation Officer
Office of Planning, Project Development & Environmental Review
Federal Highway Administration
David.Clarke@dot.gov
(202) 366-2060