

NATIONAL HISTORIC PRESERVATION ACT'S **SECTION 106** **CONSULTATION**

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NATIONAL HISTORIC PRESERVATION ACT OF 1966

MAIN PROVISIONS OF THE ACT

1. Authorizes the Secretary of the Interior to expand and maintain a National Register of Historic Places composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, and culture

MAIN PROVISIONS OF THE ACT

2. Grant funds to States for the purpose of preparing comprehensive statewide historic surveys and plans. Also matching grants-in-aid to States for projects having as their purpose the preservation for public benefit of properties that are significant in American history, architecture, archeology, and culture.

MAIN PROVISIONS OF THE ACT

3. Establish an Advisory Council on Historic Preservation to advise the President and the Congress on matters relating to historic preservation.

MAIN PROVISIONS OF THE ACT

4. Prior to approving the expenditure of funds or issuing any license for an undertaking, the head of a Federal agency must take into account the effect of the undertaking on historic properties and afford the Advisory Council on Historic Preservation a reasonable opportunity to comment.

Section 106 (54 U.S.C. 306108)

- The head of any Federal agency having **direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking** in any State and the head of any Federal department or independent agency **having authority to license any undertaking**, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.

What's an UNDERTAKING?

- “undertaking” means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including—
 - 1) those carried out by or on behalf of the Federal agency;
 - 2) those carried out with Federal financial assistance;
 - 3) those requiring a Federal permit, license, or approval; and
 - 4) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

What's a HISTORIC PROPERTY?

- “historic property” means any prehistoric or historic district, site, building, structure, or object **included on, or eligible for inclusion on**, the National Register, including artifacts, records, and material remains relating to the district, site building, structure, or object.

Where is the SHPO in all of this?

- “The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.”

The answer is in Section 110 (54 U.S.C. 306102)

- Each Federal agency's historic preservation program shall ensure that (among other things):
- The agency's procedures for compliance with Section 106 are —
 - 1) Consistent with the regulations promulgated by the Advisory Council on Historic Preservation; and
 - 2) provide a process for the identification and evaluation of historic properties for listing in the National Register and the development and implementation of agreements, in consultation with State Historic Preservation Officers, local governments, Indian tribes, etc., regarding the means by which adverse effects on such properties will be considered.

What is a “SHPO” and why should you care?

- The State Historic Preservation Officer (SHPO) administers the State Historic Preservation Program, which includes:
- directing and conducting a comprehensive statewide survey of historic property and maintain inventories of the property;
- identify and nominate eligible property to the National Register of Historic Places;
- prepare and implement a comprehensive statewide historic preservation plan;
- advise and assist, as appropriate, Federal and State agencies and local governments in carrying out their historic preservation responsibilities;
- provide public information, education, and training and technical assistance in historic preservation; and

What is a “SHPO” ... (Cont.)

- consult with the appropriate Federal agencies in accordance with the NHPA on –
 - 1) Federal undertakings that may affect historic properties; and
 - 2) the content and sufficiency of any plans developed to protect, manage, or to reduce or mitigate harm to such properties.

36 CFR Part 800: Protection of Historic Properties

- Regulations promulgated by the Advisory Council to implement compliance with Section 106.
- It establishes a four step consultation process (Subpart B: The section 106 Process)
 - 1) **INITIATE** the process (36 CFR 800.3);
 - 2) **IDENTIFY** historic properties (36 CFR 800.4);
 - 3) **ASSESS** adverse effects (36 CFR 800.5); and
 - 4) **RESOLVE** adverse effects (36 CFR 800.6).

WHO PARTICIPATES?

Participants in the Section 106 Process

- **Federal agency official** – The agency official has approval authority for the undertaking and can commit the Federal agency to take appropriate action for a specific undertaking.
- **Advisory Council** – rarely participates directly unless undertaking may impact “important” historic properties, or is controversial or complex.
- **SHPO**

Participants in the Section 106 Process (Continued)

- Applicant for Federal assistance
- Representatives of local governments (municipalities)
- Additional consulting parties (by request)
- In addition, the agency official must seek and consider the views of the public.

Things to consider in initiating the process

- Is the undertaking a **type of activity** that has the potential to cause effects on historic properties?
- If **no**, the agency official has no further responsibilities under Section 106.
- If **yes**, agency official needs to initiate the consultation with the other parties.

Things to consider in initiating the process (Continued)

- The agency official may authorize the applicant to initiate consultation with the SHPO.
- The agency official must notify the SHPO of the authorization.
- The agency official remains legally responsible for 106 compliance.

What exactly is “Consultation?”

- *Consultation* means 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. [36 CFR 800.16\(f\)](#)

Identifying Historic Properties

- In consultation with the SHPO, agency official must make a “reasonable and good faith effort” to identify historic properties
- A reasonable effort is one that is **logically designed** to identify eligible properties that may be affected by the undertaking **without being excessive or inadequate**.
- The agency official may use the services of the applicant to carry out this effort, but remains legally responsible for the outcome.
- Phase (Stage) I, II or III archaeological studies are not mentioned in 36 CFR Part 800, these are trade terms. They correspond to the identification (Phase I), evaluation (Phase II) and mitigation (treatment) of an archaeological property.

Where do you look for historic properties?

- You look for historic properties within the **AREA OF POTENTIAL EFFECTS** of the undertaking.

Area of Potential Effects (APE)

- Means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of the undertaking and may be different for different kinds of effects caused by the undertaking.
- The APE is the area within which the agency official needs to look for historic properties.

How is a property determined historic?

- Apply the National Register Criteria for Evaluation.
- If it meets at least one of the four Criteria and has integrity, nominate it to the Keeper of the National Register (NPS).
- If the Keeper decides it is eligible, it gets listed (unless there is owner objection).
- OR
- The agency official applies the National Register Criteria for Evaluation, in consultation with the SHPO.
- If the agency official and SHPO agree its eligible, it is eligible.
- If the agency official and SHPO do not agree, agency official must go to Keeper.

No Historic Properties Affected

- If the agency official finds that either there are no historic properties present or there are historic properties present but the undertaking will have no affect upon them.
- If SHPO does not object, you're done. If SHPO objects, agency official needs to go to the Advisory Council.
- **No Historic Properties Affected** and **No Adverse Effect** are NOT synonymous.

Historic Properties Affected

- Apply the criteria of Adverse Effects.
- Adverse effects can be direct (now) or indirect (later in time).
- Adverse effects can be physical, visual or audible.
- Rehabilitation inconsistent with the Secretary of the Interior's Rehabilitation Standards is an adverse effect.
- Transfer out of Federal ownership or control can also be an adverse effect.

NO Adverse Effect

- After applying the criteria of adverse effect, if the agency official finds that implementation of the undertaking will not adversely affect historic properties, the official shall seek the concurrence of SHPO.
- If the agency official and SHPO agree with a finding of No Adverse Effect (sometimes with conditions) and no consulting party has objected in writing, the agency official shall maintain a record of the finding.
- If the SHPO disagrees or a consulting party objects in writing, try to resolve the objection. If unable, go to the Council.

Adverse Effect

- If implementation of the undertaking will adversely affect historic properties, the agency official shall continue consultation with the SHPO and the other consulting parties to develop and evaluate alternatives or modifications to the undertaking that could **avoid, minimize or mitigate** adverse effects.
- The agency official must also notify the Advisory Council and recommend whether they should directly participate in the consultation. The agency official must also make information available to the public and provide them an opportunity to express their view.
- Although the Advisory Council usually does not directly participate in the consultation to resolve adverse effects, the agency must give them that opportunity to comment.

Resolution of Adverse Effects

- If the agency official and the SHPO (and Advisory Council, if participating) agree on how the adverse effect will be resolved, they shall execute a memorandum agreement (MOA).
- Occasionally (very rare), the agency official and the Advisory Council will execute an MOA.
- An MOA is a legally binding document. Execution of the MOA and the implementation of its terms evidences that the Federal agency has complied with its Section 106 responsibilities of taking into account the effects of the undertaking on historic properties and affording the Advisory Council a reasonable opportunity to comment.

What if we can't reach an agreement?

- If the parties cannot reach an agreement, the HEAD OF THE AGENCY or an Assistant Secretary type official (not just any agency official) must request the Advisory Council's comments.
- After receiving the Council's comment, the head of the agency shall take into account the Council's comments in reaching a final decision on the undertaking. The head of the agency may not delegate this responsibility.

What about NEPA?

- Compliance with NEPA does not evidence compliance with Section 106 of the National Historic Preservation Act.
- Categorical Exclusions under NEPA are not necessarily exempt from Section 106. You still have to determine whether the undertaking is the **type of activity** with the potential to affect historic properties.
- An agency official may use the process and documentation required for the preparation of an EA/FONSI or an EIS/ROD in lieu of the procedures in 36 CFR 800.3 through §800.6, if you notify the Council and SHPO, etc.
- You should refer to **NEPA and NHPA: A Handbook for integrating NEPA and Section 106**

Other things to consider

- EMERGENCIES (36 CFR 800.12)- applies only to undertakings that will be implemented within 30 days after the disaster or emergency has been formally declared by the President or Governor. **An agency may request an extension.** Immediate rescue and salvage operations conducted to preserve life or property are exempted from Section 106.
- NON-COMPLIANCE (36 CFR 800.9) – Federal courts may place an injunction on undertakings where Federal agencies did not meet their Section 106 responsibilities.
- Applicants may be denied the Federal assistance sought if they take actions to circumvent the Section 106 process.

Program Alternatives

- Sometimes the regular Section 106 consultation process is not a good fit for certain complex, multiple, multi-year or multi-state undertakings.
- Programmatic agreements (PA's) are an often used tool to address these types of undertakings. Execution of a PA and implementation of its terms evidences the agency's compliance with Section 106.