

QUICK ANSWERS TO MOST COMMON QUESTIONS

What is the National Historic Preservation Act?

In 1966, Congress enacted the National Historic Preservation Act (NHPA), which declared that the preservation of our Nation's irreplaceable heritage was in the public's interest. The NHPA called upon federal agencies to expand and accelerate preservation activities in a spirit of stewardship and partnership with American Indian tribes, the public, state and local governments, and other interested parties. The NHPA also established several institutions: the Advisory Council on Historic Preservation (ACHP), the State Historic Preservation Offices (SHPOs), the National Register of Historic Places (National Register), and the Section 106 review process.

What is Section 106?

Section 106 of the National Historic Preservation Act requires federal agencies to take into account the effects of their undertakings on historic properties and afford the ACHP reasonable opportunity to comment on such undertakings. The Section 106 review process seeks to accommodate historic preservation concerns with the needs of federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects, and seek ways to avoid, minimize, or mitigate any adverse effects on historic properties (36 C.F.R. Part 800.1(a)).

What are the Four Steps of the Section 106 Review Process?

This document is aimed at assisting interested parties in reporting necessary information to the SHPO as part of the Section 106 review process. Please remember that federal agencies, rather than project proponents, must comply with cultural resource laws and regulations, and that the SHPO is but one consulting entity in the process. The Section 106 review process (often referred to as "compliance") can be understood as a set of four (4) sequential steps of identification, assessment, and evaluation carried out by agencies in consultation with the SHPO and others:

- 1) Initiate Consultation Process, define the Undertaking and Area of Potential Effect (APE)
- 2) Identify Historic Properties in the APE
- 3) Assess Adverse Effects
- 4) Resolve Adverse Effects.

Although 36 CFR Part 800 differentiates between the steps, steps may overlap in practical application. For example, some agencies combine the identification and effect assessment steps (Steps 2 & 3). This is often done by conducting cultural resource surveys (the physical search for and recording of cultural resources) and submitting an inventory report (a compilation of information resulting from field survey, records or archival research, oral interviews, and other information about cultural resources in the area of concern) to the SHPO along with the federal agency's determinations about the significance of identified sites and possible impacts of the undertaking.

Each step must be completed for all historic properties before formally moving to the next step. (Programmatic Agreement may allow exceptions). For example, the SHPO is unable to concur with an effect finding (the overall or comprehensive effect of an action or decision) until the resolution of the Eligibility of all cultural resources and the impact on all eligible properties that are not avoided. Impacts to each historic property are considered in a comprehensive effect assessment, which takes into account the total effect of the undertaking on all historic properties in the subject area. As the regulations highlight at 36 CFR 800.3(g), these sequential steps are also intended to provide consulting parties and the public adequate time to review and comment at specified and known points in the Section 106 review process.

What is Section 110 of the National Historic Preservation Act?

Federal agencies are directed under Section 110 of the NHPA to identify and recognize historic properties under their management and planning. Section 110 also requires that federal agencies consult with the SHPO, pursuant to their responsibilities under Section 106.

What is the Montana State Antiquities Act?

The Montana State Antiquities Act (Montana Code Annotated 22-3-421 through 22-3-442) requires state, federal, and other agencies to consider the retention of heritage properties and paleontological remains on state-owned lands. The SHPO assists agencies in preserving heritage properties and paleontological remains and to encourages the avoidance, whenever feasible, of agency actions or agency assisted actions or agency licensed actions that substantially alter heritage properties or paleontological remains on state-owned lands. The Montana State Antiquities Act review process closely corresponds with the Section 106 review process, although there is no Advisory Council oversight.

What is the National Register of Historic Places?

The National Register of Historic Places (National Register) is the nation's official list of cultural resources deemed worthy of preservation. Authorized under the National Historic Preservation Act of 1966, the National Register includes districts, sites, buildings, structures, and objects that are significant in American history, architecture, archeology, engineering, and culture. Although the National Register is a program of the National Park Service, it is administered at the state level by each respective state. In addition to the recognition that listing provides, registered properties are afforded a measure of protection from projects that are funded, licensed, or executed by the federal government. Criteria for eligibility to the National Register are listed in the evaluation section below. The National Register criteria are directly relevant to the Section 106 review process and act as a guide to recognizing the values and characteristics that should be considered in evaluating the significance of cultural resources.

What is a Cultural Resource?

In this document, a cultural resource refers to any historical, archaeological, or traditional cultural place or object whether or not it is listed or determined eligible for listing in the National Register. Historic sites include districts, structures, and buildings, as well as linear features such

as trails, roads, and railroads that are fifty or more years old. Archaeological sites are evidence of past human occupation and behavior that include historic and/or prehistoric material cultural remains. Traditional Cultural Properties (TCPs) refer to places important to continuing historic cultural traditions that meet the National Register criteria.

What is a Historic Property or Heritage Property?

Historic properties (under NHPA) or heritage properties (under the Montana State Antiquities Act) specifically refer to any prehistoric or historic district, site, building, structure, or object listed or eligible for listing in the National Register. These terms include artifacts, records, and remains that are related to and located within such properties, as well as TCPs.

What does the SHPO do?

Under the NHPA, the SHPO is charged with advising, assisting, and cooperating with federal, state, tribal, and local authorities to ensure that historic properties and heritage properties in Montana are taken into consideration at all levels of planning and development. The SHPO works to reflect the interests of the state and its citizens in the preservation of their cultural heritage (36 CFR Part 800.2(c)(1)). Examples of sites important to that heritage include buildings, or other structures, irrigation ditches, mines, railroads, structural ruins, stone alignments, stone circles, art carved into or painted on rock outcrops, and sites of prehistoric human occupation. The SHPO is particularly concerned with properties that are listed, or eligible to be listed, in the National Register. As such we respond to agency requests for consultation, so the agency may not need to consult with Washington D.C.

Under the Montana State Antiquities Act, the SHPO is tasked with assisting state, federal, and other agencies in preserving heritage properties and paleontological remains. Additionally, the SHPO encourages avoidance, whenever feasible, of agency actions, agency assisted actions, or agency licensed actions that substantially alter heritage properties or paleontological remains on lands owned by the State of Montana.

What is the role of the Advisory Council on Historic Preservation?

The ACHP defines and provides general oversight of the Section 106 review process as specified in the NHPA. The implementing regulations for Section 106, 36 CFR Part 800, are written, maintained, and interpreted by the ACHP and require federal agencies to provide the ACHP opportunity to comment throughout the Section 106 review process.

Although the public and other interested parties may request ACHP review of federal agency findings at any time (36 CFR Part 800.2(b)(2) and 800.9(a)), the ACHP does not actively participate in routine consultation unless requested by a consulting party. However, federal agencies are required to notify the ACHP of all findings of adverse effect. The ACHP will then determine whether its involvement in resolving adverse effects is necessary in order to meet the purposes and intent of the Section 106 and 36 CFR Part 800.

Criteria for ACHP individual case participation are found at [Appendix A to Part 800 of 36 CFR](#)

Part 800. These criteria include (1) undertakings with substantial impacts to historic properties, (2) important questions of policy or interpretation, (3) potential procedural problems, (4) and/or issues of concern to American Indian tribes or Native Hawaiian groups. Adverse effect findings are the most common reason for ACHP participation. However, disagreements about the potential for an undertaking to affect historic properties, the Area of Potential Effect (APE), and the adequacy of inventory or treatment plans may also be referred to the ACHP by consulting parties. The SHPO, the agency, or other parties may request ACHP involvement if routine consultation is unproductive (36 CFR Part 800.2(b)(2)).

What is the role of the Keeper of the National Register?

The Secretary of the Interior and National Park Service delegate the responsibility of listing properties and determining the eligibility of properties for listing in the National Register to the Keeper. The Keeper is seldom directly involved in the Section 106 review process because the responsibility to conduct eligibility reviews is delegated to the SHPO. However, should the SHPO and federal agency disagree and not be able to find resolution regarding the eligibility of a cultural resource, the Keeper may be requested to make a final determination for the purposes of Section 106.

What are the responsibilities of the Tribal Historic Preservation Offices?

The NHPA (Section 101 (d)(2)) provides that tribes may assume all or any part of the SHPO's functions with respect to tribal lands assuming that the Secretary of Interior acting through the Director of the National Park Service finds that the tribe is capable of carrying out the functions it proposes to assume.

How do Applicants participate in the Review Process?

Federal agencies rather than applicants or consultants are responsible for consulting with the SHPO on all undertakings assisted, funded, undertaken, permitted, or licensed by the lead federal agency. In some instances, however, the lead federal agency delegates some or all of the Section 106 review process to the recipient (applicant) of the funding, license, or permit. Blanket Delegations of Authority—where the federal agency delegates the entire Section 106 review process to the applicant—are typically only used by non-land managing federal agencies (e.g. the Rural Utilities Service and the Federal Communications Commission). When a federal agency has formally delegated some or all of its responsibilities under Section 106, it retains legal accountability and is required to make an effort to resolve any disagreements that might arise. A federal agency must have a previous agreement in place with the ACHP and SHPO prior to utilizing a Blanket Delegation of Authority.

In order to ensure that the project will not be unnecessarily delayed, it is important that applicants ask agencies whether they or the agency will initiate consultation with the SHPO. In order to avoid confusion, federal agencies should notify the SHPO as early as possible when forming such agreements.

How does a Programmatic Agreement affect the Section 106 Review Process?

It is possible for a federal agency to customize or expedite the Section 106 review process by entering into a Programmatic Agreement (PA) with the ACHP and SHPO. Use of these agreements may alter the standard Section 106 review and consultation process outlined in 36 CFR Part 800. There are several types of PAs including: (1) PAs for general federal agency programs, (2) project-specific PAs for complex, long-term undertakings, and (3) property-specific PAs for cultural resources with which a federal agency consistently interacts. PAs are most useful for considering the effects of routine and repetitive undertakings in a broad temporal or spatial approach, or where administrative decisions which may affect historic properties will be made before all historic properties in an APE can be identified and evaluated, or before possible effects can be assessed.

Examples of current PAs include those with local communities regarding CDBG grants and rehabilitation programs; with individual National Forests regarding trails and logging properties; with the Montana Department of Transportation (MDT) regarding historic irrigation ditches, roads and bridges; and with the Bureau of Reclamation (BOR) regarding cabin leases. There are also more general Programmatic Agreements with the USDA Forest Service Northern Region (USFS) and with the Bureau of Land Management (BLM) that modify the standard Section 106 review process to more appropriately address organization and management needs.

The ACHP regulations providing for such alternative programs are found at 36 CFR Part 800.14, and guidance on preparing such agreements can be found in the ACHP's *Preparing Agreement Documents*.

How is review coordinated under the National Historic Preservation Act and the National Environmental Protection Act?

Compliance with the National Environmental Protection Act (NEPA) does not guarantee compliance under Section 106 of the NHPA. While certain federal agency responsibilities are related in purpose under both laws, there are differences in scope and procedure. For example, many actions that qualify as Categorical Exclusions (CEs) under NEPA require further review under Section 106. Moreover, an adverse effect under the NHPA may not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS) under NEPA.

The goal of the Section 106 review process is for federal agencies to identify historic properties potentially affected by a proposed undertaking, assess the effects of the undertaking, and seek ways to avoid, minimize, or mitigate any adverse effects. The initiation of the Section 106 review process should occur early in project planning and in advance of a federal agency making binding decisions regarding the location, design, and siting of a project. By statute, the Section 106 requirements must be met prior to a federal agency approving the expenditure of funds on an undertaking (other than funds for non-destructive planning) or prior to issuance of a license, permit, or approval needed by the undertaking. Further, an agency must complete the NEPA and Section 106 review before signing a decision document. The NEPA review may conclude with a CE, a FONSI, or a ROD. Under the Council on Environmental Quality's (CEQ) regulations, CEs, EAs, FONSI, and EISs are not decision documents. Agencies should avoid issuing NEPA

documents that present a final agency decision before they have completed the Section 106 review process, because the Section 106 process may result in a finding that requires the NEPA document to be revised or supplemented (*NEPA and NHPA: A Handbook for Integrating NEPA and Section 106*).

If a federal agency is unable to complete eligibility and effect determinations for the entire APE prior to the release of a FONSI or ROD, the ACHP regulations recognize a phased application of the Section 106 review process as an alternative option (36 CFR Part 800.4(b)(2) and 800.5(a)(3)). A project-specific PA detailing the agreed-upon measures for phased identification, evaluation, and effect findings must be completed prior to the signing and release of a decision document.

While NEPA and Section 106 of the NHPA are separate laws, federal agencies are encouraged to coordinate the processes. The ACHP's regulations concerning NHPA-NEPA coordination, integration, and substitution requirements are found at 36 CFR Part 800.8 and 800.14. If a federal agency wishes to substitute the NEPA process for the purposes of Section 106, the federal agency must notify the ACHP and SHPO in advance and follow the standards set out in 36 CFR 800.8(c). **Coordination of Section 106 and NEPA may also raise concerns regarding public disclosure or release of sensitive information. Please see the confidentiality subsection for more information on this critical concern.** Further information is available in the *NHPA and NEPA: A Handbook for Integrating NEPA and Section 106* published by the CEQ and the ACHP.