

Section 106 Consultation Involving National Historic Landmarks

(prepared by ACHP)

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Introduction

The [National Historic Preservation Act](#) (NHPA) includes provisions that specifically address Federal Agencies' responsibilities when their activities involve National Historic Landmark (NHL) properties. Section 106 and its implementing regulations, "[Protection of Historic Properties](#)" (36 CFR Part 800), address Federal Agency (Agency) responsibilities when an undertaking will affect properties eligible for or listed in the [National Register of Historic Places](#).

Section 106 requires Agencies, prior to approval of an undertaking, to "take into account" effects of an undertaking on historic properties. NHLs designated by the Secretary of Interior are included in this group. Section 110(f) of the Act also outlines the specific actions that an Agency must take when NHLs may be directly and adversely affected by an undertaking. Agencies must, "to the maximum extent possible...minimize harm" to NHLs affected by undertakings. Both Sections 106 and 110(f) also require Agencies to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking.

Agency Responsibilities

The core steps in the Section 106 review process require an Agency to identify the presence of NHLs and other historic properties within the undertaking's area of potential effects and assess whether implementation of the undertaking will have an adverse effect on such properties. If it is determined that an undertaking may affect an NHL, the Agency is required to take the following actions, as set forth in 36 CFR Sections 800.6 and 800.10.

- Notify the Council of any undertaking which may adversely affect an NHL, and invite the Council to participate in consultation to resolve adverse effects.
- Notify the Secretary of the Department of the Interior of any consultation involving an NHL, and formally invite the Secretary to participate in the Section 106 consultation process when there may be an adverse effect to these properties.
- Consider the findings of the Department of the Interior if the Council has formally requested a report from the Secretary under Section 213 of the Act to assist in consultation.
- Advise the consulting parties of the adverse effect on the NHL, and determine if other consulting parties should be involved in consultation.

- Provide background documentation to consulting parties (see 36 CFR Section 800.11(e)), including an analysis of alternatives considered to avoid, minimize, or mitigate adverse effects on the NHL. Because an NHL is involved, the Agency must focus the analysis of alternatives on actions which will minimize harm to the NHL and advance a preservation outcome, to the maximum extent possible. (see Section 110(f)).
- Notify the public of the proposed mitigation plan for the undertaking, and provide them an opportunity to express their views on resolving adverse effects.
- Resolve adverse effects, or request and consider Council comments.
- Inform the public of the outcome of the undertaking and the provisions in a Memorandum of Agreement, Programmatic Agreement, or Council comment.

In addition to complying with the requirements of Section 106, Agencies should consider the revised guidance set forth in the Section 110 Guidelines published by the National Park Service (NPS).¹ Standard 4 of the guidance applies to the Federal agency project planning, and provides a very useful summary of factors that should be considered when planning undertakings that involve NHLs.

STANDARD 4. An agency gives historic properties full consideration when planning or considering approval of any action that might affect such properties. [Sec. 110(a)(2)(B),(C), and (E), and Sec. 402 (16 U.S.C. 470a-2)].

National Historic Landmarks

(j) National Historic Landmarks (NHL) are designated by the Secretary under the authority of the Historic Sites Act of 1935, which authorizes the Secretary to identify historic and archaeological sites, buildings, and objects which "possess exceptional value as commemorating or illustrating the history of the United States." Section 110(f) of the NHPA requires that Federal agencies exercise a higher standard of care when considering undertakings that may directly and adversely affect NHLs. The law requires that agencies, "to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark." In those cases when an agency's undertaking directly and adversely affects an NHL, or when Federal permits, licenses, grants, and other programs and projects under its jurisdiction or carried out by a state or local government pursuant to a Federal delegation or approval so affect an NHL, the agency should consider all prudent and feasible alternatives to avoid an adverse effect on the NHL. [Sec. 110(a)(2)(B) and Sec. 110(f)].

(k) Where such alternatives appear to require undue cost or to compromise the undertaking's goals and objectives, the agency must balance those goals and objectives with the intent of section 110(f). In doing so, the agency should consider:

(1) the magnitude of the undertaking's harm to the historical, archaeological and cultural qualities of the NHL;

(2) the public interest in the NHL and in the undertaking as proposed, and,

(3) the effect a mitigation action would have on meeting the goals and objectives of the undertaking.

(1) The Advisory Council's regulations implementing section 106 include specific provisions that also implement section 110(f). These regulations require that the Council must be included in any consultation following a determination by the Federal agency that a Federal or federally assisted undertaking will have an adverse effect on an NHL. The Council must notify the Secretary and may request the Secretary to provide a report to the Council detailing the significance of the affected NHL under section 213 of the NHPA and recommending measures to avoid, minimize or mitigate adverse effects. The Council shall report the outcome of the section 106 process to the Secretary and the head of the agency responsible for the undertaking.²

Council Responsibilities

The Council's participation in undertakings that will adversely affect historic properties is prescribed by its regulations. Once it is established by the Agency or the Council that an undertaking will result in adverse effects on an NHL, the Council will take the following actions.

- Notify the Agency within 15 days following Agency notification of the adverse effect whether or not it will participate in consultation. It should be noted that Council participation in consultation for NHLs is discretionary. However, the decision to participate will be guided by Appendix A of 36 CFR Part 800 (see [Attachment](#)) which specifies that impacts on nationally significant properties may warrant Council involvement.
- If the Council decides to participate in consultation, ensure that the consultation process addresses the full range of preservation issues identified by consulting parties.
- Encourage development of a mitigation plan for the undertaking that balances the need to preserve the integrity of the NHL property with the project needs defined by the Agency.
- Determine whether it is appropriate to seek a formal Section 213 report on the NHL from the Department of the Interior.
- Ensure that the views of the Department of the Interior are carefully considered, whether provided by Department of the Interior staff during consultation or in a report submitted in response to Section 213 of NHPA.
- Consider the views of the consulting parties and the public regarding the proposed mitigation plan.
- Report the outcome of the consultation process to the Secretary of Interior and the head of the Agency responsible for the undertaking.
- The Council may recommend, as part of mitigation plan, re-evaluation of boundaries of the NHL or consideration of a property for NHL designation.

Rights and Responsibilities of the Public

36 CFR Part 800 provides for public participation throughout the Section 106 review process. Agencies are to provide the public with timely and complete documentation to facilitate their participation, and take appropriate steps to ensure that pertinent information is shared with consulting parties and considered during consultation. At the outset of the Section 106 review, the Agency is required to plan how and when it will involve the public. Such planning is done in consultation with the State Historic Preservation Officer (SHPO)/Tribal Historic Preservation Officer * (THPO*). Members of the public

can also provide views to the Agency on their own initiative at any time, although, as part of consultation, time limits may be established for the receipt of comments.

Members of the public may request to formally participate as consulting parties in the Section 106 review when they have demonstrated interest in the undertaking, either because of a legal or economic relation to the undertaking or NHL, or because of their concern regarding effects of the undertaking on historic properties. The Agency, in consultation with the SHPO/THPO*, shall consider all such requests.

When the Council has decided not to participate in consultation to resolve adverse effects, any individual or organization may still request the Council to provide an advisory opinion to the Agency regarding a specific determination or decision. The public may also request the Council to provide an opinion on the general adequacy of the Agency's compliance on a project.

NPS, on behalf of the Secretary of the Interior, is the repository of information on the location, boundaries, significance, integrity, and current condition of NHLs. The public, therefore, should contact NPS to share their views or concerns about such issues. Similarly, the public should also contact the SHPO/THPO* to discuss potential effects of an undertaking on an NHL since they are often familiar with the history of project planning and the preservation issues related to the NHL as a result of consultation with the Agency.

For Further Information

Should you want additional information about the Council or the procedures for complying with Section 106, please contact:

Advisory Council on Historic Preservation
The Old Post Office Building
1100 Pennsylvania Avenue, NW, Suite 809
Washington, DC 20001
Phone: (202) 606-8503/8505
Fax: (202) 606-8672
Web site: www.achp.gov

A complete list of SHPOs and tribes that have been certified under Section 101(d)(2) of NHPA can be found on the Council's Web site under State and Tribal Programs and Links.

Information about the National Register of Historic Places and National Historic Landmarks can be found on the Council's Web site under The National Historic Preservation Program: National Park Service

You may also contact the National Park Service directly to obtain information about the:

National Register of Historic Places (phone 202-343-9536)

(phone 202-343-8175)

¹The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act, 63 FR 20495-2058, April 24, 1998.

²This provision references the Council's 1986 regulations, which were later revised on June 17, 1999. Since the NHL review process has changed slightly, please refer to the Council's current regulations

Appendix A to Part 800—Criteria for Council Involvement in Reviewing Individual Section 106 Cases

(a) Introduction. This appendix sets forth the criteria that will be used by the Council to determine whether to enter an individual section 106 review that it normally would not be involved in.

(b) General Policy. The Council may choose to exercise its authorities under the section 106 regulations to participate in an individual project pursuant to the following criteria. However, the Council will not always elect to participate even though one or more of the criteria may be met.

(c) Specific Criteria. The Council is likely to enter the section 106 process at the steps specified in the revised regulations when an undertaking:

(1) Has substantial impacts on important historic properties. This may include adverse effects on properties that possess a national level of significance or on properties that are of unusual or noteworthy importance or are a rare property type; or adverse effects to large numbers of historic properties, such as impacts to multiple properties within a historic district.

(2) Presents important questions of policy or interpretation. This may include questions about how the Council's regulations are being applied or interpreted, including possible foreclosure or anticipatory demolition situations; situations where the outcome will set a precedent affecting Council policies or program goals; or the development of programmatic agreements that alter the way the section 106 process is applied to a group or type of undertakings.

(3) Has the potential for presenting procedural problems. This may include cases with substantial public controversy that is related to historic preservation issues; with disputes among or about consulting parties which the Council's involvement could help resolve; that are involved or likely to be involved in litigation on the basis of section 106; or carried out by a Federal agency, in a State or locality, or on tribal lands where the Council has previously identified problems with section 106 compliance pursuant to Section 800.9(d)(2).

(4) Presents issues of concern to Indian tribes or Native Hawaiian organizations. This may include cases where there have been concerns raised about the identification of, evaluation of or assessment of effects on historic properties to which an Indian tribe or Native Hawaiian organization attaches religious and cultural significance; where an Indian tribe or Native Hawaiian organization has requested Council involvement to assist in the resolution of adverse effects; or where there are questions relating to policy,

interpretation or precedent under section 106 or its relation to other authorities, such as the [Native American Graves Protection and Repatriation Act](#).

*** The regulations define the term "THPO" as those tribes that have assumed SHPO responsibilities on their tribal lands and have been certified pursuant to Section 101(d)(2) of the NHPA. Nevertheless, remember that tribes that have not been so certified have the same consultation and concurrence rights as THPOs when the undertaking takes place, or affects historic properties, on their tribal lands. The practical difference is that during such undertakings, THPOs would be consulted *in lieu of* the SHPO, while non-certified tribes would be consulted *in addition to* the SHPO.**