

National Historic Preservation Act (NHPA) Section 106



WHAT IS THE NHPA?

The National Historic Preservation Act (NHPA) establishes a partnership between the federal government and state, tribal, and local governments that is supported by federal funding for historic preservation (54 U.S.C. § 300101 *et seq.*). Section 106 of the NHPA requires Federal agencies to take into account the effect of their undertakings on historic properties and aims to identify historic properties potentially affected by the undertaking, assess its effects, and seek ways to avoid, minimize, or mitigate any adverse effect to historic properties (36 CFR § 800.1(a)).

ROLE OF EPA

Projects receiving grant funding from the U.S. Environmental Protection Agency (EPA) through the Community Grant Program are subject to compliance with NHPA Section 106. EPA is responsible for reviewing Community Grant projects for Section 106 compliance and requesting project details and supporting information from the grant recipient when needed. If Section 106 compliance is outstanding, EPA is responsible for making effects determinations; consulting with the State Historic Preservation Office (SHPO), Native American tribes, and representatives of local governments; ensuring mitigation measures from the consultation are included in grant conditions; and—in the case of actions with adverse effects—consulting further to resolve the adverse effects. EPA may designate a non-federal representative to initiate consultation with the SHPO/Tribal Historic Preservation Office (THPO) by issuing a non-federal designation letter; however, the ultimate responsibility for compliance with Section 106 remains with EPA.

SECTION 106 REVIEW REQUIREMENTS

Section 106 review is required for all levels of NEPA (CATEX, EA, and EIS). This review begins with determining if the proposed undertaking is a type of activity that has the potential to cause effects to historic properties. Any projects that involve earth disturbance and/or construction activities (i.e., nearly every Community Grant Project) have the “*potential to cause effects*” to historic properties and therefore require further review and Section 106 consultation. The review must consider the action’s potential direct (e.g., alteration or removal of the resource) and indirect effects (e.g., introduction of modern intrusions to the viewshed of a resource, such as the addition of a modern facility in a historic district, or other impacts to the scenic values of the resource) to historic properties in the area of potential effects (APE). Effects can also occur further in time or distance from the initial undertaking and can include cumulative effects. This review typically involves an archival records search to assess the presence of historic properties in the APE. For archaeological and tribal resources, a Secretary of Interior qualified professional may be required to review non-public state-managed information sources. The review will result in one of three determinations: “*no historic properties affected*,” “*no adverse effect to historic properties*,” or “*adverse effect to historic properties*.” EPA should then send this determination and supporting documentation to the SHPO for concurrence. If the undertaking occurs on or affects historic properties on any tribal lands, the THPO may, in some cases, assume the duties of the SHPO.

Key Definitions

Undertaking – 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 (36 CFR § 800.16(l)(1)).

Historic Property – Any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places (NRHP) maintained by the Secretary of the Interior. This term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization that meet the National Register criteria (36 CFR § 800.16(y)).

Effect – Alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the NRHP (36 CFR § 800.16(i)).

Determinations

No Potential to Cause Effects

The proposed project does not have the potential to cause effects to archaeological or architectural resources, regardless of the presence of historic properties in the APE. (Only applies to projects involving no construction or earth-disturbing activities.)

- No further Section 106 obligations.
- Proceed with NEPA review.

Documentation: Record the finding in the cross-cutter memo only.

No Historic Properties Affected

or

No Adverse Effect to Historic Properties

No historic properties are present – or – historic properties are (potentially) present but the project will incorporate avoidance measures to ensure any effects will not directly or indirectly alter any of the characteristics of a historic property that qualify it for the NRHP.

- Request review/concurrence from SHPO/THPO, wait 30 days for review or objection.
- If no objections are received, document findings and proceed with NEPA review.

Documentation: Letter to the SHPO/THPO requesting concurrence with the determination and the notification of concurrence, if received.

Adverse Effect to Historic Properties

Effects are anticipated to directly and/or indirectly alter characteristics of a historic property that qualify it for the NRHP.

- Consult further to resolve the adverse effect. Resolution takes the form of an MOA or PA.
- After a resolution is reached, proceed with NEPA review.

Documentation: All correspondence with the SHPO/THPO and other necessary consulting parties requesting further consultation to resolve the adverse effects, typically offering mitigation measures. Should include a record of the MOA/PA.

MITIGATION OF ADVERSE EFFECTS

The ACHP regulations define an adverse effect as any effect that may “diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association” (36 CFR 800.5(a)(1)). Section 106 does not prohibit actions that result in adverse effects but it requires continued consultation to develop either a Memorandum of Agreement (MOA) or a Programmatic Agreement (PA) to outline measures to avoid, mitigate, or minimize adverse effects. EPA coordinates with other consulting parties, such as SHPOs and/or Tribal representatives as appropriate, to determine these measures. MOAs are typically developed for specific projects where adverse effects are clearly defined. PAs are more suitable for complex projects where effects are less clear or for a series of undertakings that will have similar and repetitive effects.

ROLE OF THE GRANT RECIPIENT

Grant recipients must demonstrate compliance (if already completed for a project with a different federal agency) or assist EPA with complying with Section 106 for a project. As soon as the decision has been made to apply for an EPA-funded grant, the recipient should contact EPA to request assistance in determining the level of involvement in the Section 106 process. Recipients are responsible for providing EPA with the information needed to properly characterize impacts. EPA may request project details or analysis to support development of a Section 106 consultation package if required. As described above, recipients may prepare information, analyses, and recommendations, as well as initiate consultation, on behalf of EPA. For more information on designation letters, the grant recipient may reach out to the regional point of contact.

ADDITIONAL TOOLS AND RESOURCES

The following tools and resources may assist you in understanding the consultation process and identifying historic properties near your project:

- The ACHP website provides resources and guides on NHPA implementation: <http://www.achp.gov/>
- The National Park Service’s NRHP website provides information on the National Register: https://www.nps.gov/articles/nr_digitization.htm and <https://www.nps.gov/subjects/nationalregister/what-is-the-national-register.htm>
- A Citizen’s Guide to Section 106 Review provides additional guidance on the consultation process: https://www.achp.gov/sites/default/files/documents/2021-01/CitizenGuide2021_011321.pdf
- The Code of Federal Regulations provides a more in-depth explanation of the Section 106 process: <https://www.ecfr.gov/current/title-36/chapter-VIII/part-800>