

# Section 106

## of the National Historic Preservation Act of 1966 (NHPA)

**What is Section 106 review?** Section 106 of the National Historic Preservation Act of 1966 (NHPA) requires Federal agencies to take into account the effects of their undertakings on historic properties. The review process is administered by the Advisory Council on Historic Preservation (ACHP), along with the Federal Highway Administration (FHWA/agency) and the State Historic Preservation Office (SHPO). The historic preservation review process mandated by Section 106 is outlined in regulations issued by the Council. Revised regulations, "Protection of Historic Properties" (36 CFR Part 800), became effective January 11, 2001, and are summarized below.

**Why was Section 106 created?** NHPA was enacted because of public concern that so many of our Nation's historic resources were not receiving adequate attention as the Government sponsored much-needed public works projects. In the 1960s, Federal preservation law applied only to a handful of nationally significant properties, and Congress recognized that new legislation was needed to protect the many other historic properties that were being harmed by Federal activities.

**What does NHPA say?** Section 106 of NHPA requires that every Federal agency "take into account" how each of its undertakings could affect historic properties. An agency must also afford the Council a reasonable opportunity to comment on the project.

**What is a Federal "undertaking"?** This term includes a broad range of Federal activities: construction, rehabilitation and repair projects, demolition, licenses, permits, loans, loan guarantees, grants, Federal property transfers, and many other types of Federal involvement. Whenever one of these activities affects a historic property, the sponsoring agency is obligated to seek Council comments.

**What is a historic property?** For purposes of Section 106, any property listed in or eligible for the National Register of Historic Places is considered historic.

The National Register is this country's basic inventory of historic resources and is maintained by the Secretary of the Interior. The list includes buildings, structures, objects, sites, districts, and archaeological resources. The listed properties are not just of nationwide importance; most are significant primarily at the State or local level. It is important to note that the protections of Section 106 extend to properties that possess significance but have not yet been listed or formally determined eligible for listing. Even properties that have not yet been discovered (such as archeological properties), but possess significance, are subject to Section 106 review.

**What is the Advisory Council on Historic Preservation?** The 20-member Council is composed of four members of the general public (including the chairman and vice chairman), four historic preservation experts, a Native American or Native Hawaiian, a governor, a mayor, seven federal agency heads, and two ex-officio representatives of national preservation organizations--all appointed by the President of the United States.

### Section 106 Participants

**Who initiates Section 106 review?** The Federal agency involved in the proposed project or activity is responsible for initiating and completing the Section 106 review process. Under certain circumstances, local governmental bodies may act as the responsible agency. The agency works with the State Historic Preservation Officer (an official appointed in each State or territory to administer the national historic preservation program) and the Council to do so. There can be other participants in Section 106 review as well. At times, local governments, representatives of Indian tribes, applicants for Federal grants, licenses or permits, and others may join in the review process when it affects their interests or activities.

## Section 106 Step-by-Step (corresponds with flow chart)

### 1. Undertaking Determination

Determines if the proposed project or action is an “undertaking” by deciding whether the proposed action could result in changes in the character or use of any historic properties. If there is an undertaking, but it does not present a type of activity that has the potential to have an effect on a historic property, then the Section 106 obligations are complete.

It is also necessary to plan on involving the public and to identify any consulting parties (i.e., local governments, Indian tribes, Native Hawaiian organizations, and applicants for Federal assistance or permits, etc.).

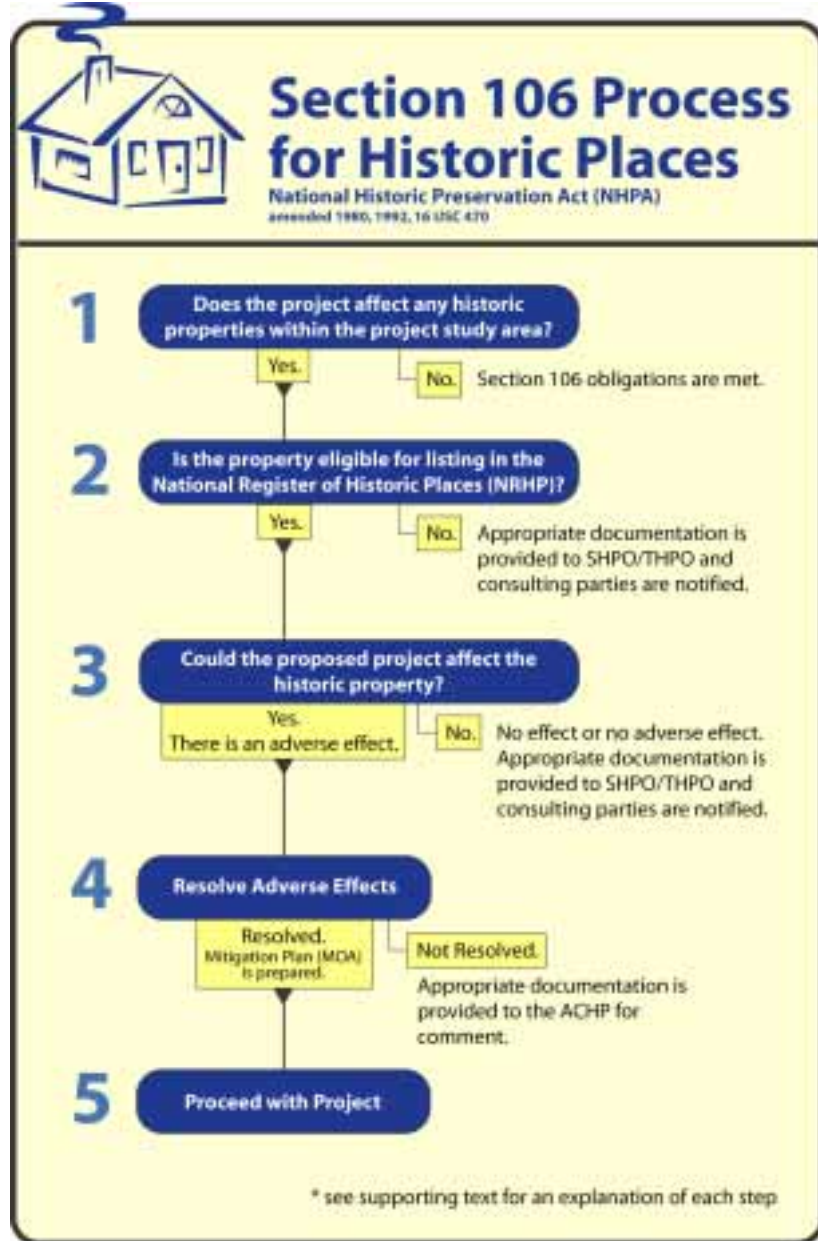
### 2. Identifying Historic Properties

Includes preliminary work, actual efforts to identify properties, and an evaluation of identified properties to determine whether they are “historic;” i.e., they are listed on, or are eligible for inclusion in, the National Register of Historic Places (NRHP).

When properties are found that may be historic but have not been evaluated, the agency and SHPO consult about eligibility for each property.

If the property is found to be ineligible, appropriate documentation must be given to the SHPO/THPO and consulting parties must be notified. Once adequate documentation is received, the SHPO/THPO has 30 days to object to the determination. The Council may also object on its own initiative within the time period. Lack of such objection within the 30-day period means that the agency has completed its Section 106 responsibilities.

If the property is found to be eligible, the effects of the undertaking on the property must be assessed and consulting parties must be notified.



### 3. Assessing Effects

Once eligible historic properties have been identified, it is then determined whether the proposed undertaking could affect the properties. The criteria of effect and adverse effect are used to determine potential effects on historic properties.

The *criteria of adverse effect* states that "an adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association... Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative." [36 CFR 800.5(a)]

When applying the criteria of effect and adverse effect, there are three possible findings:

- No Effect: There is no effect of any kind, neither harmful nor beneficial, on the historic properties. The proposed undertaking may proceed.
- No Adverse Effect: There could be an effect, but the effect would not be harmful to those characteristics that qualify the property for inclusion in the national register. Project documentation must be submitted to the Council for concurrence.
- Adverse Effect: There could be an effect, and that effect could harm characteristics that qualify the property for inclusion in the national register. Consultation must begin with the SHPO/THPO and the Council to seek ways to avoid, minimize, or mitigate the adverse effects.

### 4. Resolve Adverse Effects

The agency consults to resolve adverse effects with the SHPO/THPO and others (i.e., Indian tribes and Native Hawaiian organizations, local governments, permit or license applicants, and members of the public). The Council may participate in consultation when there are substantial impacts to important historic properties, when a case presents important questions of policy or interpretation, when there is a potential for procedural problems, or when there are issues of concern to Indian tribes or Native Hawaiian organizations.

Consultation usually results in a Memorandum of Agreement (MOA), which outlines agreed-upon measures that the agency will take to avoid, minimize, or mitigate the adverse effects. In some cases, the consulting parties may agree that no such measures are possible, but that the adverse effects must be accepted in the public interest. If an MOA is executed, the agency proceeds with its undertaking under the terms of the MOA.

If consultation proves unproductive and the adverse effect(s) cannot be resolved, the agency or the SHPO/THPO\*, or the Council itself, may terminate consultation. If a SHPO terminates consultation, the agency and the Council may conclude an MOA without SHPO involvement. However, if a THPO\* terminates consultation and the undertaking is on or affecting historic properties on tribal lands, the Council must provide its comments. The agency must submit appropriate documentation to the Council and request the Council's written comments. The agency head must take into account the Council's written comments in deciding how to proceed.

### 5. Proceed with Project

As stated in Step 4, if an MOA is executed, the agency proceeds with its undertaking under the terms of the agreement.

#### Helpful Websites:

Advisory Council on Historic Preservation: <http://www.achp.gov/>

FHWA Indiana Division Section 106 Consultation Procedures: <http://www.fhwa.dot.gov/indiv/106proc.htm>