

AASHTO PRACTITIONER'S HANDBOOK

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CONSULTING UNDER SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT

This Handbook provides recommendations for complying with Section 106 of the National Historic Preservation Act during the environmental review process for transportation projects.

Issues covered in this Handbook includes:

- Preparing for Section 106 consultation
- Defining an area of potential effects (APE)
- Inviting consulting parties
- Evaluating eligibility for the National Register of Historic Places
- Determining adverse effects
- Resolving adverse effects
- Developing memoranda of agreement (MOAs) and programmatic agreements (PAs)
- Using alternative procedures to satisfy Section 106 requirements

The Practitioner's Handbooks are produced by the Center for Environmental Excellence by AASHTO. The Handbooks provide practical advice on a range of environmental issues that arise during the planning, development, and operation of transportation projects.

The Handbooks are primarily intended for use by project managers and others who are responsible for coordinating compliance with a wide range of regulatory requirements. With their needs in mind, each Handbook includes:

- key issues to consider;
- a background briefing;
- practical tips for achieving compliance; and
- a list of reference materials.

In addition, key regulations, guidance materials, and sample documents for each Handbook are posted on the Center's web site at <http://environment.transportation.org>.



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Overview



This Handbook provides recommendations for complying with Section 106 of the National Historic Preservation Act during the environmental review process for transportation projects.

Section 106 of the NHPA requires Federal agencies to take into account the effects of their actions on historic properties.¹ The NHPA created the Advisory Council on Historic Preservation (ACHP) and authorized the ACHP to issue regulations governing the implementation of Section 106. These regulations are set forth in 36 CFR Part 800. Cross-references to the Section 106 regulations are included throughout this Handbook.

The Section 106 process seeks to incorporate historic preservation principles into project planning through consultation between a Federal agency and other parties with an interest in the effects of the Federal agency's action on historic properties. Section 106 consultation includes four main steps: initiating consultation; identifying historic properties that could be affected by the undertaking; assessing the undertaking's effects on historic properties; and seeking ways to avoid, minimize, or mitigate any adverse effects on those properties.

The intent of this Handbook is to assist project managers and Section 106 practitioners in carrying out Section 106 consultation in coordination with the National Environmental Policy Act (NEPA) for transportation projects. This Handbook focuses primarily on Section 106 consultation for highway, transit, and passenger rail projects that involve funding or other approvals by the Federal Highway Administration (FHWA), Federal Transit Administration (FTA), or Federal Railroad Administration (FRA). Many of the suggestions in this Handbook also can be applied to other types of projects.

The Reference Materials section at the end of the Handbook includes additional sources of introductory and advanced information on Section 106.

Background Briefing

This section provides an overview of key terms and concepts used in Section 106 consultation under the NHPA. The topics covered in this section are discussed in more detail in the Practical Tips section.

Agencies Involved in Section 106 Consultation. The Section 106 regulations define roles for various agencies in the Section 106 consultation process.

- The **Federal Agency** is the agency with the responsibility to carry out Section 106 consultation for an undertaking. In this handbook, the term "Federal agency" also includes any state that has assumed responsibilities of a U.S. Department of Transportation (USDOT) agency for Section 106 compliance as part of an assignment agreement pursuant to 23 USC 326 or 327.
- The **State Historic Preservation Officer (SHPO)** is an official appointed or designated by the Governor of a state to administer the state's historic preservation program. The SHPO consults with Federal agencies and provides comments at multiple points in the Section 106 process.
- The **Tribal Historic Preservation Officer (THPO)** is a tribal official appointed or designated by a federally recognized Indian tribe to carry out the responsibilities of the SHPO for purposes of Section 106 compliance on tribal lands. Not all tribes have designated a THPO. Where a THPO has not been designated and approved to act in lieu of the SHPO pursuant to Section 101(d)(2) of the NHPA, the Federal agency consults with the SHPO and with the tribal official responsible for historic preservation consultation.
- The **Advisory Council on Historic Preservation (ACHP)** is an independent Federal agency with responsibility

¹ 54 USC 306108. Prior to December 19, 2015, Section 106 was codified at 16 USC 470f.

for issuing the Section 106 regulations and overseeing compliance with Section 106. The ACHP does not routinely participate in Section 106 consultation for individual projects, but the ACHP has the right to do so and can submit comments at any time.

- The **Keeper of the National Register of Historic Places**—an office within the National Park Service (NPS) of the U.S. Department of the Interior—establishes the criteria for determining eligibility for the National Register. The Keeper also is responsible for resolving disputes about eligibility.

Consulting Parties. The Section 106 process involves consultation with the SHPO/THPO as well as other consulting parties. Entities that are entitled to serve as consulting parties (often called “by-right” consulting parties) include:

- the applicable SHPO and/or THPO;
- Indian tribes and Native Hawaiian organizations that attach religious and cultural significance to historic properties that may be affected by an undertaking (whether on or off tribal lands);
- representatives of local governments with jurisdiction over areas that may be affected by the project; and
- applicants for Federal assistance, licenses, and other approvals.²

In addition, the Federal agency may invite other entities with a “demonstrated interest in the undertaking” to participate as consulting parties.³ Examples include local historic preservation officials, historic preservation groups, community organizations, individual property owners, and other stakeholders.

Steps in Section 106 Consultation. The Section 106 consultation process includes four main steps:

- initiating consultation, which includes inviting consulting parties to participate in the process;
- determining the project’s area of potential effects (APE) and identifying any historic properties within the APE that are listed in or eligible for the National Register of Historic Places;
- determining whether the project will have an adverse effect on any historic properties that are listed in or eligible for the National Register; and
- resolving any adverse effects on those resources, typically through execution of a Memorandum of Agreement (MOA) or a Programmatic Agreement (PA).

In general, these steps are completed sequentially. The Section 106 regulations do provide some flexibility to combine steps, as long as the Federal agency and SHPO/THPO agree and members of the public still have an adequate opportunity to express their views on the undertaking.⁴

Definition of “Consultation.” The concept of consultation is at the heart of the Section 106 process. Consultation is defined in the Section 106 regulations as a “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.”⁵ Many different kinds of activities fall within this broad definition. Consultation on some projects involves numerous face-to-face meetings; on others, it may rely more heavily on an exchange of documents. The Section 106 regulations state that consultation methods should be “appropriate to the scale of the undertaking and the scope of Federal involvement” in that undertaking.⁶

Definition of “Undertaking.” Section 106 applies to any Federal undertaking. The Section 106 regulations define an undertaking as 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.⁷ A transportation project that is federally funded, or requires any Federal permit or approval, meets the definition of an undertaking and therefore requires Section 106 consultation.

Definition of “Historic Property.” Section 106 requires consultation regarding the effects of the undertaking on historic properties. The term “historic property” is defined to include “any prehistoric or historic district, site, building, structure, or

2 36 CFR 800.2(c)(1)-(4).

3 36 CFR 800.2(c)(5).

4 36 CFR 800.3(g).

5 36 CFR 800.16(f).

6 36 CFR 800.2(a)(4).

7 36 CFR 800.16(y).

object included in, or eligible for inclusion in, the National Register of Historic Places,” including “properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization.”⁸ Thus, this term includes:

- properties from the prehistoric era, as well as the historic era;
- archeological resources, as well as above-ground resources;
- properties that are eligible for the National Register, as well as those that are listed in the National Register; and
- properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization, if those properties are listed in or eligible for the National Register.

Definition of “Eligible.” The term “eligible” includes properties that have been formally determined eligible by the Keeper of the National Register, as well as all other properties that meet the National Register criteria for eligibility.⁹ For purposes of Section 106, there is no distinction between listed and eligible properties. Properties are not presumed to have greater significance simply because they are listed in the National Register.

Definitions of “Indian Tribe” and “Native Hawaiian Organization.” Section 106 includes specific requirements regarding consultation with Indian tribes and Native Hawaiian organizations.¹⁰ An Indian tribe is defined as an “Indian tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation... which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” A Native Hawaiian organization includes “any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians.”¹¹ For simplicity, this handbook uses “Indian tribe” or “tribe” to include both Indian tribes and Native Hawaiian organizations.

Review Times. The Section 106 regulations establish time periods for the SHPO/THPO to review findings or determinations at certain points during the Section 106 process. The review period is measured from the SHPO/THPO’s receipt of the request for its review of the finding or determination. If the SHPO/THPO fails to respond within the time period defined in regulation, the Federal agency can proceed in accordance with its own finding or can choose to consult with the ACHP in lieu of the SHPO/THPO.¹² The regulations also define periods for the ACHP itself to provide comments. Specific review periods are discussed below in the context of individual steps in the Section 106 process.

Consultation vs. Concurrence. The Section 106 regulations require the Federal agency to make eligibility and effects findings in consultation with the SHPO/THPO; they do not require the Federal agency to obtain the SHPO/THPO’s concurrence in those findings. The regulations prescribe steps that should be followed when a SHPO/THPO disagrees with a Federal agency’s findings. (See Practical Tips.) If there is a disagreement between a Federal agency and a SHPO on an eligibility issue, the issue can be elevated to the Keeper of the National Register for a final decision.

Timing of Consultation. Section 106 consultation must be initiated early in the undertaking’s planning, so that a broad range of alternatives may be considered during the planning process for the undertaking. Section 106 consultation must be completed before the Federal agency issues any required license, approval, or permit, and before the Federal agency approves the expenditure of funds for implementation of the project. The Federal agency can approve the expenditure of funds only for non-destructive planning activities prior to completion of the Section 106 process.¹³

Confidentiality of Historic Resource Information. Section 304 of the NHPA states that information about the “location, character, or ownership” of a historic resource shall be withheld from public disclosure if the Federal agency or SHPO/THPO finds that disclosure may (1) cause a significant invasion of privacy; (2) risk harm to the historic resource; or (3) impede the use of a traditional religious site by practitioners.¹⁴ Pursuant to Section 304, this type of information normally is withheld from any Section 106 documents that are intended to be made public. If the Federal agency receives a request for information that the agency has withheld from disclosure, and the agency still wishes to keep the information confidential, a process defined in the Section 106 regulations is used to resolve the issue. Under this process, the Federal agency consults with the Secretary of Interior about whether to withhold the information from the public. If the Federal agency decides to withhold information, the

8 36 CFR 800.16(l).

9 36 CFR 800.16(l).

10 36 CFR 800.2(c)(2).

11 36 CFR 800.16(m) and 800.16(s).

12 36 CFR 800.3(c)(4).

13 36 CFR 800.1(c).

14 54 USC 307103.

Secretary of the Interior then decides who may have access to that information for the purpose of carrying out the NHPA. If the information has been developed in the course of Section 106 consultation, the Secretary of the Interior must consult with the ACHP in making this decision.¹⁵

Staff Qualifications for Implementing Section 106. Section 112 of the NHPA requires that Federal agency employees and contractors responsible for historic resources meet the Secretary of Interior's Professional Qualification Standards.¹⁶ Similarly, the Section 106 regulations require the Federal agency to ensure that all actions taken by its employees or contractors meet the Secretary's standards.¹⁷ This requirement does not necessarily require all of those involved in supporting the development of Section 106 documents to meet the Secretary's standards. For example, environmental specialists who do not meet the Secretary of the Interior's qualification standards can play a role in reviewing and commenting on Section 106 documents that have been prepared under the direction of historic preservation professionals who do meet the Secretary of the Interior's standards.

Exemptions and Program Comments. Under the Section 106 regulations, the ACHP can exempt specific categories of undertakings from individual Section 106 consideration, and ACHP also can issue "program comments" that avoid the need for individualized consultation on specific types of resources.¹⁸ Exemptions and program comments have exceptions that must be considered in determining whether they apply to the specific facilities involved in a project. Activities that are excluded from the exemption or program comments must undergo the normal Section 106 review process. For discussion of specific exemptions and program comments, see the Practical Tips section of this Handbook.

Section 4(f). Section 4(f) of the USDOT Act includes protections for historic properties that are listed in or eligible for the National Register, as well as publicly owned parklands, recreation areas, and wildlife and waterfowl refuges.¹⁹ Section 4(f) prohibits USDOT from approving the use of these resources for a transportation project unless the agency finds that the use results in a "de minimis impact" or the agency determines that (1) there is no feasible and prudent alternative that avoids the use of the Section 4(f) resource and (2) the project includes all possible planning to minimize harm resulting from the use. FHWA and FTA have jointly issued regulations for carrying out Section 4(f) requirements.²⁰ Section 106 plays a key role in supporting compliance with Section 4(f), because the Section 106 process is used to identify listed and eligible historic properties and to assess effects on those properties.

Key Issues to Consider

Agency Roles

- What is the Federal action that requires Section 106 compliance for this project?
- If two or more Federal agencies have Section 106 responsibilities for this project, which Federal agency will take the lead in the Section 106 process?
- What tasks will be the lead Federal agency's responsibility and what tasks will be the responsibility of the project applicant?
- Is the project applicant a state that has assumed USDOT responsibilities for Section 106 compliance under an assignment agreement (pursuant to 23 USC 326 or 327)? If so, does the assignment agreement include specific requirements regarding Section 106 consultation?
- Who is responsible for initiating and conducting consultation with Indian tribes?

State-Specific Requirements

¹⁵ See 36 CFR 800.11(c).

¹⁶ 54 USC 306131.

¹⁷ 36 CFR 800.2(a)(1).

¹⁸ Exemptions and program comments are two types of "program alternatives" authorized by 36 CFR 800.14. Other types of program alternatives include: alternate procedures, programmatic agreements, standard treatments, and program comments.

¹⁹ 23 USC 138 and 49 USC 303(c).

²⁰ See 23 CFR Part 774.

- Is there a statewide Section 106 programmatic agreement (PA)? If so, how do procedures under the statewide PA differ from standard Section 106 procedures?
- Are there state, local, or tribal cultural resource laws that must be addressed? How do these laws mesh with the Section 106 process?
- Are there any state-specific manuals or other guidance documents that must be used in the Section 106 process for this project?

Consulting Parties

- Who are the Section 106 consulting parties that, by regulation, have a right to be involved in the consultation on this project?
- What process will be used to invite other agencies, organizations, or individuals to participate as consulting parties in the Section 106 process?
- How will requests for consulting party status be reviewed and decided?
- How will the consulting parties be involved in the Section 106 process?
- What methods will be used to communicate with consulting parties?
- Besides identifying and involving consulting parties, what other steps will be taken to inform the general public about the Section 106 process?
- Are there any ongoing controversies or disputes that are likely to affect the Section 106 process? If so, how should they be handled?
- Should the ACHP be invited to participate in the Section 106 process for this project?

Area of Potential Effects

- When will the APE be determined and what will it encompass?
- What factors will be used to define the APE?
- Have the SHPO/THPO or other consulting parties raised any specific concerns about the designation of the APE? If so, how are they being addressed?
- If the APE has changed during the course of the project, have the change and the reasons for it been adequately documented?

Evaluation of Eligibility for the National Register of Historic Places

- What methods will be used to identify and evaluate properties that may be eligible for the NRHP?
- When will field surveys to identify historic resources be undertaken and who will undertake them?
- Are there any issues that may justify using a phased approach to identify and evaluate historic properties?
- Are any National Historic Landmarks present in the project area?
- If there are disagreements about eligibility determinations, how will they be addressed and documented?

Assessment of Effects

- What methods will be used to assess the project's effects on historic properties?
- Are there any issues that may justify using a phased approach to assess effects (e.g., lengthy corridor or difficulty gaining access to private property)?
- How will effects on historic properties be documented?
- When will effects findings be made? How does the timing of the effects findings relate to other key milestones in the NEPA process?
- If there are disagreements about effects determinations, how are they being addressed?

Documentation of Eligibility and Effects

- What are the SHPO/THPO's expectations regarding the Section 106 documentation?
- What is the timing of these determinations in relation to the major NEPA milestones?
- Who will review and comment on the Section 106 documentation?
- How will Section 106 compliance be addressed in the NEPA document?

Resolution of Adverse Effects

- Has the ACHP been notified of any adverse effect findings and invited to participate in the consultation (by providing the documentation specified in Section 800.11(e) of the Section 106 regulations)?
- If potential adverse effects are identified, have avoidance and minimization options been thoroughly developed, considered, and documented?
- Will the undertaking cause adverse effects on a National Historic Landmark (NHL)?
- What mitigation measures are being considered for properties that will be adversely affected and who will be involved in the development of such measures?

Memoranda of Agreement and Programmatic Agreements

- Will an MOA be prepared, and if so, who will be responsible for drafting the MOA?
- Is a PA appropriate for this project, rather than an MOA? For example, a PA may be appropriate for a large-scale project that will be built over a long time period.
- Who are the signatories to the MOA and who will be invited to concur in the MOA?
- Who will receive copies of the executed MOA?
- Who will follow up on implementation of the stipulations contained in the MOA?

Practical Tips

This section describes each step of the Section 106 consultation process and provides suggestions for carrying out the required consultation activities. Cross-references to the Section 106 regulations are included throughout this section.

1 | Agency Roles

Designation of Lead Federal Agency. For most transportation projects, the lead agency is within the USDOT. If more than one Federal agency is involved, some or all of the agencies may consult and designate a lead Federal agency, often the agency with the greatest involvement in the project. The lead agency will then fulfill the Federal agencies' collective Section 106 responsibilities. For example, if a highway project requires approval from both FHWA and the U.S. Army Corps of Engineers, FHWA can serve as the lead agency and thereby satisfy Section 106 requirements for both agencies. If no lead agency is designated, each agency is individually responsible for complying with Section 106.²¹ The agreement regarding lead agency designation often is confirmed in an exchange of correspondence between the two Federal agencies.

Role of the Project Applicant. The Federal lead agency may use the services of project applicants to prepare information, analyses, and recommendations as part of the Section 106 process.²² In addition, the Federal agency may authorize an applicant to initiate the Section 106 process on the Federal agency's behalf. The Federal agency, however, remains responsible for all findings and determinations.²³ It is prudent at the outset of the process for an applicant to meet with the Federal agency, review specific tasks, and determine which can be handled by the applicant and which will be performed by the Federal agency.

²¹ 36 CFR 800.2(a)(2).

²² The term "applicant" is used in the Section 106 regulations to refer to the project sponsor, such as a state DOT.

²³ 36 CFR 800.2(a)(3), 800.2(c)(4).

Federal Agency Role in Report Preparation. Project applicants and their consultants often prepare Section 106 documentation under the direction of the Federal agency with responsibility for compliance with Section 106. Project applicants should coordinate with Federal agency officials to determine or confirm the specific points at which the Federal agency will be involved in reviewing and approving Section 106 reports. For example, the Federal agency officials may require that they review all reports before they are sent to the SHPO/THPO and consulting parties. Ultimately, the Federal agency—not the project applicant or consultants—is responsible for making the findings and approving all reports produced in the Section 106 process.

2 | State-Specific Requirements

State-Specific Documentation Standards. The Section 106 regulations contain general standards for Section 106 documentation.²⁴ These standards are often further supplemented by state-specific agreements, regulations, handbooks, or manuals. Individual SHPO/THPOs also may have expectations that are based on customary practices in that state, which may not be formally documented. While the customs of a SHPO/THPO are not binding on a Federal agency, compliance with those practices can help to facilitate expeditious reviews. If a project extends into two or more states, the applicant and lead Federal agency should consult with the applicable SHPO/THPOs to determine the documentation standards that will be followed for the project.

State, Local, and Tribal Laws. Many states have historic preservation laws patterned after the NHPA. Some of these state laws impose additional requirements and procedures, above and beyond those required by Section 106. For example, some state laws require permits for undertaking archeological fieldwork. Local governments and Indian tribes also may have historic preservation laws or other requirements. Project applicants should be familiar with any applicable state, local, or tribal requirements. In addition, certain Federal laws may apply to specific states, such as Federal laws that define Indian tribal lands in Alaska.

Statewide Programmatic Agreements. Many state DOTs have statewide programmatic agreements (PAs) that establish alternative procedures for meeting Section 106 requirements for transportation projects. For example, some states have PAs that allow historic preservation professionals within the state DOT to carry out some of the responsibilities assigned to the SHPO in the Section 106 regulations. For projects in a state with this type of PA, project applicants and consultants should follow the procedures in the PA. The recommendations in this Handbook may not all be applicable to projects governed by a statewide PA.

State-Specific Practices. Within a given state, there may be customary practices that are widely followed without necessarily being documented in a specific agreement or set of procedures. These practices may involve issues such as the working relationship between the Federal agency and the project sponsor; the format of documents submitted for review by the SHPO (including paper vs. electronic); terminology and abbreviations used in Section 106 reports; and the amount of time allowed for review of various reports. Awareness of these state-specific practices will help to build a strong relationship with the SHPO and avoid unnecessary delays.

3 | Tribal Consultation

Duty to Consult with Tribes. Section 106 requires Federal agencies to consult with any Indian tribe that “attaches religious and cultural significance to historic properties that may be affected by an undertaking.” This requirement applies *even if the historic property is located outside tribal lands*.²⁵ The Federal agency must ensure that the tribe has “a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking’s effects on such properties, and participate in the resolution of adverse effects.”²⁶ Specifically, the agency’s responsibilities include:

- Identifying Indian tribes that may attach religious and cultural significance to historic properties in the vicinity of the project.²⁷

²⁴ 36 CFR 800.11.

²⁵ 36 CFR 800.2(c)(2).

²⁶ 36 CFR 800.2(c)(2)(ii)(A).

²⁷ 36 CFR 800.3(f)(2).