

## THE SECTION 106 PROCESS

Of all federal legislation dealing with cultural resources issues, Section 106 of the NHPA of 1966 is the most important and can have the greatest impact on the operations of any federal agency. Section 106 outlines specific procedures that a federal agency, such as the Department of the Navy, must follow if any planned actions have the potential to affect the integrity of a property listed in or potentially eligible for the NRHP. Key provisions of Section 106 deal with the initiation of the SHPO consultation process, identification and evaluation of those properties that qualify for consideration, the types of actions that can affect integrity, and the procedures to mitigate or offset these actions. The entire Section 106 process can be separated into four steps, each of which is described in greater detail in the following sections. However, note that consultation should be initiated at the outset of any planned project. This will avoid costly delays and will ensure compliance with federal law and regulations. For the purposes of this discussion of the Section 106 process, the term “federal agency” or “agency” refers to the Department of the Navy.

### *STEP ONE: INITIATE THE SECTION 106 PROCESS*

Recent changes to the Section 106 regulations, which went into effect in 1999, are designed to foster early consideration of historic properties and increase opportunities for public involvement in the consultation process. The initial step in this process is to establish whether a federal action constitutes an undertaking. By definition, an undertaking includes any project, activity, or program, either funded under the jurisdiction of a federal agency or covered under a federal permit or license. Any undertaking that could potentially alter character-defining elements of a significant cultural resource is subject to the Section 106 process, including consultation with the appropriate SHPO. Renovation/rehabilitation efforts, new construction, or demolition projects are undertakings. Routine maintenance and upkeep procedures are generally not considered undertakings, and are excluded from the Section 106 coordination. At the outset of the Section 106 process, the federal agency must identify the appropriate SHPO and/or THPO (Tribal Historic Preservation Officer). NWIRP Dallas personnel should consult with the Texas Historical Commission, which serves as the Texas SHPO. This agency should be consulted for any Section 106-related activities and/or coordination.

New Section 106 regulations state that the agency must make a “reasonable and good faith” effort to identify any Native American tribes that should be consulted in the Section 106 process. The identification efforts and consultations with Native American tribes should be started early in the planning process. All consultations must be conducted in a sensitive and respectful manner, keeping in mind the government-to-government relationship between tribes and the federal government. To date, no federally-recognized tribes claim association with the NWIRP Dallas land area, and therefore THPO consultation is not required.

Once the SHPO/THPO has been identified, the federal agency should then consult with the SHPO/THPO to identify other consulting parties having a right to participate in the process. Certain parties, such as Native American tribes or Native Hawaiian organizations, local governments, applicants for federal assistance, and individuals or organizations with a demonstrated interest in the undertaking (such as property owners) are entitled to participate in the Section 106 consultation.

The agency should also develop plans for public involvement, reflecting the nature and complexity of the undertaking and its effects on historic properties, the likely public interest in the effects on historic properties, and the relationship of the federal involvement to the overall undertaking. The agency must provide the public with information about an undertaking and its effects on historic properties and seek public comments and input, except where the confidentiality of affected parties is a concern. In some cases, existing agency procedures for public involvement under the National Environmental Policy Act or other programs may satisfy these requirements. Public involvement should continue throughout the Section 106 process.

***STEP TWO: IDENTIFY AND EVALUATE HISTORIC PROPERTIES***

The next step in the Section 106 process determines which properties, if any, are considered to be historic properties. For the Section 106 process, a historic property is defined as any building, structure, object, site, or district included in or eligible for the NRHP.

**Identify Historic Properties**

Information needed to satisfy this step comes from a variety of sources. The SHPO/THPO should be contacted to determine whether there are any properties already listed in the NRHP and whether any archeological and/or comprehensive historic resources surveys have been completed. Although the NRHP has recommended a 50-year-

age threshold, consideration should be given to ensure that the identification process provides a planning window wide enough to serve the activity for the near future. Imposing a strict 50-year cut-off date will guarantee that the survey will be obsolete and out of date the year after its completion. Moreover, the 1991 Department of Defense Appropriation Act directed the DOD to inventory, protect, and conserve “physical and literary property and relics connected with the origins and development of the Cold War.” As such, DOD cultural resource management policy encourages the scrutiny of Cold War-era resources and the consideration of their significance within the context of the Cold War. Every effort should therefore be made to make the identification step be as comprehensive as possible.

At each of the Navy’s installations, the P164 form includes a comprehensive listing of all improvements at the activity. It serves as an effective starting point in the identification process for extant historic resources. The Naval Facilities Engineering Command maintains the P164s and relies on personnel at each activity to update the inventory on an annual basis. The form identifies each property by facility (or building) number and provides basic data (square footage, number of stories, length, width, height) and present use. Although the form provides an accurate listing of improvements at each activity, the descriptive data on the individual buildings are not always correct. For example, buildings constructed before the Navy gained control of the property are sometimes listed as having been built the year they were acquired by or transferred to the Navy. Therefore, the P164 serves as the basis for the identification process but must be supplemented with additional field and research investigations.

Each resource should be photographed and its location plotted on standard maps (general development maps or U.S.G.S. maps). The photographs should become part of a permanent record that documents each resource’s appearance. The images will also serve as an invaluable reference tool to chronicle changes over time. The property’s physical characteristics (exterior materials and finishes, window and door types, method of construction, etc.) should be recorded in a systematic fashion. Facilities files, such as property records and architectural plans, at the Public Works Office and other related departments should also be examined to determine the extent and severity of alterations to the extant historic properties.

Archeological sites, on the other hand, are more difficult to identify and locate. At the outset of any archeological investigation, qualified

personnel will conduct a literature and records search to identify any known archeological sites within the project area. Additional field investigations (Phase I survey) are undertaken to locate other sites and/or provide more information on previously recorded sites. A Phase I archeological survey usually consists of shovel tests in areas deemed most likely to contain archeological artifacts and remains. Soil removed during the shovel tests is screened, and any artifacts are identified and catalogued. The type, concentration, and number of recovered artifacts (or lack thereof) help determine and define archeological sites in the project area. The archaeologists will complete state archeological survey forms and will file them and support material to the SHPO and/or a designated repository for curation.

Only qualified individuals who meet professional standards as established by the Department of the Interior should undertake this identification step of the Section 106 process. A historian should supervise research efforts, an architectural historian or historical architect should oversee all field-related activities related to extant historic resources, and an archeologist should coordinate all archeological investigations. The report should include a historic context/background that describes major historical trends and events associated with the activity; an associated property types discussion that groups extant resources into broad categories; a discussion of survey, research, and evaluation methods; bibliographic references; an inventory of all identified properties; and assessments that succinctly justify whether each property is potentially eligible for inclusion in the NRHP.

The documentation should be submitted to the SHPO/THPO for comments. If prepared to the satisfaction of the SHPO/THPO, the survey will:

- Examine historical factors that contributed to the development of the activity and how they influenced the kinds of resources that were built.
- Compare the activity with others in the state or region.
- Provide written and/or graphic documentation that substantiates active periods of growth and development in the host community.
- Identify the architect and contractors of the facilities and determine how significant these buildings are in the context of their careers.

- Document existing physical characteristics of all buildings, structures, objects, and sites at the activity and determine what shared physical and associative qualities may exist to group the resources into broader categories.
- Identify alterations and/or additions to the cultural resources and determine why these changes were made.
- Determine how physical changes and modifications affect each identified property's ability to convey its significance.
- Establish whether each identified cultural resource is associated with noteworthy historical events, trends, and/or persons.
- Determine whether each cultural resource is a unique or good example of its kind or exhibits unusual or noteworthy craftsmanship or design qualities.
- Determine whether each cultural resource retains the ability to shed light on an important aspect of the past.
- Evaluate whether each cultural resource retains its integrity and meets any of the NRHP Criteria or NRHP Criteria Considerations.

The documentation is initially submitted in draft form to allow the SHPO/THPO to comment on report findings, conclusions, and NRHP recommendations. The draft report should be distributed to any other consulting parties, and all documentation should be made available to the public. If a traditional cultural property is identified in the survey, both the SHPO/THPO and any Native American tribes or Native Hawaiian organizations that attach religious and cultural significance to the property must evaluate its significance. If insufficient documentation is presented, the SHPO/THPO may ask for clarification and/or supplemental documentation before submittal of the final report.

#### **Evaluating Historic Significance**

The agency, in consultation with the SHPO/THPO and any Native American tribe or Native Hawaiian organization that attaches religious and cultural significance to identified properties, uses the National Register Criteria to evaluate each property identified in the survey. The results of the evaluation are provided to the SHPO/THPO for review. The SHPO/THPO has 30 days to review the survey documentation. If the agency determines that a property meets the National Register Criteria and the SHPO/THPO agrees, it is considered eligible for the NRHP for Section 106 purposes.

Conversely, if the agency determines that a property does not meet the Criteria and the SHPO/THPO agrees, then it is considered not eligible. If the agency and the SHPO/THPO do not agree on the NRHP eligibility of a property, then the agency must obtain a determination of eligibility from the National Park Service (NPS). The Advisory Council on Historic Preservation (ACHP) and the NPS may also request that the agency obtain a determination of eligibility. If a Native American tribe or Native Hawaiian organization that attaches religious and cultural significance to a property of tribal lands does not agree with the agency's eligibility determination, it may ask the ACHP to request a determination of eligibility from the National Park Service.

When the documentation is finalized and meets SHPO/THPO standards, there are two possible outcomes:

- *No Historic Properties Affected.* This finding is appropriate when no historic properties are present in the project area, or when there are historic properties present but the project will have no effect on them. No further documentation is required to be submitted to the SHPO/THPO, and the federal agency can proceed with planned actions or activities without involving the SHPO/THPO.
- *Historic Properties Present and Affected.* This finding is appropriate when historic properties will be affected, or may be affected, by the federal undertaking. The federal agency must comply with other provisions of Section 106 of the NHPA of 1966. The agency must consider what effects any federally sponsored projects or activities may have on the integrity of a significant cultural resource and consider mitigative steps to offset these actions (see Step Three of the Section 106 Process: Assessing Effects).

### ***STEP THREE: ASSESSING EFFECTS***

When a federal undertaking will impact significant historic and archeological resources, the federal agency must determine whether these impacts constitute an adverse effect. An adverse effect occurs when an undertaking diminishes the integrity of the property's character-defining elements, that is, those physical characteristics that must be present for the property to convey its significance and thus make the property eligible for inclusion in the NRHP. The agency must consider both direct and indirect effects. Adverse effects should include any reasonably foreseeable effects that may be cumulative, occur later in time, or occur at a distance from the resource.

### **Integrity and Effects**

Integrity is a fundamental component of the Section 106 process because it is a requisite for NRHP eligibility. The NPS definition of Effect is intentionally broad to allow for myriad actions to be categorized as an effect; however, the Seven Aspects of Integrity serve as the key to understanding how certain activities can have an impact on integrity. Because it is a requisite for NRHP eligibility, it is important to understand how the SHPO applies them in Section 106 assessments.

*Integrity of Location* is one of the most important factors pertaining to an NRHP-eligible property and generally refers to the site on which the resource was originally built, or the location on which it achieved significance. Integrity of Location links a property to a specific site and represents a vital component in the ability of a resource to convey its significance. If moved, a resource loses an important part of its overall historic character. Resources that were relocated during their period of significance can, however, attain Integrity of Location relative to the new site. Undertakings that produce can affect Integrity of Location include relocating the resource to another site.

*Integrity of Design* refers to physical elements that define the character of a historic resource and include attributes such as the scale, massing, form, or layout of a resource. Integrity of Design also includes physical elements such as applied architectural ornamentation, the placement of windows and doors, the arrangement of interior spaces, and the type of structural systems and materials employed in the property's construction. The importance of Integrity of Design varies considerably and depends largely on the area of significance for which a historic resource is eligible for the NRHP. A property significant under NRHP Criterion C for architectural merit derives its significance from its physical characteristics. As such, the property should retain a high degree of its Integrity of Design. Alterations and additions can have a negative impact on the building's overall Integrity of Design and can compromise the property's NRHP eligibility. In contrast, a property eligible under NRHP Criterion A or B is significant for its historical associations and does not need to remain unaltered and in pristine condition. However, it must still retain sufficient Integrity of Design to appear much as it did during the property's period of significance. Undertakings that can adversely effect Integrity of Design include:

- Adding new wings and/or rooms.

- Enclosing windows and/or doors.
- Changing the size of window and/or door openings.
- Removing and/or changing porches and/or chimneys.
- Removing distinctive architectural detailing and/or ornamentation.
- Changing the roof form and/or pitch.

*Integrity of Setting* refers to the relationship between a resource and the open spaces that link it to its surroundings. Setting also refers to the physical context and placement in which a resource exists, its orientation, topographical features, landscape elements, vegetation, and/or the arrangement and placement of associated outbuildings. To retain its Integrity of Setting, a resource should be part of the property associated with its historic operation. The removal of associated outbuildings, landscaping, or the introduction of new buildings onto the grounds can have negative impact on Integrity of Setting. Undertakings that can produce Effects most likely to have an impact on the Integrity of Setting include:

- Removing or altering existing landscape features that are critical components of the property's historic character and/or use.
- Introducing new and historically inappropriate landscape features.
- Disturbing or moving any of the soil within an archeological site.
- Paving or covering areas that have been undeveloped or maintained as lawns.
- Re-orienting a resource on its existing site.
- Constructing new buildings on property historically associated with the resource.

*Integrity of Materials* is a particularly important Aspect of Integrity because most properties under military stewardship generally present a straightforward character and lack stylistic embellishment or ornamentation. Consequently, the materials used in a resource's construction, covering, or detailing assume greater significance as character-defining elements and include exterior finishes (wood siding, stucco, masonry, etc.), window frames, doors, chimneys, and

porch supports. Removing, replacing, or covering the resource's original materials can have a negative impact on a resource's integrity, but this concern is limited primarily to exterior finishes. Only in rare instances- such as the interior of a hangar or a building's finely detailed lobby-will interior features be an important consideration involving Integrity of Materials. Undertakings that can negatively impact Integrity of Materials include:

- Replacing original doors or windows.
- Covering original exterior finish (such as wood siding) with synthetic or alternate materials (such as vinyl, aluminum, or stucco).
- Using replacement materials that do not match the color, size, and/or texture of original exterior finishes.
- Painting masonry surfaces.
- Repointing mortar joints with Portland cement, unless it is the content of the historic mortar.

*Integrity of Workmanship* is the physical evidence that demonstrates the skill of a craftsman's labors or expertise and can be based on common building traditions, a popular architectural style or form, or innovative work techniques or skills. Integrity of Workmanship is often critical for assessing and evaluating an archeological site that may be eligible for the NRHP under Criterion D. A recovered artifact that retains its Integrity of Workmanship can illustrate a high level of craftsmanship or resourcefulness of a people or culture. Integrity of Workmanship is also critical for a historic property that is significant under NRHP Criterion C. Such a resource derives significance from its physical traits and attributes, as manifested by architectural detailing and/or ornamentation. These qualities are not only indicative of a particular style or movement, they also illustrate the skills and craftsmanship of a builder, contractor, or carpenter. Conversely, most military properties are utilitarian buildings that typically lack noteworthy stylistic ornamentation and embellishment. Evaluating their Integrity of Workmanship relies more on the extent to which they adhere to original building specifications and construction technology. Military resources that possess Integrity of Workmanship should retain sufficient original materials and methods of construction to relay an understanding of the workmanship and building technology from the historic period. Types of undertakings that can impact Integrity of Workmanship include:

- Removing or covering architectural ornamentation/embellishment.
- Changing salient physical features such as the replacement of architectural ornamentation with modern or anachronistic elements.

*Integrity of Feeling* is measured by the degree to which the aesthetic and historic character of a resource is conveyed, and one must assess the degree to which the resource expresses its original aesthetic and historic qualities. A property that retains its Integrity of Feeling closely resembles its appearance at the time it achieved significance and remains in a good state of repair. Integrity of Feeling can be compromised by additions, alterations, and other changes to a resource's historic character. Modifications to the form, massing, layout, use of materials, and orientation are examples of changes that can detract from a property's Integrity of Feeling. In addition, a resource that retains its other Aspects of Integrity but is in deteriorated condition may have lost its Integrity of Feeling.

Undertakings that can negatively impact Integrity of Feeling include:

- Installing windows with different configurations than the original.
- Painting masonry surfaces.
- Using replacement materials of a different color, shape, or texture than original used.
- Changing the roof type or pitch.
- Erecting a new wing or addition.
- Allowing a resource to fall into extreme disrepair.
- Encroaching development of land that abuts or adjoins an archeological site.

*Integrity of Association* links a resource to the historic trends or events through which its significance was attained. Most properties under military stewardship retain their Integrity of Association if they are still used for military purposes and fulfill roles that are the same or similar to their historic functions. Buildings used for entirely different purposes than their intended use are often modified to such an extent that Integrity of Association is compromised. Undertakings that produce Effects that can impact Integrity of Association include:

- Selling a federally owned property.
- Transferring a property to another federal agency.
- Using a property for an activity unrelated to its original function or use.

### **Two Types of Effects**

The federal agency is responsible for determining whether an undertaking produces an adverse effect, in consultation with the SHPO/THPO and any Native American tribe or Native Hawaiian organization that attaches religious and cultural significance to a property. Any views provided by other consulting parties and the public must be considered by the agency when assessing possible adverse effects. There are two possible findings when assessing effects: Adverse Effect and No Adverse Effect.

*Adverse Effects* may result from the following actions:

- Destruction of, or damage to, a property.
- Alteration of a property that is not in accordance with the Secretary of the Interior's Standards for Treatment of Historic Properties (36 CFR 68).
- Removal of the property from its historic location.
- Change of the character of the property's use, or of character-defining features within the property's setting.
- Addition of intrusive visual, atmospheric, or audible elements.
- Neglect of a property (except if such neglect is a recognized quality of a traditional cultural property).
- Transfer, lease, or sale of a property out of federal control, without restrictive covenants.

Conversely, undertakings that typically result in a determination of *no adverse effect* might include:

- Routine maintenance and repair of a resource that does not alter the historic fabric.
- Repair of existing roads in the public right-of-way.
- Additions or changes to noncontributing (nonhistoric) properties in an NRHP-eligible historic district that do not alter or negatively impact the historic district's overall integrity.

The agency should consult the SHPO/THPO regarding measures to avoid potential Adverse Effects. These measures may include:

- Submitting project plans to the SHPO/THPO to ensure consistency with the Secretary of the Interior's Standards for the Treatment of Historic Properties;
- Rehabilitating the historic property to preserve its physical characteristics.
- Selecting an alternate site for the construction of a new building or structure.
- Changing the design or limiting the scope of the proposed work.
- Imposing adequate restrictive covenants at the time of a property's transfer, lease, or sale, to ensure the long-term preservation of the property's significance.

*NO ADVERSE EFFECT*

If the agency finds that there is No Adverse Effect to the property, then the agency should notify the SHPO/THPO and all consulting parties and provide them with documentation of its findings. This documentation should include:

- A description of the undertaking, specifying the federal involvement and the project's area of potential effects, including photographs, maps, and drawings, as necessary.
- A description of the methodology used to identify historic properties, such as reference to a survey with SHPO-concurrence regarding NRHP eligibility recommendations.
- A description of the affected historic properties, including information on the characteristics that qualify them for inclusion in the NRHP.
- An explanation of why the finding of No Adverse Effect was appropriate.
- Copies or summaries of any views provided by consulting parties and the public.

The SHPO/THPO has 30 days upon receipt of the documentation to review the findings. If the SHPO/THPO agrees with the findings, the agency may proceed with the undertaking. Failure to respond within 30 days is considered agreement with the agency's findings by default.

If the SHPO/THPO or any other consulting party disagrees with the agency's findings within the 30-day review period, then the agency should proceed with further consultations to resolve the disagreement or request the ACHP to review the agency's findings.

If a Native American tribe or Native Hawaiian organization that attaches religious and cultural significance to a historic property disagrees with determinations within the 30-day review period, they must specify reasons for the disagreement and request further review by the ACHP. In addition, the ACHP, on its own initiative, may request further review of the findings within the initial 30-day review period. The ACHP has an additional 15 days to review the findings, upon receipt of the agency's documentation. Failure of the ACHP to respond within the 15-day review period is considered agreement with the agency's findings.

*ADVERSE EFFECT*

If the agency finds an Adverse Effect to a historic property, then consultations should proceed to the next step in the Section 106 process.

***STEP FOUR: RESOLVE ADVERSE EFFECTS***

If there is an Adverse Effect on historic properties, then further consultations are required to develop and evaluate alternatives to the undertaking that could avoid, minimize, or mitigate the adverse effects on the historic properties. The agency should notify the SHPO/THPO and all consulting parties of the adverse effect determination. The agency must also notify the ACHP of the adverse effect. The ACHP should be invited to serve as a consulting party if the agency wishes such ACHP participation, a National Historic Landmark is involved, or a Programmatic Agreement (PA) will be prepared as part of the consultation. The SHPO/THPO, a Native American tribe or Native Hawaiian organization, or any other consulting party may also request that the ACHP participate in the consultation. The ACHP may choose to become a consulting party on its own initiative, following notification from the agency.

The agency should provide the ACHP, SHPO/THPO, and any other consulting parties with documentation of its finding of Adverse Effect. This documentation should include:

- A description of the undertaking, specifying the federal involvement and the project's area of potential effects, including photographs, maps, and drawings, as necessary.

- A description of the methodology used to identify historic properties.
- A description of the affected historic properties, including information on the characteristics that qualify them for inclusion on the National Register.
- An explanation of why the finding of Adverse Effect was appropriate.
- Copies or summaries of any views provided by consulting parties and the public.

At this point, the agency, the SHPO/THPO, and the ACHP may agree to invite other individuals or organizations to become additional consulting parties. The agency should also make all documentation available to the public and provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking. As in earlier steps of the Section 106 process, the public involvement should reflect the nature and complexity of the undertaking and its effects on historic properties, and the relationship of the federal involvement to the overall undertaking.

**Avoidance, Minimization, and Mitigation of Adverse Effects**

During this phase of consultation, all the consulting parties should discuss and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate the adverse effects to historic properties. The following alternatives are usually considered by the consulting parties to avoid causing Adverse Effects:

- Moving the undertaking to an alternate site.
- Using an alternative design.
- Pursuing an alternative undertaking.
- Performing no undertaking at all.

If the alternatives are not acceptable or appropriate, the consulting parties must agree on steps or actions that can mitigate or offset the proposed undertaking, including the following:

- Limiting the magnitude of the undertaking.
- Rehabilitating, rather than demolishing, some historic properties.

- Adopting a planned program of preservation and maintenance (Programmatic Agreement).
- Moving historic properties.
- Donating, selling, or leasing historic property.
- Documenting a historic property before destroying it.

However, loss of historic properties is sometimes unavoidable and, in those cases, there may be no alternative to demolition or no way to mitigate loss of integrity. Such occurrences require the adoption of a formalized agreement (Memorandum of Agreement) that clearly delineates the roles, duties, and responsibilities to be carried out by the principal participants associated with the proposed undertaking.

#### **Memorandum of Agreement**

Agreements reached during the consultation process are formalized in a Memorandum of Agreement (MOA). The MOA is written to satisfy four primary purposes:

- To specify the mitigation or alternatives agreed to by the consulting parties.
- To identify who is responsible for carrying out the specified measures.
- To address comments of the ACHP.
- To serve as an acknowledgment of the consulting parties that the agency has taken into account the effects of the undertaking on the historic property. The MOA functions as a legal document that shows that the agency has satisfied the requirements of Section 106. When writing a clear, concise MOA, the writer should:
  - Identify the undertaking.
  - Identify the responsible agency.
  - Assign duties only to signatory or concurring parties.
  - Include a “sunset clause” that allows for a periodic review and reevaluation of the MOA.
  - Avoid using the passive voice.
  - Include all agreed-upon provisions.
  - Address the lay reader.
  - Define acronyms.

- Structure the document logically.
- Identify properties clearly and completely.
- Cover the entire undertaking.
- Provide complete citations.
- Use consistent terminology.
- Use terms that are consistent with statutory definitions where applicable.
- Define terms.
- Anticipate future effects.
- Include all statutory authorities.

The MOA should also contain three parts: a preamble, stipulations, and signatures. The preamble identifies the project, explains the legal authority of the MOA, and lists the parties in the agreement. The stipulations state the agreed-upon mitigation and identify the responsible parties. The signatures of the consulting parties prove that the agency has taken into account the Effects of its undertaking on historic properties and provided the ACHP with an opportunity to comment on the undertaking.

There are three ways to process an MOA: the Three-Party MOA, Two-Party MOA, and Agency-Council MOA.

*Three-Party MOA*

- Signed by the agency, SHPO, and ACHP.
- Consultation has no time limit.
- Any of the three parties can write the MOA.

*Two-Party MOA*

- Signed by the agency and SHPO (if ACHP did not participate in the consultation).
- Agency must submit MOA and adverse effect documentation to ACHP as notification of agreement.

*Agency-Council MOA*

- Rare means of processing an MOA-only occurs when the SHPO declines to sign an MOA.
- May be signed by just the agency and the ACHP.

Other consulting parties may be invited to sign the MOA with the agency, SHPO, and ACHP. However, if other parties refuse to sign, their refusal does not prevent the ACHP, the SHPO, and the agency from completing the MOA. All consulting parties, regardless of their signatory status, should receive a copy of the MOA. All MOAs must contain provisions for termination and for reconsideration if the undertaking has not been carried out within a specific time period. If the original terms of the MOA cannot be carried out, the signatories consult to make amendments to the agreement. If the agreement is not amended, any signatory may terminate the original MOA. The agency must then execute a new MOA, or alternatively may seek comments from the ACHP.

**Failure to Resolve Adverse Effects**

If the parties fail to resolve the adverse effects resulting from the undertaking, the agency, the SHPO/THPO, or the ACHP can terminate further consultation. Any party that terminates consultation should notify the other parties in writing. If the agency terminates consultation, the head of the agency or other policy-level officials must request comments from the ACHP. If the SHPO terminates consultation, the agency and the ACHP can execute an agency-council MOA without SHPO involvement. If the THPO terminates consultation for an undertaking affecting historic properties on tribal lands, the ACHP will provide comments to the agency. If the ACHP terminates consultation, the ACHP notifies the agency and all consulting parties. The ACHP will also provide its comments to the agency.

**ACHP Comments**

Prior to issuing its comments, the ACHP provides an opportunity for all parties to give their views on the undertaking and consultation process. The ACHP issues its comments within 45 days. The ACHP comments are provided to the agency head, with copies provided to the agency's Federal Preservation Officer and all other consulting parties. The ACHP may also issue comments for any undertaking, at the time the agency executes an MOA. If the ACHP provides comments following termination of consultation, the head of the agency must take the ACHP's comments into account when reaching a final decision on the undertaking. The agency head must also document this decision and prepare a written summary of the decision. The summary must be provided to the ACHP and all consulting parties. In addition, the public must be notified of the decision, and a copy of the summary made available for public inspection.

**Special Situations**

Occasionally, an agency may act on an undertaking in response to an emergency condition. The ACHP encourages agencies to develop procedures for taking historic properties into account during a disaster or emergency. If approved by the ACHP, these procedures would apply during any disaster or emergency declared by the President, a governor, or a tribal government, in lieu of the standard Section 106 process. An agency may propose an emergency undertaking as an essential and immediate response to a disaster or emergency declared by the President, a governor, a tribal government, or another immediate threat to life or property. Without prior procedures in place, either through a Programmatic Agreement or through the emergency provisions discussed earlier, the agency must notify the ACHP, the SHPO/THPO, and any applicable Native American tribe or Native Hawaiian organization of its proposed actions and give them an opportunity to comment within seven days, if time permits. The emergency provisions apply only to undertakings that will be implemented within 30 days of the emergency. The agency may request an extension of the 30-day limit. Immediate rescue and salvage operations to preserve life or property are exempt from the provisions of Section 106.

**Unexpected Late Discovery**

Unexpected discoveries of historic properties, especially those made during projects that involve excavation or other ground disturbance, occasionally occur and often have unforeseen effects. When a historic property is discovered after an undertaking has begun, the agency has several options for dealing with the discovery:

- Compliance with standard Section 106 process - the agency can request consultation to develop an MOA, if the project has not been approved or construction has not begun.
- Expedited Section 106 process - If the project has been approved and construction has already begun, the agency should develop a plan for handling the property and notify the ACHP, the SHPO/THPO, and any applicable Native American tribe or Native Hawaiian organization of its intentions within two days of the discovery. The notified parties will provide comments within two days. The agency must take their recommendations into account and provide a report of the actions when they are completed.
- AHPA compliance- if the property retains archeological value, it is subject to the requirements of the AHPA, with which the agency can comply instead of Section 106. The agency must

give the SHPO and any Native American tribe or Native Hawaiian organization that might attach religious and cultural significance to the property an opportunity to comment, and must provide the ACHP, SHPO/THPO, and the Native American tribe or Native Hawaiian organization with a report after work has been completed. When a discovery occurs on tribal land, the agency must obtain concurrence of the tribe on the proposed action and must comply with all applicable tribal regulations and procedures with the tribe during the implementation of any of these requirements.

To avoid project delays caused by unexpected discoveries, agencies should develop a plan for treating such properties prior to beginning work on a project. Such plans should be documented during the review process and included in MOAs.

#### *ALTERNATIVES TO STANDARD SECTION 106 REVIEW*

##### **Counterpart Procedures**

The agency may develop counterpart procedures that substitute for 36 CFR 800, in consultation with the ACHP. Consultations may also include SHPO/THPOs, Native American tribes, and Native Hawaiian organizations, as appropriate. These procedures must be reviewed and approved by the ACHP.

##### **Routine Cases**

For routine cases, the ACHP can:

- Exempt a program or category of undertakings from review under Section 106.
- Establish standard methods of treatment for a category of undertakings, effects, or historic properties.
- Issue program comments on an entire category of undertakings, rather than conducting individual reviews.

##### **Programmatic Agreement**

The Programmatic Agreement (PA) is a special type of agreement, typically developed for a complex undertaking or for a series of undertakings. PAs are appropriate when:

- Effects are similar and repetitive, or are multi-state or regional in scope.
- Effects cannot be fully determined prior to approval.

- Non-federal parties are delegated major decision-making responsibilities.
- Routine management activities are undertaken at federal installations.

To develop a PA, the ACHP and agency must consult. The consultation should also involve (as appropriate) SHPO/THPOs, the National Council of SHPOs, Native American tribes and Native Hawaiian organizations, other federal agencies, and members of the public. The agency will notify the public and arrange involvement appropriate to the subject matter and scope of the program. The ACHP, agency, and other appropriate consulting parties will sign and execute the PA. An approved PA satisfies the agency's Section 106 responsibilities for individual undertakings carried out in accordance with the agreement. PAs are applicable on tribal lands only if signed by the THPO, tribe, or their designated representative. If the agency fails to carry out the PA or the agreement is terminated, the agency must comply with Section 106 on a case-by-case basis.

**Concurrent Review With The National Environmental Policy Act**

The new Section 106 regulations provide a process allowing agencies to use an Environmental Document (EA) or Environmental Impact Statement (EIS) to comply with the Section 106 process. The goal is to simplify the often concurrent NEPA and Section 106 review processes, while ensuring that historic properties are taken into account in the NEPA process. If the agency decides to use an EA or EIS for Section 106 review, it must notify the SHPO/THPO and ACHP in advance. The agency must identify consulting parties, historic properties, and project effects. The agency must also consult with identified consulting parties regarding the project's effects, possible project alternatives, and any measures needed to mitigate for possible adverse effects. Public involvement must take place, using the agency's NEPA procedures.

Under this alternate process, an EA, draft EIS, or EIS must be submitted to the consulting parties for review. If a consulting party objects to the performance standards of the document or to the proposed resolution of effects, and the ACHP agrees with the objection, the alternate review process is terminated. The agency must then execute an MOA or seek ACHP comments, as required under the standard Section 106 process.

If no objections to the document are raised, the alternate process may continue, with the agency's Finding of No Significant Impact (FONSI) or Record of Decision (ROD) specifying all mitigation measures. Any mitigation measures must be adopted by the agency through a binding commitment.

**Native American Tribe and Native Hawaiian Consultation**

For any of the alternate processes, the appropriate THPO must be consulted, where appropriate, provided that the tribe has formally assumed Section 106 responsibilities of the SHPO on tribal lands. In addition, other tribes and Native Hawaiian organizations must be consulted if a program alternative would affect properties on tribal lands or religious and cultural properties off tribal lands.

**IMPORTANT CONTACTS FOR INFORMATION & COMPLIANCE ASSISTANCE**

***FEDERAL LEVEL POINTS-OF-CONTACT***

Engineering Field Division South, Naval Facilities Engineering Command

Historic Preservation Officer, Code 064RJ  
P.O. Box 19100  
North Charleston, SC 29419  
Telephone: (843) 820-5990  
Fax: (843) 820-7472

Advisory Council on Historic Preservation – Eastern Office of Project Review

1100 Pennsylvania Avenue, N.W.  
Suite 809  
Washington, D.C. 20004  
Telephone: (202) 606-8503  
Fax: (202) 606-8647  
E-mail: [achp@achp.gov](mailto:achp@achp.gov)  
Website: [www.achp.gov](http://www.achp.gov)

National Trust for Historic Preservation

1785 Massachusetts Avenue, N.W.  
Washington, D.C. 20036  
Telephone: (202) 673-4000

*STATE LEVEL POINTS-OF-CONTACT*

Texas Historical Commission (Texas SHPO)  
P. O. Box 12276  
Austin, Texas 78711  
512-463-6100

*NAGPRA INFORMATION & CONTACTS*

The United States Department of the Interior recognizes 556 tribal entities in the 48 contiguous states and in Alaska that are eligible for funding and services from the Bureau of Indian Affairs by virtue of their status as Native American tribes. Congress established recognition of organized, tribal entities through Section 104 of the Act of 2 November 1994 (Pub. L. 103-454; 108 Stat. 4791, 4792).

The Bureau of Indian Affairs updated its list of federally-recognized tribal entities on 30 December 1998 (63 FR 71941). The listed tribal entities are acknowledged to have the immunities and privileges available to other federally acknowledged Native American tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations, and obligations of such tribes.

For questions regarding whether a local tribal entity is a federally recognized tribe and has a THPO representing the tribe's interests, first check the following websites. Checking more than one site demonstrates a "good faith effort" on the part of the activity during consultation efforts:

[www.doi.gov/bia/tribes/telist.00.html](http://www.doi.gov/bia/tribes/telist.00.html)

<http://www.doi.gov/bia/bar/index1.htm>

<http://www.doi.gov/bia/bar/indexA.htm>

If you do not have access to the Internet or need further clarification on a tribal listing, contact the local office of Bureau of Indian Affairs, Eastern Division at:

Bureau of Indian Affairs, Eastern Region  
Attn: Franklin Keel, Regional Director  
3701 N. Fairfax Drive  
MS: 260-VASQ  
Arlington, VA 22203  
Telephone: (703) 235-2571  
Fax: (703) 235-8610

## INTEGRATED CULTURAL RESOURCES MANAGEMENT PLAN

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The local office of Indian Affairs will have the current listing of federally recognized tribes and whether that tribe has a THPO. They may also provide you with the telephone, address, and email of the THPO for the tribe in question. There are also websites that list the names and addresses of THPOs. These sites also contain maps of Native American Lands that allow you to check whether a geographic location is claimed by a registered Native American tribe. These sites also allow you to download versions of the maps in Adobe Acrobat format, for free. Some good resources on the Internet regarding THPOs and are:

<http://www.gdsc.bia.gov/products/default.htm>

As a last resort or to report a complaint, call the main number of the Bureau of Indian Affairs, headquartered in Washington, D.C.:

Bureau of Indian Affairs  
Attn: Daisy West, BIA  
Division of Tribal Government Services, MS-4631-MIB  
849 C Street, N.W.  
Washington, D.C. 20240  
Telephone: (202) 208-2475

