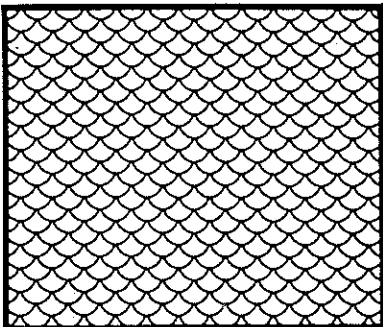
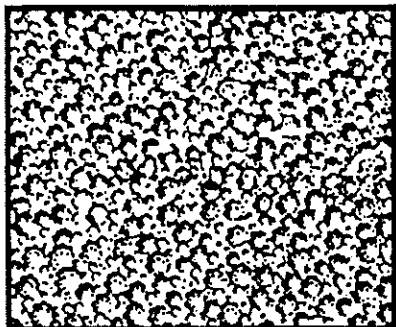
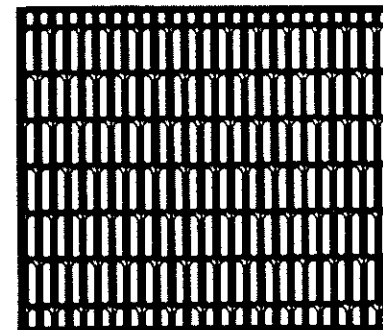
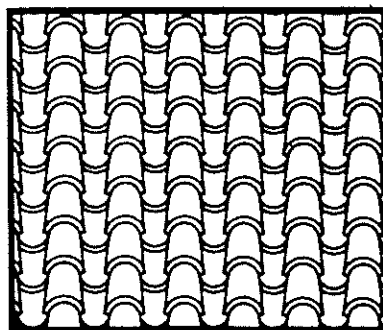
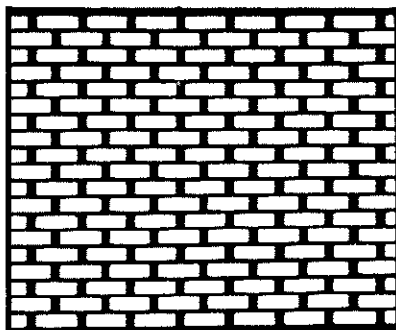
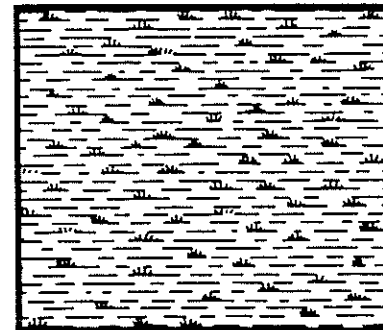
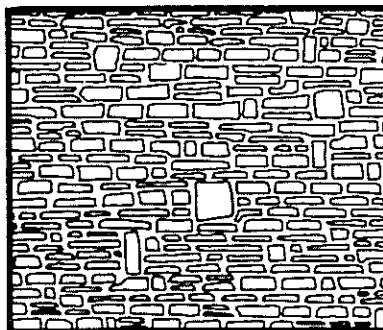
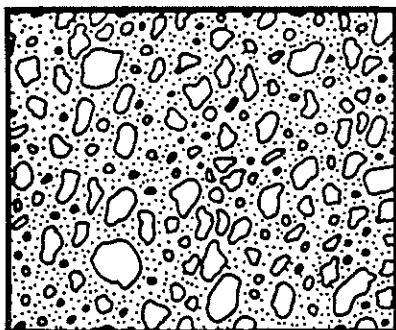


WORKING WITH
SECTION 106



Section 106, Step-by-Step



Advisory Council on Historic Preservation

Issued October 1986

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Section 106, Step-by-Step

Section 106 of the National Historic Preservation Act requires Federal agencies to consider the effects of their actions on historic properties and seek comments from an independent reviewing agency, the Advisory Council on Historic Preservation. The purpose of Section 106 is to avoid unnecessary harm to historic properties from Federal actions. Now commonly known as the "Section 106 process," the procedure for meeting Section 106 requirements is defined in regulations of the Advisory Council on Historic Preservation, "Protection of Historic Properties" (36 CFR Part 800). These revised regulations, which became effective October 1, 1986, were published in the Federal Register on September 2, 1986, at 51 FR 31115. This booklet provides a discussion of the Section 106 review process and briefly explains each of its steps.

SOME BACKGROUND ON SECTION 106

Origins of Section 106

The concerns that resulted in Section 106 began to develop during the 1950's and 1960's, when Federal law applied to a limited number of nationally significant historic properties. During those decades, hundreds of Federal projects -- such as highways, dams, and urban renewal -- were completed with little regard for historic resources valued by the communities in which they were located. As a result, those Federal projects destroyed or damaged thousands of historic properties, much to the dismay of local citizens.

Congress observed this phenomenon across the country and recognized that new legislation was needed to ensure that Federal agencies considered historic properties in their planning.

National Historic Preservation Act

The National Historic Preservation Act of 1966 (NHPA) was passed to address these concerns and has since been amended and strengthened several times. The cornerstone of Federal preservation law, NHPA established today's national historic preservation program, which includes elements for identification, assistance, and protection.

Identification is coordinated by the State Historic Preservation Officers (SHPO's), who are appointed by each governor. SHPO's develop comprehensive preservation plans for their States, direct their States' surveys and inventories of historic properties, and nominate properties to the National Register of Historic Places, which is maintained by the Department of the Interior. Identification is also carried out by Federal agencies, local communities, certified local government historic preservation programs, and private industry as part of project and program planning.

Assistance under NHPA is the responsibility of the Department of the Interior, which has authority to make grants-in-aid and which offers published technical guidance on many preservation issues. Other Federal assistance for historic preservation is available through tax incentives for rehabilitation and the use of various Federal grant programs to achieve preservation objectives.

Protection is generally integrated into the planning process for Federal actions that may affect historic properties. Sections 110 and 106 of NHPA assign responsibilities to all Federal agencies.

What Section 110
of NHPA requires
of Federal agencies

Under Section 110, all Federal agencies must carry out their programs in accordance with, and in furtherance of, national historic preservation policy; designate historic preservation officers to coordinate the agencies' activities under the act; identify and preserve historic properties under their ownership or control; and make efforts to minimize harm to National Historic Landmarks.

What Section 106
of NHPA requires
of Federal agencies

Section 106 requires each agency to take into account the effects of its actions on historic properties. Furthermore, an agency must afford the Advisory Council on Historic Preservation -- an independent Federal agency created by NHPA -- an opportunity to comment on any of the agency's undertakings that could affect historic properties.

The language of Section 106 of the National Historic Preservation Act as amended (16 U.S.C. §§ 470f) follows:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.

Section 106 applies to all properties already listed in the National Register, to properties formally determined eligible for listing, and to properties not formally determined eligible but that meet specified eligibility criteria. This means that properties that have not yet been listed, and even properties that have not yet been discovered, can be eligible for consideration under Section 106.

Evolution of the
Section 106
commenting process

While Section 106 of NHPA tells agencies they must take the effects of their undertakings into account and afford the Council an opportunity to comment, it does not tell them how. Acting under the authority of Section 211 of NHPA, the Council has developed a process for carrying out Section 106 responsibilities. This is set forth in regulations, "Protection of Historic Properties," at 36 CFR Part 800.

The first Section 106 procedures were issued in 1968. They evolved over the years and were recast as regulations in 1979. Recently revised and reissued, the current regulations took effect on October 1, 1986. An annotated version of these regulations is available from the Council.

Basic Section 106
review steps

The Section 106 review process includes steps for identifying and evaluating historic properties, assessing the effects of the agency's proposed action on the historic properties, and, if there is a harmful (adverse)

effect, consultation about ways to avoid, reduce, or mitigate that harm.

Consultation always involves the agency and the SHPO (unless the SHPO declines to participate), and often includes the Council and other interested persons. Typically, such consultation results in a Memorandum of Agreement (MOA), which sets out specific steps for avoiding or reducing harm to historic properties. When an MOA has been accepted by the Council, it serves as the Council's comment. In those cases in which the consulting parties cannot reach agreement, consultation may be terminated and the agency may request Council comments directly.

In the early years of Section 106 review, the steps of identification, assessment of effect, and mitigation were almost universally applied on a project-by-project basis, and effects were considered for a particular location or site. Under current regulations, agencies may obtain Council comment on a programmatic basis, eliminating the need for case-by-case Council involvement. This approach saves time and money for both the agency and the Council and tends to institutionalize preservation concerns in agency program operation. As a result, the programmatic approach in many instances accomplishes historic preservation objectives even more effectively than case-by-case review.

Principles of
Section 106 review

Whether an agency seeks Council comment on a case-by-case or programmatic basis, the principles involved are the same. Inherent in the philosophy underlying Section 106 is the belief that a built environment in which old and new blend harmoniously is the best in which to live and work. At the same time, this philosophy recognizes that pure preservation of every historic property is unrealistic and not in the public interest.

Hence, the Section 106 process does not require preservation in every case. Nor does it give the Council veto power over an agency's actions. What it does require is full consideration of preservation values by Federal agencies. Section 106 "solutions" resulting from the process can range from the purest preservation to unmitigated loss of a property. However, Section 106 does ensure that an agency's decision about how to treat historic properties

results from meaningful consideration of historic values and of options available to protect the properties. In short, the Section 106 review process ensures that an agency weighs preservation into the balance with the projected benefit of the completed undertaking, costs, and other factors.

Another Section 106 principle has to do with timing. It is important that consideration of historic properties occur in the early stages of project planning so that preservation concerns can receive thorough consideration as a project is planned. Early preservation review also permits modifications to a project while they are relatively easy to accomplish and reduces the potential for conflict and delay.

Properties subject
to Section 106

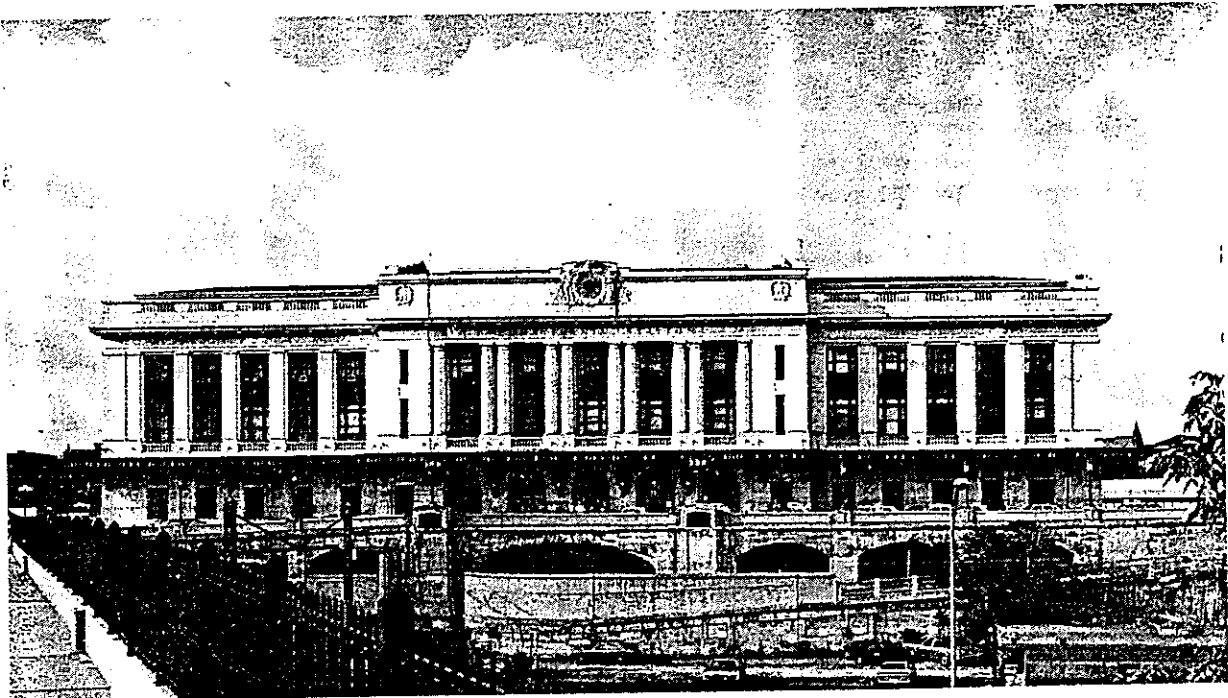
Because Section 106 extends not only to National Register-listed properties but to eligible unlisted (and especially in the case of archeology, often even undiscovered) properties as well, it is essential to understand what qualifies a property for National Register listing.

Department of the Interior regulations describe the National Register criteria for listing this way [36 CFR Section 60.4]:

The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and that (a) are associated with events that have made a significant contribution to the broad patterns of our history; or (b) that are associated with the lives of persons significant in our past; or (c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant distinguishable entity whose components may lack individual distinction; or (d) that have yielded or may be likely to yield information important in history or prehistory.

SECTION 106 applies to any property listed in, or eligible for, the National Register of Historic Places, the official list of the Nation's cultural resources worthy of preservation. Buildings, structures, objects, sites, and districts are included in the National Register for their importance in American history, architecture, archeology, culture, or engineering.

Properties included on the National Register range from large-scale, monumentally proportioned buildings such as the Baltimore Pennsylvania Station in Baltimore, Maryland, to smaller scale, regionally distinctive buildings such as the Toyo Theater, Honolulu, Hawaii.



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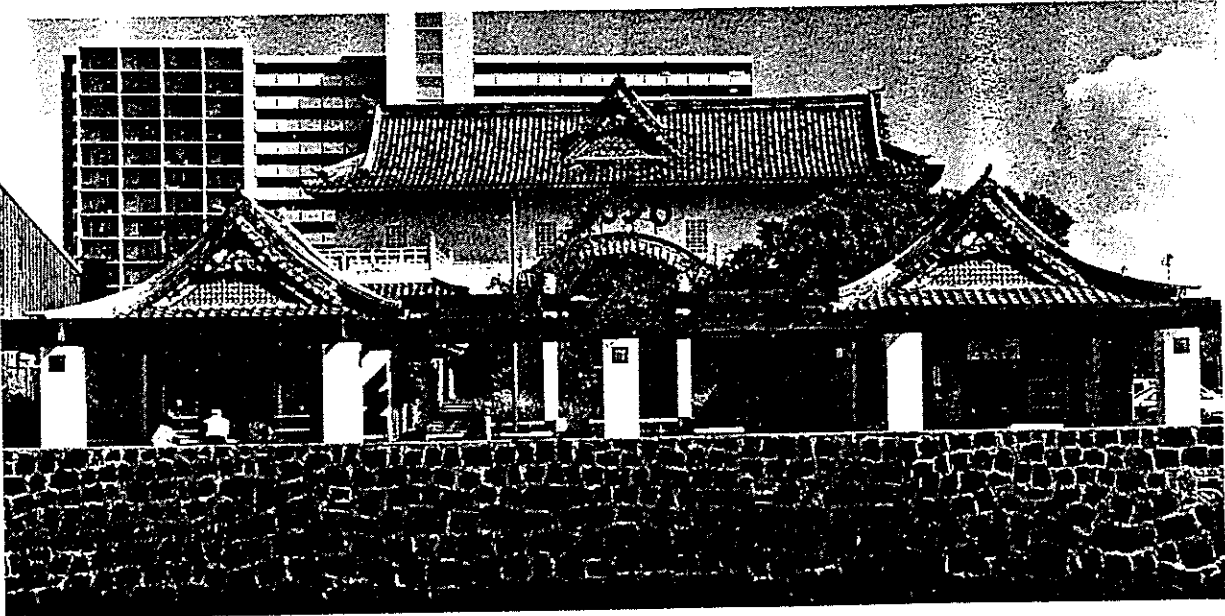
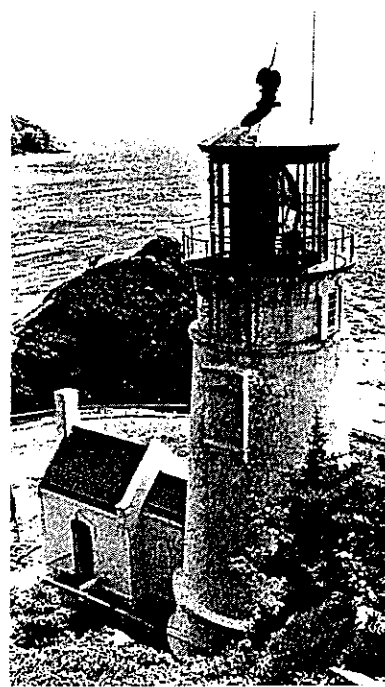
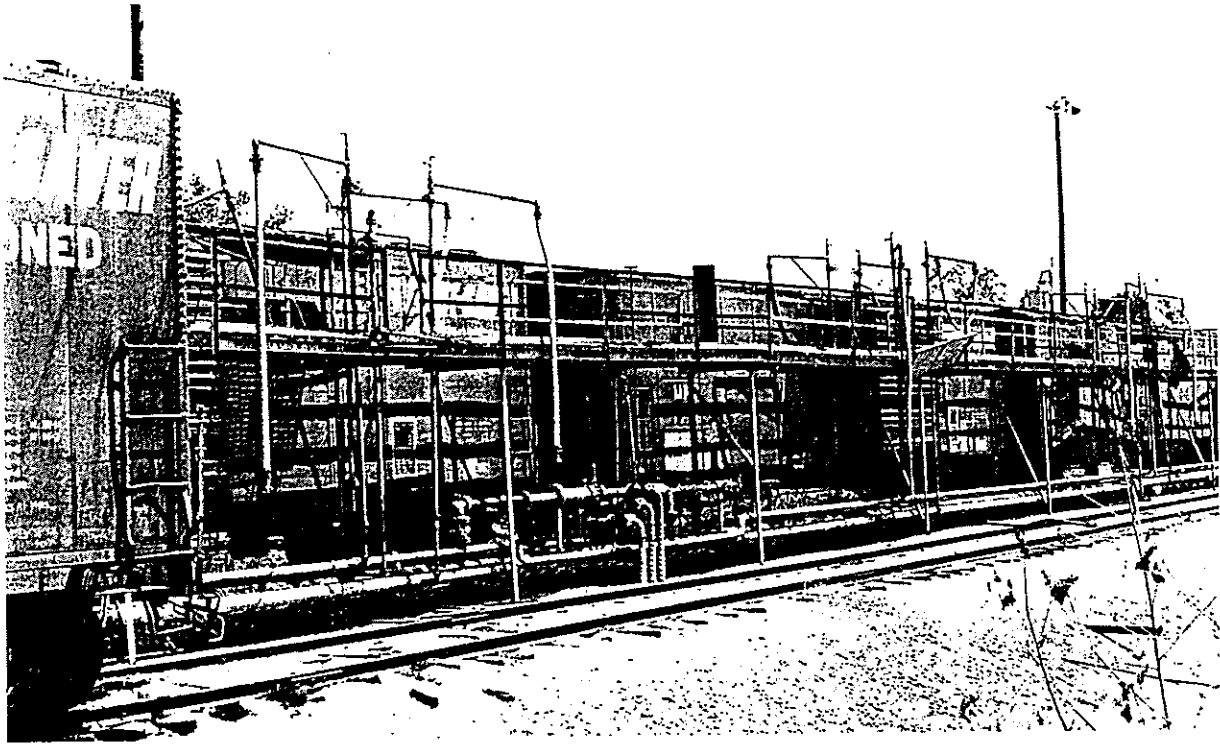


Photo credits: Toyo Theatre courtesy of Hawaii State Historic Preservation Office/Rick Regan; Baltimore Pennsylvania Station courtesy of Federal Railway Administration/©Steve Rosenthal.

Owned and administered by the U.S. Coast Guard, the Heceta Head Lighthouse is one of nine historic lighthouses remaining on the Oregon coast. The Eureka Lily Headframe is the only 4-post headframe of its type listed in the Tintic Mining District Multiple Resource Area near Eureka, Utah. The Poplar Grove Tide Mill, in operation until 1912, is the only known tide mill still standing in Virginia. This archeological site on the Old Hampton waterfront in Virginia was excavated in connection with an Urban Development Action Grant project that was reviewed under Section 106.





An industrial structure associated with the oil industry, the Sinclair Loading Rack is located along an Oklahoma railroad, where it could fill large tank storage cars easily and quickly. The Pleasant Hill Historic District in Macon, Georgia is a significant historic Black neighborhood.

Photo credits: Heceta Head Lighthouse courtesy of Oregon State Historic Preservation Office; Eureka Lily Headframe courtesy of Utah State Historical Society/Paul Mogensen; Poplar Grove Tide Mill courtesy of Virginia Division of Historic Landmarks; Old Hampton Waterfront archeology site courtesy of MAAR Associates; Sinclair Loading Rack courtesy of Oklahoma Historical Society/Mark Miller; Pleasant Hill Historic District courtesy of Georgia Department of Natural Resources/James R. Lockhart.

The National Register criteria are broadly drawn, in response to clear Congressional direction that locally valued places be included. The criteria require that a property retain integrity. In addition, it must be associated with historic lives or events; historically, architecturally, or artistically distinctive; or valuable as a source of information.

Properties are nominated to the National Register by SHPO's, through certified local government historic preservation programs, and by Federal agencies (pursuant to Section 110 of NHPA). There are more than 45,000 listings, many of which are districts, and more are being nominated daily.

Federal actions
subject to
Section 106

The word "undertaking" was used deliberately in NHPA and in Council regulations to connote a broad range of Federal actions. The statutory language refers specifically to undertakings over which Federal agencies have either "direct" or "indirect" jurisdiction. Three kinds of undertakings are alluded to: Federal undertakings (actions undertaken directly by a Federal agency); federally assisted undertakings (for example, activities receiving direct Federal financial assistance or such indirect assistance as loan guarantees and mortgage insurance); and federally licensed undertakings (undertakings requiring permits or other entitlements from Federal agencies).

In its regulations, the Council has defined the term "undertaking" to include Federal actions that can result in changes in the character or use of historic properties, if such properties are located in the area to be affected by an action. [Section 800.2(o)] The intent of this definition is to make it clear that actions which by their nature have no potential to affect historic properties (for example, providing hot lunches to school children or installing new radios in police cars) need not be subjected to Section 106 review, even though they are federally supported.

Agencies subject
to Section 106

The agency responsible for meeting Section 106 requirements can be any component of the Federal Government directly or indirectly responsible for an undertaking. Most departments have delegated the responsibility for Section 106 compliance to their constituent bureaus and offices, and in many instances these units in

turn look to their field offices to ensure compliance.

For certain programs of the Department of Housing and Urban Development, notably Community Development Block Grants (CDBG), Urban Development Action Grants (UDAG), the Rental Rehabilitation Program, and the Housing Development Grant Program (HoDAG), compliance responsibility has been delegated by statute to the local governments as recipients of the grants.

Effect of Council regulations

As Federal regulations, the procedures set forth in 36 CFR Part 800 are binding on all agencies, including the Council. While the regulations specifically state at Section 800.3(b) that the procedures may be implemented in a flexible manner by agencies, agencies as well as the Council must meet the purposes of Section 106 of NHPA. Failure to do so may lead to litigation.

Counterpart regulations

Agencies may work with the Council's professional staff to develop counterpart regulations designed to meet the objectives of Section 106 while reflecting particular agency needs. When concurred in by the Council, counterpart regulations substitute for the Council's regulations. [Section 800.15]

The relationship of Section 106 to NEPA and other authorities

Council regulations encourage maximum coordination with the environmental review process required by the National Environmental Policy Act (NEPA). It is typical for agencies to design the draft environmental impact statement or draft environmental assessment so that it can also serve as part of the required documentation during Section 106 consultation. Normally an agency describes the outcome of the Section 106 review process in its final environmental impact statement or final environmental assessment. Undertakings that do not require an environmental impact statement or environmental assessment under NEPA still are subject to Section 106 if they have the potential to affect historic properties.

The Council suggests coordination between Section 106 and other statutes, as well. Council regulations encourage agencies to design determinations and agreements so that they also meet requirements of such other authorities as the Archeological and Historic Preservation Act, the Archeological Resources Protection Act,

Section 110 of NHPA, and Section 4(f) of the Department of Transportation Act. [Section 800.14]

Coordination with consideration of social and cultural values

Special social and cultural values related to historic properties are often important to Native American groups and local communities. Also, historic properties sometimes receive special consideration under the American Indian Religious Freedom Act. The regulations encourage agencies to consider intangible social and cultural values related to historic properties. The regulations provide for traditional cultural leaders and other Native Americans to be brought into the consultation process when historic properties of importance to them may be affected. [Sections 800.1(c)(2)(iii), 800.4(a)(1)(iii), 800.5(a), and 800.5(e)(1)(ii); see also Sections 800.7, 800.11, and 800.13]

Coordination with State and local reviews

Section 106 review is a Federal requirement separate and apart from any environmental or planning reviews required under State and local laws and ordinances. Coordination of Section 106 review with State and local review is recommended, however, to avoid redundant efforts. Under some circumstances, Section 106 review and review under State and local laws may be explicitly combined. Section 800.7 of the regulations permits SHPO's to establish review processes which, when approved by the Council, can stand in place of Section 106 review. Such processes could be identical with processes established to carry out the requirements of a State historic preservation or environmental statute. Section 800.1(c)(2)(i) of the regulations permits a local government whose historic preservation program has been certified pursuant to Section 101(c)(1) of NHPA to assume the duties of the SHPO when the local government, the SHPO, and the Council so agree. A local government assuming such duties could carry them out in coordination with functions required by a local ordinance.

HOW SECTION 106 REVIEW WORKS

Consideration of the effects of Federal undertakings on historic properties under Section 106 consists of five basic steps: identification and evaluation of the historic properties; assessment of the undertaking's

effects; consultation to avoid, reduce, or minimize adverse effects; Council comment; and the final agency decision about whether and how to proceed.

The remainder of this booklet briefly explains each step of the Section 106 review process. Bracketed references throughout refer the reader to the Council's current regulations.

STEP 1: IDENTIFY AND EVALUATE HISTORIC
PROPERTIES

Agency responsibility
for identification

Carrying out the tasks involved in the identification of historic properties -- properties included in or eligible for inclusion in the National Register -- is the responsibility of the agency official with direct or indirect jurisdiction over the undertaking. [Section 800.4] When the undertaking involves providing assistance or issuing a license, the agency may rely on the applicant to assist in the identification of historic properties, but the final responsibility for identification is the agency's. [Section 800.1(c)(i)] Council regulations state that efforts to identify historic properties should follow the Secretary of the Interior's "Standards and Guidelines for Archeology and Historic Preservation." [Section 800.4(b)] The following discussion clarifies how the agency can receive help in completing its identification responsibilities.

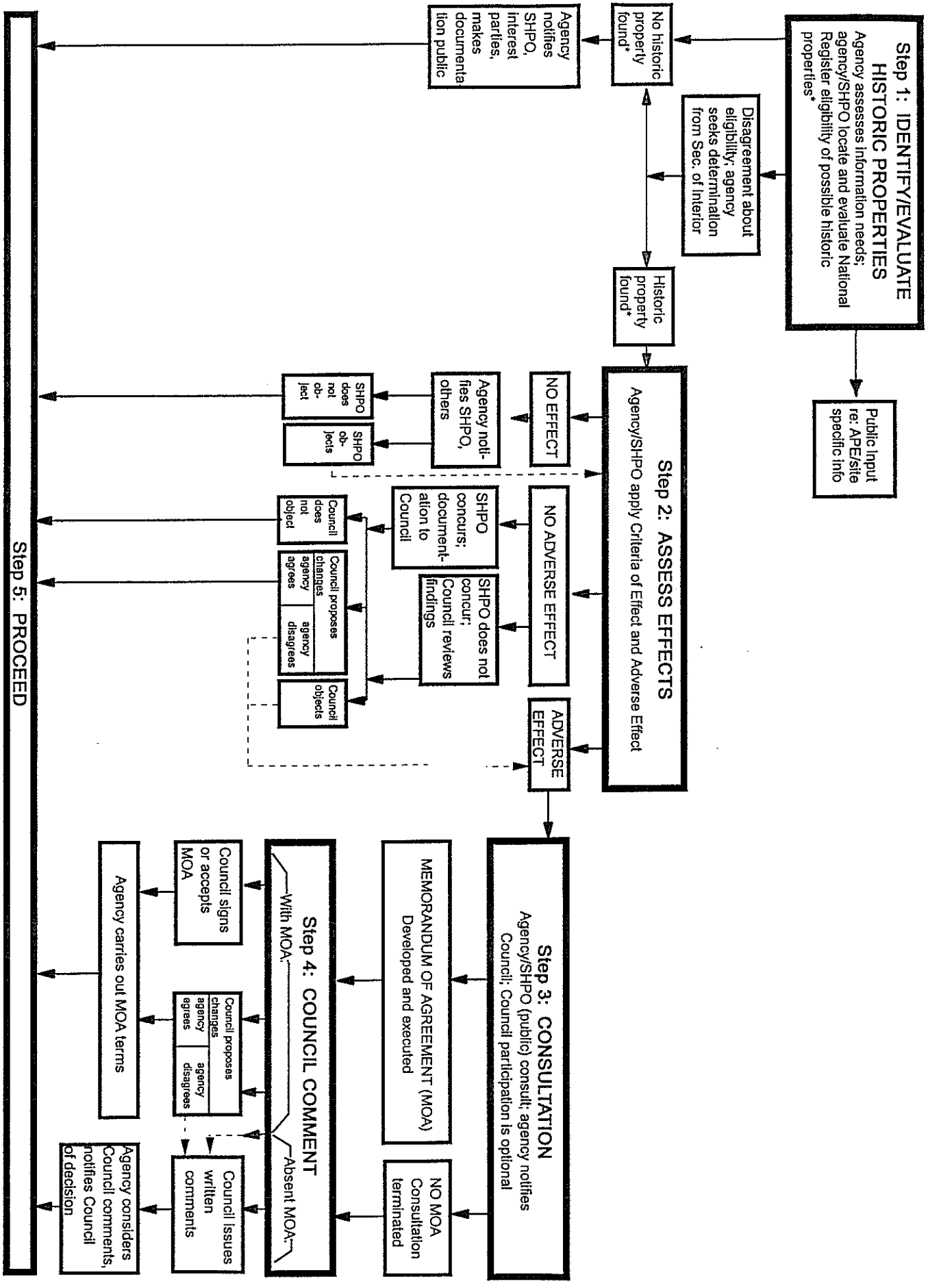
Determining that an
action constitutes
an undertaking

Before beginning identification work, the agency first establishes that its proposed action constitutes an "undertaking." [Section 800.4(a)(1)] That is, the agency determines whether the proposed action could result in changes in the character or use of any historic properties, in the event any such properties are located in the area of potential effects. [Section 800.2(o)]

It is important to note that determining whether a given Federal action constitutes an "undertaking" does not require that an agency know from the outset that specific historic properties will be subject to change as a result of the action. Considering whether an action could affect historic properties is a prospective activity in which the agency considers whether the action is of a sort that could affect historic properties, if any are there to be affected.

For example, a program designed to provide medical counseling to Federal workers would not normally be viewed as having the potential to affect historic properties, and so would not be an undertaking for purposes of Section 106. But, if the program could result in the modification of buildings to provide space in which to carry out such counseling, the program

Figure 1: THE BASIC STEPS OF SECTION 106 REVIEW



* Public may request Council review of agency's findings at these points

would be an undertaking, because if any of the buildings were historic, the program would have the potential to affect them.

Determining the area
of potential effects

The agency must also determine the "area of potential effects," which is defined in Council regulations as "the geographic area or areas within which an undertaking may cause changes in the character or use of historic properties, if any such properties exist." [Section 800.2(c)] It is not necessary to know that the area in question contains historic properties, or even to suspect that such properties exist, in order to recognize the area as the area of potential effect.

For example, the area in which a federally assisted construction project will disturb land or result in the demolition or alteration of buildings is always part of the area of potential effect, because if any historic properties exist there, they will surely experience change as a result of the project.

The area of potential effects need not be a contiguous area; it can include multiple alternative project sites or multiple areas in which possible changes are anticipated. For example, the area of potential effects of a highway construction project might include alternative construction corridors; locations from which borrow material might be obtained; areas where access might be provided to archeological sites, resulting in their disturbance by artifact seekers; areas where visual or audible changes could occur; and areas where the project could result in modified traffic patterns that might affect the livability or commercial viability of historic districts.

Assessing
information needs

After determining that its action constitutes an undertaking and establishing the area of potential effects, the agency begins the first task involved in identification, which is assessing what information it needs in order to identify historic properties. [Section 800.4(a)] This involves review of all available information that can help in determining whether there might be historic properties in the area of potential effects.

Using the published
National Register

One readily available source of information on known historic properties is the published

National Register of Historic Places. Single copies are available from: National Register, U.S. Department of the Interior, Washington, D.C. 20240. The most recent edition was published on February 6, 1979; annual updates of new National Register listings are published in the Federal Register each February or March. In addition, listings of properties already determined by the Secretary of the Interior to be eligible for the National Register are published periodically in the Federal Register. Information on National Register listings may also be obtained from the SHPO.

Although the published National Register is an important source of information on what is already known about the historic resources of an area, it cannot be assumed to be comprehensive. Historic properties are constantly being discovered and added to the National Register; many others remain to be discovered. Thus, the fact that an area of potential effect contains no properties presently included in or determined eligible for inclusion in the National Register does not mean that it contains no historic properties subject to review under Section 106.

Other sources of
information and advice

Therefore, in addition to reviewing information on properties already recorded in the National Register, the agency must consult other sources. The SHPO, a primary source for information, can advise the agency on previous identification studies pertinent to the area, previously recorded historic properties not listed in the National Register, and the likelihood that undiscovered or unrecorded properties exist in the area. The SHPO can provide information on properties being nominated and on State registers or State inventories. Other sources of information include the State Archeologist (where such an official exists), local academic institutions and museums, historical and archeological societies, local governments, Indian tribes, and published or unpublished background studies pertinent to the area.
[Section 800.4(a)(1)(i)]

The regulations require that the agency also seek information from local governments, Indian tribes, public and private organizations, and others who may have knowledge of historic properties in the area or who may be concerned about such properties. This serves two

purposes: it aids the agency in determining what it needs to do to identify historic properties, and it permits interested persons to express their interests in historic properties early in the agency's planning process so they can be considered in a timely manner. The agency is encouraged to use its existing planning processes to seek such information; the regulations do not require that special new processes be established to obtain it. [Section 800.4(a)(1)(iii)] Agencies are encouraged, however, to examine their administrative processes to ensure that they provide adequately for this and other forms of public participation, and to consult with the Council to develop improved processes if impediments to public participation are found to exist. [Section 800.1(b)]

The agency must also request the SHPO's views about whether further actions are needed to identify historic properties -- for example, field surveys or additional background research. [Section 800.4(a)(1)(ii)] Based on its review of available information and the advice of the SHPO, the agency then decides whether any further information gathering will be necessary to identify historic properties. Typical further actions include field surveys and the use of predictive models, which are discussed below. [Section 800.4(a)(2)]

Locating historic properties

Based on its assessment of existing information and further needs, the agency then moves on to the second task, which is to make a reasonable and good faith effort to actually locate historic properties that may be affected by the undertaking and to gather enough information to evaluate their eligibility for inclusion in the National Register. This effort is carried out in consultation with the SHPO and should be consistent with the Secretary of the Interior's "Standards and Guidelines for Archeology and Historic Preservation." The specific standards and guidelines within that document that are applicable to this stage of Section 106 review are the Secretary's "Standards and Guidelines for Preservation Planning," published at 48 FR 44716-44720, September 29, 1983, and the Secretary's "Standards and Guidelines for Identification," published at 48 FR 44720-44723, September 29, 1983. This effort should also be consistent with the agency's program for carrying out the identification requirements set

forth in Section 110(a)(2) of NHPA, for which guidelines are being developed by the Secretary of the Interior. [Section 800.4(b)]

Additional useful guidance about surveys can be found in two National Park Service publications: "Guidelines for Local Surveys: A Basis for Preservation Planning" and "The Archeological Survey: Methods and Uses." "Guidelines for Local Surveys" is available at no charge by requesting National Register Bulletin #24 from the U.S. Department of the Interior, National Park Service, National Register of Historic Places, P.O. Box 37127, Washington, DC 20013-7127. "The Archeological Survey" is available from the National Technical Information Service by sending \$16.95 plus \$3.00 for shipping and handling to NTIS, 5285 Fort Royal Road, Springfield, VA 22161; indicate identification #PB284061 on the order.

Surveys and predictive models

If a survey is needed, the SHPO will probably be able to provide State or regional guidelines for surveying and forms for recording survey methods and properties discovered. The SHPO may also be able to help identify individuals, institutions, and firms that can do survey work under contract. Some SHPO's conduct survey work themselves on behalf of Federal agencies, an activity authorized by Section 110(g) of NHPA. When large areas of potential effects are involved, an agency may find it useful to prepare a predictive model -- that is, a set of predictions about where historic properties of different kinds are likely to occur, based on background data -- and then to orient its survey work to test this model.

Reports of completed surveys, as well as of any other original identification research, should always be filed with the SHPO -- even if no historic properties were found -- so that the results can be incorporated into the SHPO's statewide inventory of historic properties. Although this is not a requirement of the regulations, it helps the SHPO build up a body of information and will help prevent redundant future studies of the same area.

Identifying classes of historic properties

In some cases, agencies may find it useful to identify and consider "classes" of historic properties. For example, if an undertaking will have difficult-to-define effects on a large area -- as would be the case when a federally

assisted water project makes it possible to begin irrigation agriculture in a large valley, or when a federally assisted housing program will rehabilitate buildings throughout a city -- it may not be feasible to identify all individual properties subject to effect prior to project approval. It may, however, be possible to predict that the undertaking will affect certain kinds of archeological sites in the agricultural valley or certain kinds of historic buildings in the city. Knowing that such effects will occur, it may be possible to develop systems to protect the significant characteristics of such properties. Thus the fact that it may not always be feasible to identify specific historic properties does not mean that an agency cannot carry out its responsibilities under Section 106.

Evaluating eligibility

When properties are found that may be historic but have never actually been evaluated, it is the agency's responsibility to complete the final task, which is to ascertain whether the properties are eligible for the National Register. To determine whether a property is eligible, the agency reviews the property with reference to the National Register listing criteria, which are listed on page 8 of this booklet. The regulations require that agencies also follow the Secretary of the Interior's "Standards and Guidelines for Evaluation," published at 48 FR 44723-44726. [Section 800.4(c)(1)] In addition, the regulations require that the agency's determination be made in consultation with the SHPO, but if the SHPO does not provide views as to the eligibility of properties, the SHPO is presumed to agree with the agency's determination. [Section 800.4(c)(5)]

In evaluating properties for historic significance, agencies should be aware that the passage of time or changing perceptions of significance may justify reevaluation of properties that were previously determined to be eligible or ineligible for the National Register. [Section 800.4(c)(1)]

When the agency and SHPO agree about eligibility

The agency and SHPO consult about eligibility for each property within the area of potential effects that may be historic. If the agency and SHPO agree that a property is eligible, it is treated as eligible for purposes of Section 106 [Section 800.4(c)(2)]; if they agree that a

property is not eligible, it is treated as not eligible for purposes of Section 106. [Section 800.4(c)(3)]. Others may request the Council to review eligibility findings, in which case the Council will refer the matter to the Secretary of the Interior. [Section 800.6(e)(3)]

When disagreement about eligibility occurs

If the agency and the SHPO cannot agree about National Register eligibility, the agency must obtain a formal determination of eligibility from the Keeper of the National Register, who acts on behalf of the Secretary of the Interior, in accordance with applicable National Park Service regulations. If either the Council or the Secretary so requests -- as either might after reviewing an agency/SHPO agreement about eligibility -- the agency must obtain a formal determination of eligibility from the Keeper. [Section 800.4(c)(4)]

Agency action when no historic properties are found

Once the agency has completed the identification tasks described above, the agency may find that there are no historic properties that may be affected by its proposed action. In that event, the agency:

- o Must provide documentation to the SHPO that it has found no historic properties;
- o Should notify other interested parties, such as those with whom the agency has consulted during identification, of the same thing; and
- o Must make pertinent documentation available to the public. [Section 800.4(d)]

When the agency has found no historic properties, it has completed the Section 106 process once it has taken the above actions. [Section 800.4(d)] However, any member of the public may question the agency's determination that there are no historic properties and may request a Council review of that finding. The Council must conduct its review within 30 days of such a request; the Council's finding may cause the agency to reconsider its finding of "no historic properties." [Section 800.6(e)]

Agency action when historic properties are found

If the agency finds one or more historic properties that its undertaking could affect, the agency proceeds to Step 2 in the Section 106 process, assessing effects. [Section 800.4(e)]

STEP 2: ASSESS EFFECTS

Once the agency has identified historic properties, it then determines whether its proposed activity could affect the properties in any way. Again, the agency consults with the SHPO to decide this and takes into account the views of any interested persons. [Section 800.5(a)] The agency's judgment about whether there could be an effect is based on the criteria of effect and adverse effect, which are found in the Council's regulations. [Section 800.9]

Figure 2: CRITERIA OF EFFECT AND ADVERSE EFFECT

Criterion of Effect: [Section 800.9(a)]

"An undertaking has an effect on a historic property when the undertaking may alter characteristics of the property that may qualify the property for inclusion in the National Register. For the purpose of determining effect, alteration to features of a property's location, setting, or use may be relevant depending on a property's significant characteristics and should be considered."

Criteria of Adverse Effect: [Section 800.9(b)]

"An undertaking is considered to have an adverse effect when the effect on a historic property may diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Adverse effects on historic properties include, but are not limited to:

- (1) Physical destruction, damage, or alteration of all or part of the property;
- (2) Isolation of the property from or alteration of the character of the property's setting when that character contributes to the property's qualification for the National Register;
- (3) Introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting;
- (4) Neglect of a property resulting in its deterioration or destruction; and
- (5) Transfer, lease, or sale of the property."

Exceptions to the Criteria of Adverse Effect: [Section 800.9(c)]

"Effects of an undertaking that would otherwise be found to be adverse may be considered as being not adverse for the purpose of these regulations:

- (1) When the historic property is of value only for its potential contribution to archeological, historical, or architectural research, and when such value can be substantially preserved through the conduct of appropriate research, and such research is conducted in accordance with applicable professional standards and guidelines;
 - (2) When the undertaking is limited to the rehabilitation of buildings and structures and is conducted in a manner that preserves the historical and architectural value of affected property through conformance with the Secretary's "Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings"; or
 - (3) When the undertaking is limited to the transfer, lease, or sale of a historic property, and adequate restrictions or conditions are included to ensure preservation of the property's significant historic features."
-

Applying the criteria
of effect and
adverse effect

Basically, if the undertaking could change in any way the characteristics that qualify the property for inclusion in the National Register, for better or for worse, it is considered to have an "effect." If the potential Federal activity could diminish the integrity of such characteristics, it is considered to have an "adverse effect."

Effects may occur at the same time and place as the undertaking, or they may occur later than or at a distance from the location of the undertaking. For example, highway construction that may cause the demolition of buildings or the disruption of archeological sites clearly has the potential to affect historic properties in the area or areas the highway traverses. If it can reasonably be anticipated that the highway, once built, will cause or accelerate changes in land use or traffic patterns in other areas, these changes are also potential effects of the action. The latter kind of effect is sometimes called "indirect," though this terminology is not used in the Council's regulations.

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

- o No effect: There is no effect of any kind (that is, neither harmful nor beneficial) on the historic properties;
- o 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; or
- o Adverse effect: There could be an effect, and that effect could diminish the integrity of such characteristics.

Agency action for a
finding of no effect

If there is no effect on historic properties,
the agency must:

- o Notify the SHPO and any interested persons who have made their concerns known to the agency (for example, parties with whom the agency has consulted during identification) that there has been a finding of no effect; and
- o Compile the documentation that supports the finding and make that documentation available for public inspection.

Unless the SHPO objects to the finding of no effect within 15 days or the agency decides to reconsider its finding after review by the Council under Section 800.6(e)(1), these actions complete the agency's Section 106 responsibilities. [Section 800.5(b)]

Agency action when an effect is found

If the agency determines that there is an effect, or if the SHPO objects to the agency's finding of no effect, the agency must consider whether the effect is adverse, using the criteria of adverse effect in the regulations. This is done in consultation with the SHPO. [Sections 800.5(c), 800.5(b), and 800.9(b)]

Agency action for a finding of no adverse effect

If there is effect, but the effect is not adverse, the agency has a choice. It may either:

- o Obtain the SHPO's concurrence with the finding of no adverse effect and then notify the Council with summary documentation, which it must also make available for public inspection [Section 800.5(d)(1)(i)]; or

- o Submit the finding of no adverse effect directly to the Council for a 30-day review period and notify the SHPO of its action. In this case, the agency must submit specific documentation spelled out in Section 800.8(a) of the regulations. [Section 800.5(d)(1)(ii)]

Submitting notice with summary documentation to the Council when SHPO concurs

When the SHPO concurs with the agency's finding of no adverse effect, the agency should include the following summary documentation when notifying the Council:

- o A map or other documentation showing the area of potential effects;

- o The name and a brief description of the undertaking;

- o A brief summary of the historic properties subject to effect;

- o A brief explanation of why the undertaking will have no adverse effect on the historic properties involved;

- o The written concurrence of the SHPO; and

- o The views of interested persons, if any.

Submitting no adverse effect documentation for Council review without mandatory SHPO concurrence

When the agency chooses to have the Council review an agency's finding of no adverse effect (without mandatory SHPO concurrence), Section 800.8(a) of the regulations prescribes the following documentation to be sent to the Council:

- o A description of the undertaking, including photographs, maps, and drawings, as necessary;
- o A description of historic properties that may be affected by the undertaking;
- o A description of the efforts used to identify historic properties;
- o A statement of how and why the criteria of adverse effect were found inapplicable; and
- o The views of the State Historic Preservation Officer, affected local governments, Indian tribes, Federal agencies, and the public, if any were provided, as well as a description of the means employed to solicit those views.

The Council's 30-day review period does not commence until this documentation has been provided.

Council response to a determination of no adverse effect

The Council may object to determinations of no adverse effect, whether made with the concurrence of the SHPO or submitted directly to the Council. If the Council does not object to the agency's determination within 30 days after it receives notice, the agency has completed its Section 106 requirements. [Section 800.5(d)(2)]

If the Council does object, it may propose changes in or conditions to the agency's finding. If the agency accepts these changes, it has completed its Section 106 requirements. [Section 800.5(d)(2)]

If the agency does not accept proposed Council changes or if the Council objects to the finding without proposing changes, the effect is considered adverse, and the agency then proceeds to Step 3 of the Section 106 process, consultation. [Section 800.5(d)(2)]

If the agency requires the Council's response to a determination of no adverse effect in less time than the 30 days allowed by the

regulations, the agency should contact the Council to make special arrangements.

Agency fulfillment
of conditions

In reaching a determination of no adverse effect, an agency may specify that the undertaking will be carried out in accordance with particular conditions (for example, that construction specifications will be reviewed and approved by the SHPO), or it may agree to such conditions when proposed by the SHPO or by the Council, as described above. If the agency has committed itself to conditions in this way, it must honor its commitments as it proceeds with its undertaking. [Section 800.5(d)(2)]

Agency action for a
finding of adverse
effect

If there is adverse effect, the agency proceeds with Step 3 of the Section 106 process, consultation. [Section 800.5(e)]



DESTRUCTION OR ALTERATION of historic property is considered the most serious adverse effect. The prehistoric mound shown opposite is being bulldozed without regard to its potential archeological significance.

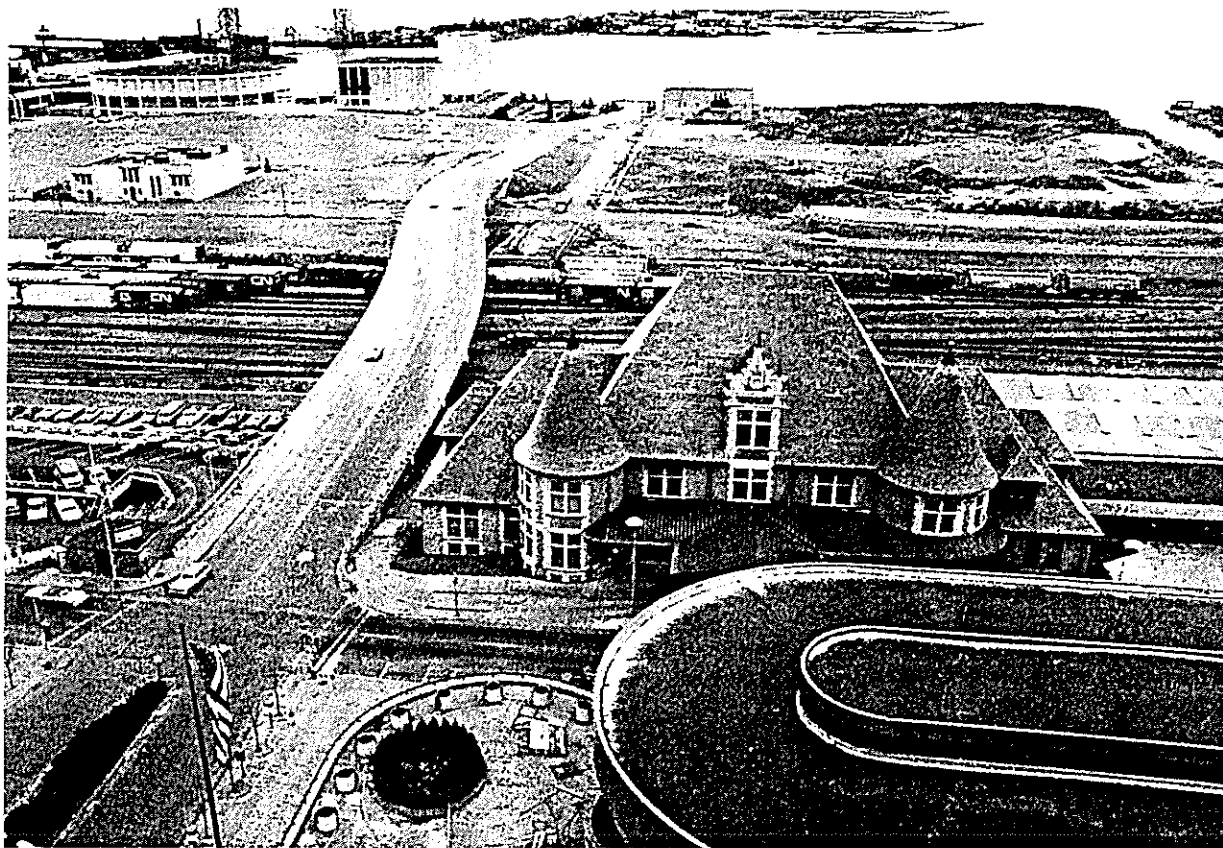
Alterations to the building above -- insertion of an inappropriate doorway and window and closure of three window openings -- are adverse to its historic architectural character. The alteration also introduces a visual element out of keeping with the property, another of the criteria of adverse effect.

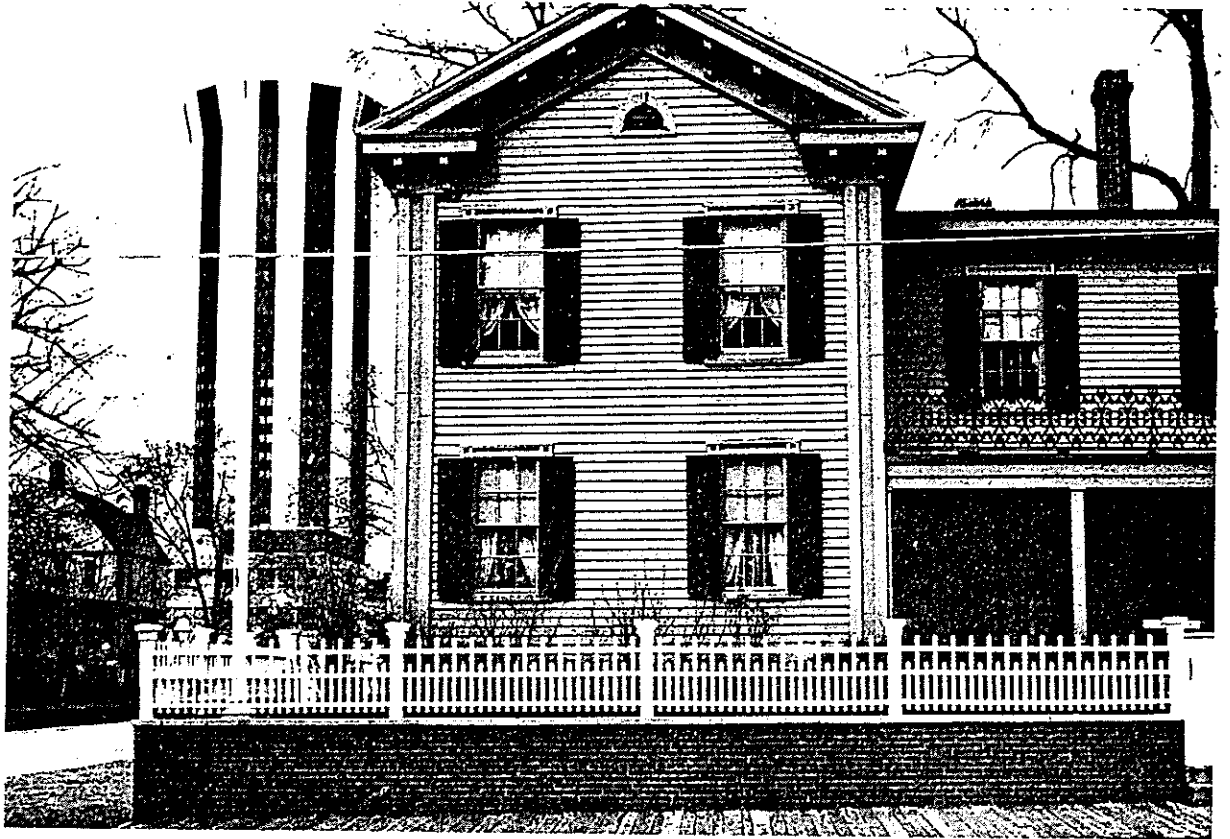




THE SCALE of surrounding buildings can isolate a property from its environment or alter its environment, both adverse effects. This office tower completely overwhelms the Vieux Carré Historic District.

Another type of isolation from, or alteration of, a property's surrounding environment can be caused by new land use and traffic patterns. This successfully rehabilitated 19th-century train station was once surrounded by 2- and 3-story commercial structures. Despite its excellent reuse as a community arts center, the depot is forever cut off from any remnant of its historic environment.





INTRUSIONS of a visual, audible, or atmospheric nature are also adverse effects, and can take many forms. At left, a large hotel structure intrudes upon Abraham Lincoln's home in Springfield, Illinois.

The window replacement on this 19th-century building is an intrusion of a different type; it is totally different from the building's existing window form.

Two commercial building "updates" illustrate how misguided alterations can detract from the appearance of a historic building. The building below was built about 1823, but a new first-floor storefront has been added that is totally out of keeping with the upper floors. In the lower left illustration, a new portico was added, and the first floors of both buildings were altered to match each other. They no longer match their upper floors, and the effect is jarring.



NEGLECT RESULTING in a property's deterioration or destruction is an obvious adverse effect. This lighthouse has been so neglected that it is open to the weather and in danger of collapse.



STEP 3: CONSULTATION

Initiating consultation

When an agency's proposed action will cause adverse effect, the agency initiates consultation. At a minimum, consultation takes place between the agency and the SHPO. The agency notifies the Council that consultation is beginning. The Council may participate in the consultation if either the SHPO or the agency so requests, and may also decide to do so without an invitation to join. [Section 800.5(e)]

Involving interested persons

Interested persons must be invited to join the consultation under some circumstances, and may be invited to do so in other cases at the discretion of the agency, the SHPO, and the Council, if participating. Interested persons who must be invited to consult are the following:

- o The head of a local government, upon his or her request, when the undertaking may affect historic properties within the local government's jurisdiction; [Section 800.5(e)(1)(i); see also 800.1(c)(2)(i)]
- o Applicants for and holders of grants, permits, or licenses involved in the undertaking, and owners of affected lands, upon their request; [Section 800.5(e)(1)(iii); see also 800.1(c)(2)(ii)]
- o The representative of an Indian tribe, when the undertaking will affect Indian lands; [Sections 800.5(e)(1)(ii) and 800.1(c)(2)(iii)] and
- o Other interested persons, when the agency official, SHPO, and the Council (if the latter is a consulting party) jointly deem it appropriate. [Section 800.5(e)(1)(iv)]

The regulations specifically identify traditional cultural leaders and other Native Americans as interested parties when historic properties of significance to such persons are involved, either within or beyond the boundaries of Indian lands. [Section 800.1(c)(2)(iii)] The regulations more generally identify "the public" as interested persons. [Section 800.1(c)(2)(iv)] Members of the public who often participate in consultation include local historical, historic preservation, and archeological organizations; civic and business associations; neighborhood

organizations; and individuals concerned with historic properties in the area of potential effects.

Purpose of consultation	Consultation brings together these principal parties to consider ways to avoid, reduce, or mitigate the adverse effects of the undertaking on historic properties. A successful consultation accommodates the needs of the agency's undertaking and the integrity of the historic property in a way that the consulting parties agree best serves the public interest.
Consideration of alternatives	Consultation typically gives first consideration to alternative ways of accomplishing the agency's goals without unacceptably damaging historic properties. Alternate sites, alternate undertakings, and alternate designs are typically addressed in an agency's planning process as well as during consultation. The alternative of not carrying out the undertaking at all should also always be considered in weighing the importance of the undertaking against the severity of its effects.
Mitigation of adverse effects	<p>Mitigation is the term for actions that reduce or compensate for the damage an undertaking does to historic properties. Typical mitigation measures include:</p> <ul style="list-style-type: none"> o <u>Limiting</u> the magnitude of the undertaking; o <u>Modifying</u> the undertaking through redesign, reorientation of construction on the project site, or other similar changes; o <u>Repair, rehabilitation, or restoration</u> of an affected historic property (as opposed, for instance, to demolition); o <u>Preservation</u> and maintenance operations for involved historic properties; o <u>Documentation</u> (drawings, photographs, histories) of buildings or structures that must be destroyed or substantially altered; o <u>Relocation</u> of historic properties; and o <u>Salvage</u> of archeological or architectural information and materials.
The concept of acceptable loss	There are instances in which no alternatives or mitigation are possible and the undertaking's

benefits in relation to the significance of the property justify damage -- or even destruction -- as an acceptable loss.

Documentation
for consultation

The agency official provides each consulting party with specific documentation for use during consultation. [Section 800.5(e)(2)] The documentation requirements are spelled out in the Council regulations at Section 800.8(b):

- o A description of the undertaking, including photographs, maps, and drawings, as necessary;
- o A description of the efforts to identify historic properties;
- o A description of the affected historic properties, using materials already compiled during evaluation of significance, as appropriate; and
- o A description of the undertaking's effects on historic properties.

Other documentation that may be developed in the course of consultation is to be shared with the consulting parties. [Section 800.5(e)(2)]

Public involvement
in consultation

In addition to involving interested persons in consultation, the agency official must provide an opportunity for members of the public to receive information and express their views about preservation issues pertinent to the undertaking. Agency officials are encouraged to use procedures for public involvement already in place within their agencies, but should ensure that these procedures adequately inform the public of preservation issues so as to elicit and seek to resolve public concerns about such issues. The agency official, SHPO, or Council may meet with interested persons or members of the public or may conduct a public information meeting in order to help involve the public. [Section 800.5(e)(3); see also Section 800.1(c)(2)(iv)]

The Memorandum
of Agreement (MOA)

In most cases, the consulting parties can agree on ways to accommodate historic preservation concerns as the undertaking proceeds. The product of consultation in such a case is a Memorandum of Agreement (MOA) that contains stipulations specifying how the undertaking will be carried out in order to avoid or mitigate adverse effects or accepting such effects.

Since Memoranda of Agreement are legally binding documents, care must be taken in drafting them. Suggested language for use in MOA's addressing commonly recurring types of undertakings and effects can be found in the Council's "Manual of Mitigation Measures (MOMM)."

The parties who sign an MOA may vary. When the Council participates in consultation, the Council, the agency, and the SHPO are signatories; when the Council is not a participant, the MOA is signed by the agency and the SHPO and is then submitted to the Council for review. [Section 800.5(e)(4)] Should the SHPO decline to sign a MOA, however, or fail to respond within 30 days to the agency's request for the SHPO's participation, the MOA may be signed only by the agency and the Council. [Section 800.1(c)(ii)]

When an undertaking will affect Indian lands, the governing body of the responsible Indian tribe must be invited to concur in the MOA. [Section 800.1(c)(2)(iii)] Although the regulations do not require that other consulting parties be invited to concur in the MOA, the agency, the SHPO, and the Council (if it is a participant in consultation) may agree to extend such an invitation. [Section 800.5(e)(4)]

If the Council is a consulting party, its execution of the MOA concludes the Section 106 process. If the Council is not a consulting party, the agency submits a signed MOA for Council review, [Section 800.5(e)(4)] which takes place as described below under Step 4.

Amendments to an MOA

If an undertaking is modified after an MOA is executed, or if for some reason the terms of the MOA cannot be carried out, it is necessary to amend the MOA. Amendments to an MOA are developed through consultation in the same manner as the original MOA. [Section 800.5(e)(5)]

If consultation fails

The Council encourages agencies to use consultation to the fullest extent practicable, but if, having engaged in consultation, the parties cannot agree on terms for an MOA, the consultation may be terminated. The agency, the SHPO, or the Council may state that further consultation will not be productive and thereby terminate the consultation process.

If this should happen, the agency official must request the Council's comments on the undertaking, notifying all other consulting parties of its request and providing the Council with specific forms of documentation. [Section 800.5(e)(6)] See Step 4, Council comment, for a discussion of how this is done.

STEP 4: COUNCIL COMMENT

Council comment can occur in one of two ways:

- o With an MOA: If the Council is a consulting party, as noted under Step 3, its execution of the MOA serves as the Council's comment on the undertaking. If the Council is not a consulting party, but rather reviews and accepts an MOA submitted by an agency, its acceptance of the submitted MOA serves as the Council's comment.
- o Absent an MOA: If consultation fails and the agency submits no MOA, the Council issues written comments.

Council comment,
with an MOA

When the Council has been a consulting party, neither the MOA nor additional documentation need be submitted to the Council after an MOA is executed, since these will already have been obtained by the Council. When the Council has not been a consulting party, the agency submits the MOA, signed by all consulting parties, to the Council for review. [Section 800.5(e)(4)] With the MOA, the agency must also submit specific documentation, which is spelled out in Council regulations at Sections 800.8(b) and 8(c) and described below. [Section 800.6(a)(1)]

Documentation for
Council comment,
with an MOA

Documentation required for Council review of an MOA submission is as follows:

- o Copies of the basic descriptive data developed when consultation was initiated (see "Documentation for consultation" on page 37);
- o The signed Memorandum of Agreement;
- o A description and evaluation of any proposed mitigation measures or alternatives that were considered to deal with the undertaking's effects; and
- o A summary of the views of the SHPO and any interested persons. [Section 800.8(c)]

Council review of an MOA submitted by the agency yields one of the following three results:

o Within 30 days after it receives the MOA and accompanying documentation, the Council accepts the MOA and informs all consulting parties. This concludes the Section 106 process. [Section 800.6(a)(1)(i)]

o Within 30 days after it receives the MOA and accompanying documentation, the Council advises the agency of changes to the MOA that would make it acceptable to the Council. If the agency and SHPO agree to these changes, or if the agency, the SHPO; and the Council reach agreement on alternative changes, the modified MOA will be accepted by the Council, concluding the Section 106 process. [Section 800.6(a)(1)(ii)] If the agency, SHPO, and Council cannot agree on changes, the agency notifies the Council. The Council provides written comments to the agency within 30 days of receiving this notice. [Section 800.6(a)(2)] OR

o Within 30 days after it receives the MOA and accompanying documentation, the Council advises the agency that it has decided to comment directly on the undertaking rather than accepting or seeking to modify the agreement. Unless the agency agrees to a longer time period, the Council issues written comments within 60 days after it receives the complete MOA submission. [Section 800.6(a)(1)(iii)]

Council comment,
absent an MOA

When consultation has been terminated and there is no MOA, the agency requests written Council comments directly. In making such a request, the agency must provide the Council with specific documentation, which is spelled out in Council regulations at Section 800.8(d). The agency may request that the Council provide its written comments within 60 days after the agency submits complete documentation. [Section 800.6(b)(1)]

Documentation for
Council comment,
absent an MOA

Documentation required for Council comment,
absent an MOA, is as follows:

o A description of the undertaking, with photographs, maps, and drawings, as necessary;

o A description of the efforts to identify historic properties;

- o A description of the affected historic properties, with information on the significant characteristics of each property;
- o A description of the effects of the undertaking on historic properties and the basis for the determinations;
- o A description and evaluation of any alternatives or mitigation measures that the agency proposes for dealing with the undertaking's effects;
- o A description of any alternatives or mitigation measures that were considered but not chosen and the reasons for their rejection;
- o Documentation of consultation with the SHPO regarding the identification and evaluation of historic properties, assessment of effect, and any consideration of alternatives or mitigation measures;
- o A description of the agency's efforts to obtain and consider the views of affected local governments, Indian tribes, and other interested persons;
- o The planning and approval schedule for the undertaking; and
- o Copies or summaries of any written views submitted to the agency concerning the effects of the undertaking on historic properties and alternatives to reduce or avoid these effects. [Section 800.8(d)]

The agency should provide additional information concerning the undertaking so that the Council can complete an adequate review of the agency's proposed activity. The Council may also ask the agency to help arrange an onsite inspection of the undertaking site and a public meeting. [Section 800.6(b)(2)]

The Council issues its written comments to the head of the agency that has requested comments, providing copies to the SHPO, interested persons, and others as appropriate. [Section 800.6(b)(3)]

STEP 5: PROCEED

Agency's response
to Council comment

With an MOA: If the Council has commented by executing or accepting an MOA, the agency simply proceeds with its undertaking in accordance with the terms of that MOA. Carrying out the terms of the MOA evidences that the agency has fulfilled its Section 106 responsibilities. [Section 800.6(c)(1)]

Absent an MOA: Absent an MOA, the agency must take into account the Council's written comments and then make a final decision about how (or whether) to proceed with its undertaking. The agency notifies the Council of its decision, and if possible should do so before work on the undertaking begins. [Section 800.6(c)(2)]

Either outcome concludes the Section 106 review process and satisfies the agency's statutory responsibilities under Section 106.

SOME SPECIAL SITUATIONS

Failure to carry
out an MOA

If an agency has signed an MOA but fails to carry it out, the agency must resubmit the undertaking for Council comment in accordance with Section 800.6 of the regulations -- in other words, in the form of a revised MOA under Section 800.6(a) or as a request for comment under Section 800.6(b). [Section 800.6(c)(1)]

Agency foreclosure of
the Council's
opportunity to comment

The Council may advise an agency that, in the Council's view, the agency has not provided the Council a reasonable opportunity to comment. This situation is most likely to arise if an agency has proceeded with work on an undertaking before Section 106 review has taken place and the consideration of alternatives or mitigation is therefore no longer practicable. In such a case, Council comment would be moot, since it would be impossible for the agency to incorporate Council recommendations or suggestions into planning or execution of the undertaking.

The Council's decision to advise an agency that it has foreclosed opportunity to comment is made after majority vote of the Council membership or majority vote of a panel consisting of three or more Council members and the concurrence of the Council Chairman. [Section 800.6(d)(1)]

Before determining whether an agency has foreclosed Council opportunity to comment, the Council will notify the agency that it is considering such an action and give the agency a reasonable opportunity to respond. [Section 800.6(d)(2)]

Foreclosing the Council's opportunity to comment leaves the agency vulnerable to litigation for failure to carry out its Section 106 responsibilities.

Public requests for
Council review of
agency determinations

There are several points in the Section 106 process at which any person, regardless of their formal involvement in the process, can request Council review of an agency's findings. [Section 800.6(e)] Such review may address:

- o Identification of historic properties (described at Section 800.4(b));
- o Evaluation of historic significance of properties (described at Section 800.4(c));
- o Finding that no historic properties are present (described at Section 800.4(d)); and
- o Finding no effect on historic properties (described at Section 800.5(b)).

When requested, the Council completes a review within 30 days of the request and advises the agency, SHPO, and requestor of the results. [Section 800.6(e)(1)] In light of the Council's views, the agency should reconsider its finding. However, such a request for Council review does not require the agency to suspend action on an undertaking. [Section 800.6(e)(2)]

When an inquiry concerns an agency's judgment about National Register eligibility of a potential historic property, the Council refers the matter to the Secretary of the Interior, who is responsible for issuing formal determinations of National Register eligibility. [Section 800.6(e)(3)]

ALTERNATIVES TO CASE-BY-CASE SECTION 106 REVIEW UNDER SECTIONS 800.4 THROUGH 800.6

To give agencies added flexibility, the Council's regulations provide three possible alternatives to the case-by-case review process

[Sections 800.4 through 800.6] described in the preceding pages. Instead, agencies may choose:

o To develop a Programmatic Agreement with the Council, thus completing Section 106 review for a whole range of related Federal actions at once; [Section 800.13]

o To prepare counterpart regulations, in consultation with and approved by the Council, which substitute for 36 CFR Part 800; [Section 800.15] or

o To comply with a substitute State historic preservation review process, to which the Council has agreed. [Section 800.7]

More detailed discussion of each of these alternatives follows.

PROGRAMMATIC AGREEMENTS

Programmatic Agreements

One alternative to the case-by-case review described at Sections 800.4 through 800.6 is the Programmatic Agreement. This is developed between the agency, the Council, and, when appropriate, the SHPO, several SHPO's, or the National Conference of SHPO's. A Programmatic Agreement fulfills Section 106 requirements for a large or complex project or a class of undertakings that would otherwise require numerous individual requests for comments under Section 106. [Section 800.13(a)]

When Programmatic Agreements are appropriate

Programmatic Agreements are appropriate for projects or programs such as these:

o When effects on historic properties are similar and repetitive or are multi-State or national in scope (for example, when a financial assistance program will result in the rehabilitation of houses throughout the Nation); [Section 800.13(a)(1)]

o When effects on historic properties cannot be fully determined prior to approval of the undertaking (for example, when a large oil exploration program must be approved before surveys, which would identify specific properties subject to impacts by roads and well pads, have been done); [Section 800.13(a)(2)]

o When non-Federal parties are delegated major decisionmaking responsibilities in the undertaking (for example, when Federal financial assistance is channeled to a State or local agency for parceling out to individual applicants); [Section 800.13(a)(3)]

o When undertakings involve regional or land-management plans (for example, National Forest plans, plans for multiple-use management of public lands, or coastal zone management plans); [Section 800.13(a)(4)] or

o When undertakings involve routine management activities at Federal installations (for example, the operation of a military base or training facility). [Section 800.13(a)(5)]

How Programmatic
Agreements are
developed

The agency and Council consult to develop a Programmatic Agreement. When the proposed Federal action would affect only one State, the SHPO is invited to be a consulting party. When the action would affect several States, the SHPO of each affected State is invited to be a consulting party. If the action is national in scope, the President of the National Conference of SHPO's is invited by the Council to be a consulting party. The agency and Council may also invite other Federal agencies or other parties to participate in consultation, as appropriate. [Section 800.13(b)]

The Council, assisted by the agency, arranges for public notice of the programmatic consultation underway and for public involvement as appropriate. The consulting parties are required to invite views from affected units of State and local government, Indian tribes, industries, and organizations as well. The agency and Council consider the views of these parties and, upon reaching agreement, execute a Programmatic Agreement. Other consulting parties may also sign the agreement, as appropriate. [Sections 800.13(c) and (d)]

Once the agreement is signed, the Council publishes notice of the Programmatic Agreement in the Federal Register and makes copies available to the public. [Section 800.13(f)] A Programmatic Agreement satisfies agency Section 106 responsibilities for any undertaking carried out under its terms. It remains in force until it expires or is terminated. [Section 800.13(e)]

If an agency fails to carry out the terms of a Programmatic Agreement, it must complete Section 106 review for each individual undertaking that otherwise would be covered by the agreement, in accordance with 36 CFR Sections 800.4 through 800.6. [Section 800.13(g)]

COUNTERPART REGULATIONS

Counterpart regulations

In some agency situations, procedural requirements at 36 CFR Part 800 mesh poorly with existing agency procedures or specific statutory provisions (which might, for instance, establish specific timeframes that differ from those in the Council's regulations). In such cases, agencies are encouraged to develop -- in conjunction with the Council -- their own alternative regulations for taking into account historic preservation values and affording the Council an opportunity to comment on agency actions that affect historic properties.

The agency develops the counterpart regulations in consultation with the Council and, once concurred in by the Council, these regulations stand in place of 36 CFR Part 800. In order to satisfy Section 106 requirements, the agency must consistently comply with its own counterpart regulations in carrying out its Federal actions. [Section 800.15]

STATE REVIEW PROCESSES

Substitute State review processes

Section 800.7 of the regulations provides that any SHPO may enter into an agreement with the Council to substitute a State review process for the procedures spelled out at 36 CFR Part 800. A specified procedure for creating such agreements is set forth in that section. Whenever the Council approves such a substitute review process, the Council publishes a notice to that effect in the Federal Register, thus notifying other Federal agencies of its existence. [Section 800.7(a)(5)]

How agencies use a State's review process

In States where a substitute review process has been approved by the Council, Federal agencies may elect to comply with the State process rather than 36 CFR Part 800. At any time during a State review, if the agency decides it would prefer to terminate State review and comply instead with 36 CFR Part 800, the agency may do

so. [Sections 800.7(b)(1) and (2)] The Council may participate in a State review of an undertaking at any time, and participants using a State's review process are encouraged to draw upon the Council's expertise when that is appropriate. [Section 800.7(b)(3)]

The Council monitors a State's activities under its substitute review process in coordination with the overall review of State programs that is carried out by the Secretary of the Interior under Section 101(b)(1) of NHPA. [Section 800.7(c)(1)] Either the Council or the State may terminate a substitute State review process. If a State review process is revoked or terminated, a pending review may nevertheless be concluded under the State process if the agency responsible for the undertaking elects to do so. [Section 800.7(c)(2)-(4)]

OTHER SPECIAL CONSIDERATIONS

Council regulations also provide for several special situations agencies might encounter in the course of their business. These are:

- o Adverse effects on National Historic Landmark properties; [Section 800.10]
- o Properties discovered after a project has begun; [Section 800.11] and
- o Federal actions taken in response to a declared disaster or state of emergency. [Section 800.12]

Discussion of each of these special situations follows.

PROTECTING NATIONAL HISTORIC LANDMARKS

Protecting National Historic Landmarks

Section 110(f) of NHPA charges Federal agencies to afford some special protection to National Historic Landmarks (NHL's). These are a special category of landmark designated by the Secretary of the Interior as nationally important in American history, architecture, archeology, engineering, or culture.

Specifically, Section 110(f) requires that the agency official "to the maximum extent possible, undertake such planning and actions as may be

necessary to minimize harm" to any National Historic Landmark that may be directly and adversely affected by an undertaking.

When dealing with NHL's, agencies must use the Section 106 review process described at Sections 800.4 through 800.6. Also, the following special provisions apply:

- o The Council must be included as a consulting party when an MOA is being developed; [Section 800.10(a)]
- o The Council may request from the Secretary of the Interior (under Section 213 of NHPA) a report detailing the significance of the NHL, describing effects of the undertaking on it, and recommending measures to avoid or mitigate harm to it; [Section 800.10(b)] and
- o The Council must report the outcome of the Section 106 review process to the President, Congress, and Secretary of the Interior, as well as the head of the responsible Federal agency. [Section 800.10(c)]

PROPERTIES DISCOVERED AFTER A PROJECT HAS BEGUN

Sometimes, even after an agency has fully complied with Section 106 requirements, new or additional historic properties are discovered after work has begun on a project. This often happens in the case of projects that involve excavation or ground-disturbing activities, when previously undiscovered archeological resources may be uncovered during the process of construction or excavation. In other cases, a project has unexpected effects on known historic properties.

If an agency discovers properties that have not previously been listed in or formally determined eligible for listing in the National Register, it may assume the properties to be eligible for purposes of Section 106. [Section 800.11(d)(1)]

When an agency's action is of a type likely to uncover historic properties after work has begun, the agency is encouraged to develop a plan for treating such newly discovered historic properties. Often, agencies will realize as they complete the identification step of Section

Properties discovered
after a project has
begun

When the agency
develops a plan
for discoveries

106 review [Section 800.4] that discovery of additional properties is likely later on.

For example, an agency planning a surface mine or other project that will involve deep ground disturbance might find that certain portions of its project area contain deep sediments under which very ancient archeological sites may lie buried. However, it might not be financially or environmentally feasible to remove such sediments before the mining or construction itself gets underway. In such a case, development of a plan to handle discoveries during implementation would be appropriate.

Plans for handling discoveries should be included in the documentation developed during the assessment of effects [Section 800.5] and consultation [Section 800.5(e)] steps of the Section 106 process. [Section 800.11(a); see also Section 800.5] In the surface mine example mentioned above, for example, such a plan might provide for stripping the sediment with care and providing time and funds for necessary archeological survey, testing, and data recovery before excavation continues.

When an agency has developed such a plan and then discovers historic properties after completing Section 106 requirements, the agency simply follows the plan that was approved during the consultation and Council comment steps of Section 106 review. When it has done so, the agency has met its Section 106 requirements regarding the newly discovered properties. [Section 800.11(b)(1)]

When the agency has no plan for new discoveries

If an agency has not prepared a plan in anticipation of newly discovered historic properties, the procedure is a bit more complex. In this case, the agency must afford the Council an opportunity to comment on effects to these newly discovered historic properties in one of the following ways:

- o The agency can comply with Section 800.6, which means either consulting to develop an MOA and submitting that MOA for Council review, or requesting Council comments absent an MOA. (See pages 39-41 of this booklet for further discussion of Council comment, Step 4 of Section 106 review.) [Section 800.11(b)(2)(i)] If the agency chooses this option, the Council will provide its comments in a time period consistent

with the agency's schedule, even if this is shorter than the 30 days normally allotted for Council review. [Section 800.11(c)(1)]

o The agency can develop and implement actions to handle the newly discovered properties, taking into account the undertaking's effects on them and comments received from the SHPO and the Council. [Section 800.11(b)(2)(ii)] When an agency chooses this option, it should notify the SHPO and Council at the earliest possible time. The Council will provide interim comments about the plan to the agency within 48 hours of the request, and final comments within 30 days of the request. [Section 800.11(c)(2)] OR

o The agency can comply with the requirements of the Archeological and Historic Preservation Act (AHPA) instead of Section 106 requirements, if the newly discovered historic property is principally of archeological value and subject to the requirements of AHPA (16 U.S.C. §§ 469(a)-(c)). [Section 800.11(b)(2)(iii)] When the agency chooses this option, the agency provides the SHPO an opportunity to comment on the work undertaken and provides the Council with a report on the work after it has been completed. [Section 800.11(c)(3)]

Specific guidance for compliance with AHPA is the responsibility of the Department of the Interior. The Department of the Interior is developing AHPA regulations which, when issued, will appear at 36 CFR Part 66. For further information about how to meet AHPA requirements, agencies should contact the Departmental Consulting Archeologist, Archeological Assistance Division, National Park Service, P.O. Box 37127, Washington, D.C. 20031-7127; telephone (202) 343-4101.

If historic properties are discovered after work has begun, Council regulations do not require agencies to stop work on the undertaking. However, depending on the nature of the property and the undertaking's apparent effects on it, agencies should try to avoid or minimize harm to any historic properties until the Section 106 requirements have been met. [Section 800.11(b)(3)] For example, work might be delayed in the immediate vicinity of the discovery while continuing elsewhere.

When a discovery occurs on lands under the jurisdiction of an Indian tribe, the agency consults with the Indian tribe in completing Section 106 requirements. [Section 800.11(d)(2)]

EMERGENCY UNDERTAKINGS

Emergencies

Council regulations make special provisions for agency actions that are undertaken on an emergency basis or in response to an emergency situation. [Section 800.12(a)] "Emergency" in this context refers to an officially declared disaster or state of emergency; undertakings that will not be implemented within 30 days of the emergency must go through the Section 106 process outlined in Sections 800.4 through 800.6, rather than following the process in Section 800.12. [Section 800.12(d)]

In an emergency, an agency may choose one of two courses of action:

- o When applicable, a Federal agency may elect to waive Section 106 requirements and comply instead with requirements of 36 CFR Part 78, "Waiver of Federal Agency Responsibilities under the National Historic Preservation Act." [Section 800.12(a)] These regulations, published by the Department of the Interior, spell out procedures by which NHPA requirements may be waived. 36 CFR Part 78 may be invoked only in a limited range of circumstances involving "major natural disaster or imminent threat to the national security"; these terms are defined in 36 CFR Part 78. OR
- o When the agency proposes an emergency action as an essential and immediate response to a disaster declared by the President or State Governor, the agency may notify the Council and SHPO of its proposed actions and afford them an opportunity to comment within seven days, if circumstances permit. [Section 800.12(b)] This course of action can also be employed, for purposes of actions assisted under Title I of the Housing and Community Development Act of 1974 as amended, in case of an imminent threat to the public health or safety as a result of a natural disaster or emergency declared by a local government's chief executive officer or legislative body. In the latter circumstance, however, if either the SHPO or the Council objects to the undertaking, the undertaking must

undergo Section 106 review according to Sections 800.4 through 800.6, which call for identification of properties, assessment of effects, consultation, and issuance of Council comment. [Section 800.12(c)]

CONCLUSION

The Council's regulations at 36 CFR Part 800 have evolved over many years' use, and recently have undergone a major reevaluation to refine and streamline them. The regulations currently in effect offer agencies a wide range of procedural options while ensuring that historic values are taken into account as Federal agency actions are planned and carried out. The regulations are based on the idea that the public interest may best be found through reasoned consultation and negotiation among interested parties. It is this philosophy that should guide all participants in the Section 106 process.

TO LEARN MORE ABOUT SECTION 106 REVIEW

This brief booklet obviously cannot present all of the facts about the Section 106 process. For complete information, consult the regulations themselves, 36 CFR Part 800, which are the final authority on agency requirements. They were published in the Federal Register on September 2, 1986, at 51 FR 31115. Single annotated copies of the regulations are available from the Council on request.

For easy-to-understand training on the Section 106 process, the Council offers a 2-day course, "Introduction to Federal Projects and Historic Preservation Law," which is offered in many locations around the country each year. Available since 1981, the course has been completed by more than 1,700 government officials at every level and contains up-to-date information about procedures and regulatory developments. The course is designed for the Section 106 novice and explains, step-by-step, what actions are required by Federal, State, and local officials to meet the requirements of the law.

For more information, write: Training, Advisory Council on Historic Preservation, 1100

Pennsylvania Avenue, N.W., Suite 809,
Washington, D.C. 20004; telephone (202) 786-0503
(executive offices and training) or (202)
786-0505 (Section 106 review office).

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Appendix A: SECTION 106 WORKING DOCUMENTS

* Denotes documents referenced in 36 CFR Part 800. The last line in the listing tells where in 36 CFR 800 this reference is made.

** See footnote at the end of Appendix A.

FINAL REGULATIONS

*36 CFR Part 60, "National Register of Historic Places."** Published November 16, 1981, by the Department of the Interior. Of particular importance is 36 CFR § 60.4, National Register Criteria, used in evaluating the eligibility of properties for the National Register. [Primary references at 36 CFR §§ 800.2(1) and 800.4(c)(1)]

*36 CFR Part 61, "Procedures for Approved State and Local Government Historic Preservation Programs." Published by the Department of the Interior, April 13, 1984. Amended 50 FR 35223, August 30, 1985. 36 CFR Part 800 references participation in Section 106 review by "a local government whose historic preservation program has been certified pursuant to Section 101(c)(1) of [NHPA]." 36 CFR Part 61 is the regulation that governs such local government certification. [Referenced at 36 CFR § 800.1(c)(2)(i)]

*36 CFR Part 63, "Determinations of Eligibility for Inclusion in the National Register of Historic Places."** Published September 21, 1977, by the Department of the Interior. Redesignated at 45 FR 28716, April 30, 1980, and 46 FR 34329, July 1, 1981. If the agency and SHPO cannot agree on whether a property meets National Register listing criteria, the agency must seek a formal determination of eligibility from the Secretary of the Interior, according to procedures set out in 36 CFR Part 63. [Referenced at 36 CFR § 800.4(c)(4)]

*36 CFR Part 65, "National Historic Landmarks Program." Published February 2, 1983, by the Department of the Interior. NHL's are historic properties of outstanding national significance that have been specially designated by the Secretary of the Interior. Under Section 110(f) of NHPA, NHL's require special treatment: agencies must "to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic Landmark that may be directly and adversely affected by an undertaking." This special consideration applies in addition to requirements of Section 106. 36 CFR Part 65 is the regulation that governs designation of NHL properties. [Referenced at 36 CFR § 800.10]

*36 CFR Part 78, "Waiver of Federal Agency Responsibilities under Section 110 of the National Historic Preservation Act." Published February 25, 1985, by the Department of the Interior. Concerns waiver of NHPA responsibilities in cases of national emergency or disaster. [Referenced at 36 CFR 800.12(a)]

36 CFR Part 800, "Protection of Historic Properties." Published September 2, 1986, by the Advisory Council on Historic Preservation at 51 FR 31115.

The basic regulations of the Advisory Council on Historic Preservation, which govern the review process established by Section 106 of the National Historic Preservation Act.

36 CFR Part 801, "Historic Preservation Requirements of the Urban Development Action Grant Program." Published August 20, 1981, by the Advisory Council on Historic Preservation.

These regulations propose a slightly altered Section 106 review system for UDAG projects. Since the revised Part 800 regulations were published on September 2, 1986, Part 801 has been scheduled for amending.

[No specific reference in 36 CFR Part 800]

43 CFR Part 7, "Protection of Archeological Resources: Uniform Regulations." Published January 6, 1984, by the Department of the Interior. These uniform regulations also appear at three other titles of the Code of Federal Regulations: 36 CFR Part 296 (USDA Forest Service), 32 CFR Part 229 (Department of Defense), and 18 CFR Part 1312 (TVA).

These regulations establish procedures for implementing provisions of the Archeological Resources Protection Act of 1979 in response to direction in Section 10(a) of the act. They enable Federal land managers to protect archeological resources on public lands and Indian lands from unauthorized disturbance.

[No specific reference in 36 CFR Part 800]

LEGISLATION

*Archeological and Historic Preservation Act of 1974, 16 U.S.C. §§ 469-469c (1982).

When an agency discovers, during implementation of an undertaking, historic properties that are subject to the requirements of this act, the agency may comply with this act and its implementing regulations rather than proceed with Section 106 review. Proposed implementing regulations of the act were published by the Department of the Interior on January 28, 1977. To date, these proposed regulations have not been issued in final form.

[Referenced at 36 CFR §§ 800.11(b)(2)(iii) and 800.14(b)]

*Archeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-470ll (1982).

36 CFR Part 800 encourages agencies to design determinations and agreements that satisfy both Section 106 requirements and the requirements of other authorities, such as this one, to avoid duplication of effort and excessive delay.

[Referenced at 36 CFR § 800.14(b)]

Housing and Community Development Act of 1974, as amended, 42 U.S.C. §§ 5301-5320 (1982).

Title I of this statute governs administration of various community development grants. The Department of Housing and Urban Development may delegate duties to grant recipients under 36 CFR Part 800. Title I is also mentioned in 36 CFR Part 800 with reference to the issuance of Council

comments about a Federal action proposed in the face of a disaster, imminent threat to public health or safety, or declared local emergency.
[Referenced at 36 CFR §§ 800.1(c)(2)(i) and 800.12(c)]

*National Environmental Policy Act of 1966, 42 U.S.C. §§ 4321-4347 (1982).
36 CFR Part 800 encourages agencies to design determinations and agreements that satisfy both Section 106 requirements and the requirements of other authorities, such as this one, to avoid duplication of effort and excessive delay.

[Referenced at 36 CFR §§ 800.1(c)(2)(iv) and 800.14(a)]

*National Historic Preservation Act of 1966 (NHPA), 16 U.S.C. §§ 470-470w-6 (1982).

This is the legislation that established the Advisory Council on Historic Preservation. Section 106 of NHPA requires Federal agencies to take into account the effects of their undertakings on historic properties and to afford the Council an opportunity to comment on such undertakings. Section 110 of the act sets out additional Federal agency responsibilities for protecting historic properties.

[Primary references at 36 CFR §§ 800.1(a) and 800.2(a)]

Section 4(f) of The Department of Transportation Act of 1966, 49 U.S.C. § 303 (1982).

36 CFR Part 800 encourages agencies to design determinations and agreements that satisfy both Section 106 requirements and the requirements of other authorities, such as this one, to avoid duplication of effort and excessive delay.

[Referenced at 36 CFR § 800.14(b)]

GUIDANCE

"Guidelines for Exemptions under Section 214 of the National Historic Preservation Act." 47 FR 46347, October 18, 1982. Published by the Advisory Council on Historic Preservation.

These guidelines specify conditions under which an agency may apply to the Council for exemptions from the requirements of the National Historic Preservation Act.

[No specific reference in 36 CFR Part 800.]

**Archeology and Historic Preservation: Secretary of the Interior's Standards and Guidelines." 48 FR 44716, September 29, 1983. Published by the Department of the Interior.

These are performance standards and guidelines for carrying out historic preservation activities such as planning, identification, evaluation, registration, documentation, and a variety of projects. The document also includes professional qualifications standards and preservation terminology. 36 CFR Part 800 states that efforts to identify historic properties during Section 106 review should be consistent with these guidelines.

[Referenced at 36 CFR §§ 800.4(b) and 800.7(a)(4)(v)]

**Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings." The "Standards for Rehabilitation"

included in this National Park Service publication were published by the Department of the Interior at 36 CFR Section 68.4(e) on December 7, 1978. Redesignated at 46 FR 34329, July 1, 1981, and at 36 CFR Section 67.7 on March 12, 1984.

This publication illustrates and explains the standards against which building rehabilitation projects are judged in order to qualify for investment tax credits under the Economic Recovery Tax Act. These standards are often referenced in Section 106 Memoranda of Agreement as the standards agencies agree to meet in carrying out a building rehabilitation. The Secretary's Standards and Guidelines may be ordered from the Government Printing Office by sending \$2.00 for Stock #024-005-01003-3.

[Referenced at 36 CFR § 800.9(c)(2)]

**On August 5, 1986, the Department of the Interior published the proposed rule, 36 CFR Parts 60 and 63, "National Register of Historic Places," at 51 FR 28204. This proposed rule consolidates and updates procedures now contained in 36 CFR Part 60 and 36 CFR Part 63, which contain administrative procedures for the evaluation of historic properties.

Appendix B: BRIEF GLOSSARY OF SECTION 106 TERMS

Like many Federal processes, Section 106 review uses a vocabulary specific to the regulations that define it. These are "Protection of Historic Properties," 36 CFR Part 800. Compiled here are the most commonly used terms, with their Section 106 definitions.

Those terms marked with an asterisk (*) are defined in the regulations at 36 CFR § 800.2. For these terms, definitions below comport with regulatory language, but may also offer further explanation.

***act.** The National Historic Preservation Act of 1966 (16 U.S.C. §§ 470-470w-6).

adverse effect. Harm to historic properties, directly or indirectly caused by a Federal agency's action. Council regulations set forth criteria of effect and adverse effect at 36 CFR § 800.9.

***agency official.** The party responsible for completing Section 106 review. Normally, this means the Federal agency head or designee with authority over a specific undertaking who has been delegated legal responsibility for compliance with Sections 106 and 110(f) of NHPA.

In the case of certain programs of the Department of Housing and Urban Development, notably Community Development Block Grants (CDBG), Urban Development Action Grants (UDAG), the Rental Rehabilitation Program, and the Housing Development Grant Program (HoDAG), the grant recipient (a city or county) has been designated by statute to act as the agency official and thus has responsibility for completing Section 106 review. In this booklet, the term "agency" is used to mean the responsible unit of government, whether Federal or local.

***area of potential effects.** The geographic area or areas within which an undertaking may cause changes in the character or use of historic properties, if any such properties exist there. This area always includes the actual site of the undertaking, and may also include other areas where the undertaking will cause changes in land use, traffic patterns, or other aspects that could affect historic properties.

Certified Local Government. A local government whose historic preservation program has been certified pursuant to Section 101(c)(1) of the National Historic Preservation Act. Department of the Interior regulations at 36 CFR Part 61 govern this certification process. (See also "local government.")

class of historic properties. Properties of a specific type (eg. 19th-century textile mills in a given river valley, or prehistoric village sites in a given mountain range), the members of which are likely to be eligible for listing in the National Register whenever they are identified.

consultation process. Step 3 of the Section 106 process, during which consulting parties consider ways to reduce ("mitigate") adverse effects of

an agency's proposed action on historic properties. Successful consultation resolves the conflict between the needs of an agency's undertaking and the integrity of historic properties in a way that the consulting parties agree best serves the public interest. Consultation results in a Memorandum of Agreement signed by the agency, State Historic Preservation Officer, and Council, if participating.

consulting parties. The participants in consultation, Step 3 of the Section 106 review process. Consulting parties always include the agency and SHPO and may -- depending on circumstances -- include others, such as the Council; local governments; representatives of Indian tribes; applicants for Federal grants, licenses, or permits; affected land-owners; and others.

*Council. The Advisory Council on Historic Preservation, an independent Federal agency composed of 19 members, is charged with advising the President and the Congress on historic preservation matters and administering the provisions of Section 106 of the National Historic Preservation Act. The various duties of the Council that are defined by regulations at 36 CFR Part 800 are carried out by Council members, the Council Chairman, and the Council Executive Director, according to an internal delegation of authority.

Council comment. Step 4 of the Section 106 review process. The Council issues its comments in one of two ways: (1) by signing or accepting a Memorandum of Agreement (MOA); or (2) absent an MOA, in written comments directed to the head of the undertaking agency.

counterpart regulations. In some agency situations, procedural requirements at 36 CFR Part 800 mesh poorly with existing agency procedures or statutory provisions. In such cases, agencies may -- in conjunction with the Council -- develop alternative regulations for taking into account historic values and affording an opportunity for Council comment. Once approved by the Council, counterpart regulations substitute for 36 CFR Part 800 for the issuing agency.

criteria of adverse effect. The Council's definition of harm to historic properties caused by Federal actions. These criteria are spelled out in the Council's regulations at 36 CFR §§ 800.9(b) and (c). Figure 2 of this booklet lists the criteria of adverse effect.

criteria of effect. The Council's definition of change to historic properties caused by Federal action. This criterion [at 36 CFR § 800.9(a)] says, "An undertaking has an effect on a historic property when the undertaking may alter characteristics of the property that may qualify the property for inclusion in the National Register. For the purpose of determining effect, alteration to features of a property's location, setting, or use may be relevant depending on a property's significant characteristics and should be considered."

determination of eligibility. The process of ascertaining a property's eligibility for the National Register of Historic Places. A property eligible for the National Register -- but not actually listed or formally

determined eligible by the Secretary -- is afforded the same protection under Section 106 as a listed property.

"eligible" property. See "National Register-eligible property."

emergency undertakings. Agency actions taken in response to an officially declared disaster or state of emergency. Council regulations make special provisions for such situations at 36 CFR § 800.12.

field survey. This involves background research and in-field inspection of the area of potential effects to seek and record historic properties in sufficient detail to determine their significance and identify potential effects on them.

foreclosure. This refers to foreclosure of reasonable opportunity for the Council to comment on an agency's undertaking. This situation typically arises when an agency has proceeded with work on an undertaking before Section 106 review has taken place, and the chance to consider alternatives or mitigation has thus been effectively ruled out. This, for all practical purposes, renders any Council comment moot.

*historic property. This means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register. The term includes artifacts, records, and remains that are related to and located in such properties. The term "eligible for inclusion in the National Register" includes both properties formally determined as such by the Secretary of the Interior and all other properties that meet National Register listing criteria.

*Indian lands. All lands under the jurisdiction or control of an Indian tribe.

*Indian tribe. The governing body of any Indian tribe, band, nation, or other group that is recognized as an Indian tribe by the Secretary of the Interior and for which the United States holds land in trust or restricted status. The term also includes any native village corporation, regional corporation, and native group established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. § 1601, et seq.)

*interested person. Those individuals and organizations that are concerned with the effects of a particular undertaking on historic properties. Interested persons are given opportunities to participate in the Section 106 process at various points.

*license. Formal permission given by an agency to any party which allows that party to carry out an action -- for example, a permit, a right-of-way grant, or a certificate of license.

*local government. A city, county, parish, township, municipality, borough, or other general purpose subdivision of a State. (See also "Certified Local Government.")

Memorandum of Agreement (MOA). The agreement -- resulting from consultation -- that states measures the agency will take to avoid or

reduce effects on historic properties as the agency carries out its undertaking. The MOA is signed by the agency, the State Historic Preservation Officer, and the Council, if participating.

mitigate. This term means reducing harm to historic properties.

*National Historic Landmark (NHL). This is a special category of landmark designated by the Secretary of the Interior because of its national importance in American history, architecture, archeology, engineering, or culture. Section 800.10 of the Council's regulations specify some special protections for NHL's under the Section 106 review process.

National Historic Preservation Act (NHPA). (16 U.S.C. §§ 470-470w-6.) The basic legislation of the Nation's historic preservation program that established the Council and the Section 106 review process.

*National Register. The Nation's master inventory of known historic properties worthy of preservation. The National Register of Historic Places is administered by the National Park Service on behalf of the Secretary of the Interior. National Register listings include buildings, structures, sites, objects, and districts that possess historic, architectural, engineering, archeological, or cultural significance. Properties listed are not limited to those of nationwide significance; most are significant primarily at the State or local level.

*National Register Criteria. The criteria established by the Secretary of the Interior for use in evaluating whether properties qualify for listing in the National Register of Historic Places. These are defined by regulation at 36 CFR Part 60.

National Register-eligible property. A property that has been determined eligible for National Register listing by the Secretary of the Interior, or one that has not yet gone through the formal eligibility-determination process but which meets the National Register Criteria. For Section 106 purposes, an "eligible" property is treated as if it were already listed.

onsite inspection. Under Step 4, Council comment, of the Section 106 process, when consultation has failed and an agency requests written Council comment, the Council may request an opportunity to visit the site of an undertaking before issuing comments. Such a visit is an onsite inspection.

other Native American. This term refers to American Indians, including Carib and Arawak, Eskimo and Aleut, and Native Micronesians and Polynesians, who are identified by themselves and recognized by others as members of a named cultural group that historically has shared linguistic, cultural, social, and other characteristics, but that is not necessarily an Indian tribe as defined above.

predictive modeling. This refers to a body of techniques used with reference to large areas of land, in which background information on geography, history, prehistory, and ethnography are used to predict where historic properties are likely to occur and what their characteristics are likely to be. These predictions are then tested using field surveys; if

they are found to be accurate, it may not be necessary to subject the entire area of potential effects to such survey.

Programmatic Agreement. A special type of Memorandum of Agreement typically developed for a large or complex project or a class of undertakings that would otherwise require numerous individual requests for Council comments under Section 106. Procedures for developing a Programmatic Agreement are spelled out in Council regulations at 36 CFR § 800.13.

public information meeting. Under Step 4, Council comment, of the Section 106 process, when consultation has failed and an agency requests written Council comment, the Council may request a public information meeting before issuing comments.

*Secretary. The Secretary of the Interior.

Section 106 process. A review process established under Section 106 of the National Historic Preservation Act and administered by the Advisory Council on Historic Preservation under its regulations at 36 CFR Part 800. During this process, agencies afford the Council an opportunity to comment on any agency activity or undertaking that may affect historic properties, and must take such Council comment into account.

Section 110(f). This section of the National Historic Preservation Act requires that Federal agency heads, to the maximum extent possible, undertake necessary planning and actions to minimize harm to National Historic Landmarks that may be harmfully affected by agency undertakings. Section 110(f) responsibilities are separate from those of Section 106, but are satisfied through compliance with the Council's regulations at 36 CFR Part 800.

State Historic Preservation Officer (SHPO). The official in each State or territory who (among other duties) consults with Federal agencies during Section 106 review. The SHPO administers the national historic preservation program at the State level, reviews National Register nominations, and maintains file data on historic properties that have been identified but not yet nominated. SHPO's are designated by the Governor of their respective State or Territory.

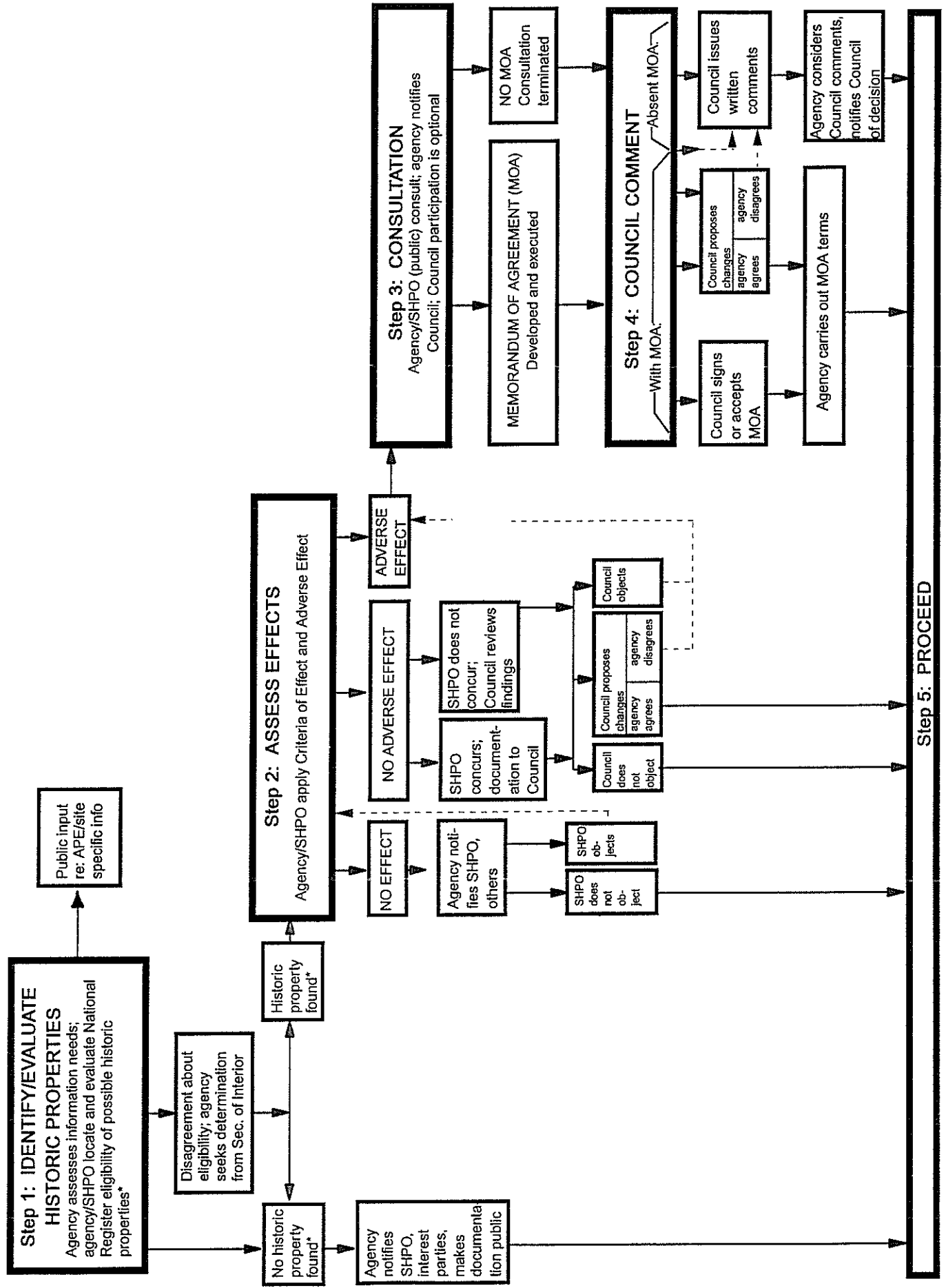
Agencies seek the views of the appropriate SHPO(s) while identifying historic properties and assessing effects of an undertaking on historic properties. Agencies also consult with the SHPO when developing Memoranda of Agreement.

State review processes. Council regulations permit States -- under certain conditions -- to develop review processes that substitute for the Section 106 process. Once the Council has approved such a substitute State review process, agencies may choose to comply with the appropriate State process rather than regulatory requirements at 36 CFR §§ 800.4 through 800.6.

traditional cultural authority. This refers to an individual in a Native American group or other social or ethnic group who is recognized by members of the group as an expert on the group's traditional history and cultural practices.

*undertaking. Under NHPA, a Federal activity that is subject to Section 106 requirements. The term "undertaking" is intended to include any project, activity, or program -- and any of its elements -- that has the potential to have an effect on a historic property and that is under the direct or indirect jurisdiction of a Federal agency or is licensed or assisted by a Federal agency. Included are construction, rehabilitation, repair projects, demolition, planning, licenses, permits, loans, loan guarantees, grants, Federal property transfers, and many other Federal activities.

Figure 1: THE BASIC STEPS OF SECTION 106 REVIEW



*Public may request Council review of agency's findings at these points

