

Advisory Council on Historic Preservation

Section 106 Regulations Users Guide

Regulations Summary

Introduction

Section 106 of the National Historic Preservation Act of 1966 (NHPA) requires Federal agencies to take into account the effects of their undertakings on historic properties, and afford the Advisory Council on Historic Preservation a reasonable opportunity to comment. The historic preservation review process mandated by Section 106 is outlined in regulations issued by ACHP. Revised regulations, "Protection of Historic Properties" (36 CFR Part 800), became effective January 11, 2001, and are summarized below.

Initiate Section 106 Process

The responsible Federal agency first determines whether it has an undertaking that is a type of activity that could affect historic properties. Historic properties are properties that are included in the National Register of Historic Places or that meet the criteria for the National Register. If so, it must identify the appropriate State Historic Preservation Officer/Tribal Historic Preservation Officer * (SHPO/THPO*) to consult with during the process. It should also plan to involve the public, and identify other potential consulting parties. If it determines that it has no undertaking, or that its undertaking is a type of activity that has no potential to affect historic properties, the agency has no further Section 106 obligations.

Identify Historic Properties

If the agency's undertaking could affect historic properties, the agency determines the scope of appropriate identification efforts and then proceeds to identify historic properties in the area of potential effects. The agency reviews background information, consults with the SHPO/THPO* and others, seeks information from knowledgeable parties, and conducts additional studies as necessary. Districts, sites, buildings, structures, and objects listed in the National Register are considered; unlisted properties are evaluated against the National Park Service's published criteria, in consultation with the SHPO/THPO* and any Indian tribe or Native Hawaiian organization that may attach religious or cultural importance to them.

If questions arise about the eligibility of a given property, the agency may seek a formal determination of eligibility from the National Park Service. Section 106 review gives equal consideration to properties that have already been included in the National Register as well as those that have not been so included, but that meet National Register criteria.

If the agency finds that no historic properties are present or affected, it provides documentation to the SHPO/THPO* and, barring any objection in 30 days, proceeds with its undertaking.

If the agency finds that historic properties are present, it proceeds to assess possible adverse effects.

Assess Adverse Effects

The agency, in consultation with the SHPO/THPO*, makes an assessment of adverse effects on the identified historic properties based on criteria found in ACHP's regulations.

If they agree that there will be no adverse effect, the agency proceeds with the undertaking and any agreed-upon conditions.

If a) they find that there is an adverse effect, or if the parties cannot agree and ACHP determines within 15 days that there is an adverse effect, the agency begins consultation to seek ways to avoid, minimize, or mitigate the adverse effects.

Resolve Adverse Effects

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

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

Implementation

If a Memorandum of Agreement is executed, the agency proceeds with its undertaking under the terms of the MOA.

Failure to Resolve Adverse Effects

If consultation proves unproductive, the agency or the SHPO/THPO*, or ACHP itself, may terminate consultation. If a SHPO terminates consultation, the agency and ACHP may conclude a Memorandum of Agreement without SHPO involvement. However, if a THPO* terminates consultation and the undertaking is on or affecting historic properties on tribal lands, ACHP must provide its comments. The agency must submit appropriate documentation to ACHP and request ACHP's written comments. The agency head must take into account ACHP's written comments in deciding how to proceed.

Tribes, Native Hawaiians, and the Public

Public involvement is a key ingredient in successful Section 106 consultation, and the views of the public should be solicited and considered throughout the process.

The regulations also place major emphasis on consultation with Indian tribes and Native Hawaiian organizations, in keeping with the 1992 amendments to NHPA. Consultation with an Indian tribe must respect tribal sovereignty and the government-to-government relationship between the Federal Government and Indian tribes. Even if an Indian tribe has not been certified by NPS to have a Tribal Historic Preservation Officer who can act for the SHPO on its lands, it must be consulted about undertakings on or affecting its lands on the same basis and in addition to the SHPO.

*** The regulations define the term "THPO" as those tribes that have assumed SHPO responsibilities on their tribal lands and have been certified pursuant to Section 101(d)(2) of the NHPA. Nevertheless, remember that tribes that have not been so certified have the same consultation and concurrence rights as THPOs when the undertaking takes place, or affects historic properties, on their tribal lands. The practical difference is that during such undertakings, THPOs would be consulted *in lieu of* the SHPO, while non-certified tribes would be consulted *in addition to* the SHPO.**