



# **A Section 106 Review Under the National Historic Preservation Act (NHPA): How It Works**

**Kristina Alexander**  
Legislative Attorney

May 16, 2012

**Congressional Research Service**

7-5700

[www.crs.gov](http://www.crs.gov)

R42538

## Summary

Designed to preserve historic properties, the National Historic Preservation Act (NHPA) has been faulted by some for delaying implementation of federal projects. Under NHPA, federal agencies must conduct a collaborative, thoughtful review of a project's effects on historic properties. The review must allow for participation by the public and other interested parties. When projects would have adverse effects on historic properties, NHPA procedures allow interested parties to negotiate how best to address such effects. In addition to providing procedures to assess project impacts on historic properties, NHPA establishes programs for the federal government to study and protect historic properties, including sites, buildings, structures, and objects. The act also authorizes grants for assisting state and tribal governments with preservation, among other things. This report will examine the NHPA process for evaluating federal projects' impacts on historic properties, which is known as a Section 106 review.

The 112<sup>th</sup> Congress is considering legislation that would limit NHPA reviews for certain projects, such as reconstructing highways or bridges destroyed in a disaster (H.R. 7, §3003; H.R. 2112, §127 [public print version only, not as introduced or enrolled]; H.R. 3347; S. 1389); and transferring Bureau of Land Management (BLM) land in the Mohave Valley for a shooting range (S. 526 [introduced version]). Additionally, the American Energy and Infrastructure Jobs Act of 2012 (H.R. 7) would change NHPA by excluding some properties from consideration under Section 106, and accepting state procedures for highway projects in place of Section 106 when they are found to be substantially equivalent.

## **Contents**

Introduction.....	1
Background of Historic Preservation Law.....	1
Antiquities Act of 1906 .....	1
The Historic Sites Act of 1935 .....	1
National Historic Preservation Act .....	2
Introductory NHPA Concepts.....	3
Undertaking.....	3
State Historic Preservation Officer.....	4
Advisory Council on Historic Preservation.....	5
National Register of Historic Places .....	5
Consultation .....	6
The Section 106 Process.....	6
Commencing the Section 106 Process .....	6
Assessing Adverse Effects.....	10
Resolving Adverse Effects—Memorandum of Agreement.....	11
Exception for Emergencies.....	14
Programmatic Agreements .....	14
Legislation in the 112 <sup>th</sup> Congress.....	15

## **Appendixes**

Appendix. Criteria for Evaluation for the National Register .....	17
---	----

## **Contacts**

Author Contact Information.....	18
---------------------------------	----

## Introduction

The National Historic Preservation Act (NHPA) is expansive legislation. Besides creating programs to study and protect historic places at the federal, state, and tribal levels, NHPA is the origin of the National Register of Historic Places. It is also a procedural statute, creating a process, known as a Section 106 review, for federal agencies to consider the impacts their projects have on historic properties. Accordingly, some see NHPA as legislation that delays implementation of federal projects. The 112<sup>th</sup> Congress is considering legislation that would limit NHPA reviews for certain projects, such as reconstructing highways or bridges destroyed in a disaster (H.R. 7, §3003; H.R. 2112, §127 [public print version only, not as introduced or enrolled]; H.R. 3347; S. 1389); and transferring Bureau of Land Management (BLM) land in the Mohave Valley for a shooting range (S. 526). This report will focus on Section 106 reviews.

## Background of Historic Preservation Law

### Antiquities Act of 1906

Historic preservation has deep roots in American law. At the beginning of the 20<sup>th</sup> century, excavations and thefts were threatening to destroy valuable American artifacts. Recognizing that generations of Americans had an interest in these artifacts, a Senate Committee on Public Lands report stated: “their preservation is of great importance.”<sup>1</sup> To protect artifacts as well as historic places, Congress enacted the Antiquities Act of 1906. The Antiquities Act empowered the President to establish national monuments, authorized scholarly examination of archaeological ruins,<sup>2</sup> and prohibited harming historic or prehistoric ruins or objects of antiquity.<sup>3</sup>

### The Historic Sites Act of 1935

In 1935, Congress enacted a law acknowledging the significance of historic structures and places. The Historic Sites Act states that “it is a national policy to preserve for public use historic sites, buildings and objects of national significance for the inspiration and benefit of the people of the United States.”<sup>4</sup> The Historic Sites Act gave broad powers to the Department of the Interior to advance that policy, including naming National Historic Landmarks. Under the Historic Sites Act, the Secretary was authorized to do the following:

- secure, collate, and preserve drawings, plans, and photographs of archeological sites, buildings, and objects;
- survey sites, buildings, and places to determine which possess “exceptional value as commemorating or illustrating the history of the United States”;

---

<sup>1</sup> S.Rept. 8797 (59<sup>th</sup> Congress).

<sup>2</sup> 16 U.S.C. §432.

<sup>3</sup> 16 U.S.C. §433.

<sup>4</sup> Act of August 21, 1935, 49 Stat. 666; 16 U.S.C. §§461 et seq. (the Historic Sites Act).

- investigate and research sites, buildings, or objects to obtain accurate historical data;
- acquire for the United States any property deemed “to be satisfactory to the Secretary”;
- make agreements with states, municipalities, and others to operate sites owned by the United States;
- restore, reconstruct, and rehabilitate sites;
- erect tablets to mark places and events of historic significance;
- manage sites, buildings, and properties for the benefit of the public, with the authority to charge fees or issue leases;
- create corporations to manage any sites too burdensome for the Department of the Interior;
- develop educational programs for the sites; and
- make such rules and regulations necessary to administer the sites.<sup>5</sup>

The act allowed the United States to acquire any property using eminent domain, provided that the property was not already administered for the benefit of the public or owned by a religious or educational institution.<sup>6</sup> Congress must make a specific appropriation, however, to enable the United States to exercise its eminent domain rights under the Historic Sites Act.

## **National Historic Preservation Act**

In 1966, Congress passed the National Historic Preservation Act.<sup>7</sup> Broader than its two predecessors, NHPA covers sites, buildings, structures, and objects. It establishes the National Register of Historic Places and the procedures by which historic properties are placed on the register; makes and funds the National Trust for Historic Preservation; creates a grants program for state historic preservation; designates a program to protect historic properties of Indian tribes; requires federal agencies to manage and preserve their historic properties; directs a standard to which U.S. owned historic sites will be maintained; serves as the enabling legislation for the Convention Concerning the Protection of the World Cultural and Natural Heritage (which establishes UNESCO<sup>8</sup> sites); and establishes a grants program for historic black colleges and universities. Finally, NHPA creates a process for federal agencies to follow when their projects may affect a historic property. This process is found in Section 106 of the act, and thus is known as a Section 106 review.

---

<sup>5</sup> Historic Sites Act of 1935, §§2(a)–(k); 16 U.S.C. §§462(a)–(k).

<sup>6</sup> 16 U.S.C. §462(d).

<sup>7</sup> P.L. 89-665, 80 Stat. 915; 16 U.S.C. §§470 et seq. Because so much of the terminology used in NHPA is based on the initial act, where appropriate, this report will include those citations as well as citations to the codified version of the law, as amended, in the *U.S. Code*.

<sup>8</sup> United Nations Educational, Scientific and Cultural Organization.

NHPA Section 106 requires federal agencies to review the potential impacts of their actions on historic sites. It is similar to the National Environmental Policy Act (NEPA) in that both are procedural acts.<sup>9</sup> Courts describe NHPA as a “stop, look, and listen” statute that requires the agency to consider the effects of its project on historic sites.<sup>10</sup> Whereas NEPA does not require an agency to choose an action that would lead to the least environmental harm, NHPA does not require an agency to halt an action that would harm a historic site. Instead, both laws require agencies to make informed decisions about actions or projects that would impact the environment or historic properties.

Under NHPA, the Section 106 process is to be concluded before federal funding is provided or a federal license issued.<sup>11</sup> Starting Section 106 review early in the project development process ensures that agencies consider “a broad range of alternatives” during the planning process.<sup>12</sup> According to a study commissioned by the National Trust for Historic Preservation (NTHP), the Section 106 process involves “hundreds of federal agencies and offices, thousands of federal programs, projects, and activities, and many thousands of individuals at all levels of government and within the private sector.”<sup>13</sup>

The vast majority of Section 106 reviews result in findings that the proposed project affects no historic properties. According to the NTHP Report, of the 114,000 eligibility actions reviewed annually, approximately 85% were found not to involve historic properties.<sup>14</sup> Thirteen percent of the determinations involved historic properties, but the NHPA process found the project had no adverse effects. For the 2% of properties that were adversely affected, the interested parties resolved their concerns through Memoranda of Agreement.<sup>15</sup>

## Introductory NHPA Concepts

### Undertaking

The Section 106 process is triggered by a federal *undertaking*. NHPA requires federal agencies “to take into account the effects of their undertakings on a site, building, structure, or object that is included in or eligible for inclusion in the National Register of Historic Places.”<sup>16</sup> Under the act, an *undertaking* is defined as “a project, activity, or program funded in whole or in part under

---

<sup>9</sup> Procedural acts are laws that require a process to be followed rather than mandating a particular result.

<sup>10</sup> See *Safeguarding the Historic Hanscom Area’s Irreplaceable Resources, Inc. v. Federal Aviation Administration*, 651 F.3d 202, 214 (1<sup>st</sup> Cir. 2011); *Business and Residents Alliance of East Harlem v. Jackson*, 430 F.3d 584, 591 (2d Cir. 2005); *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 805 (9<sup>th</sup> Cir. 1999); *Illinois Commerce Commission v. Interstate Commerce Commission*, 848 F.2d 1246, 1261 (D.C. Cir. 1988).

<sup>11</sup> 16 U.S.C. §470f.

<sup>12</sup> 36 C.F.R. §800.1(c).

<sup>13</sup> Leslie E. Barras, *Section 106 of the National Historic Preservation Act: Back to Basics*, Summary p. 5 (2010) (hereinafter *NTHP Report*), available at <http://www.preservationnation.org/information-center/law-and-policy/legal-resources/additional-resources/Back-to-Basics-Summary.pdf>.

<sup>14</sup> NTHP Report, Summary p. 3 (2010), based on data from John W. Renaud, U.S. Department of the Interior, National Park Service, e-mail message to Leslie E. Barras, June 28, 2009. This number represents the number of *properties* reviewed for eligibility during a project’s Section 106 review and not the number of federal *projects* reviewed.

<sup>15</sup> *Id.*

<sup>16</sup> P.L. 89-665, §106; 16 U.S.C. §470f.

the direct or indirect jurisdiction of a Federal agency.”<sup>17</sup> In 1992, Congress amended this definition to give the following examples of types of projects that constitute undertakings:

- (A) those carried out by or on behalf of an agency;
- (B) those carried out with Federal financial assistance;
- (C) those requiring a Federal permit license, or approval; and
- (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.<sup>18</sup>

Courts have clarified that, despite this broad definition, Section 106 applies only to federally controlled or federally licensed undertakings.<sup>19</sup> Thus, projects subject to state or local regulation do not require a Section 106 review unless the project also involves either federal control or a federal license.<sup>20</sup>

### **State Historic Preservation Officer**

The Section 106 review requires federal agencies to consult with the State Historic Preservation Officer<sup>21</sup> (SHPO). The SHPO is the state’s lead authority for historic preservation who “reflects the interests of the State and its citizens in the preservation of their cultural heritage.”<sup>22</sup> When tribal properties are at stake, federal agencies must consult with the Tribal Historic Preservation Officer (THPO). The main responsibility of the SHPO/THPO in the Section 106 process is to review whether the federal agency has adequately identified and addressed an undertaking’s impacts. Federal agencies must have the SHPO/THPO’s concurrence to advance an undertaking, or must follow the termination procedure described later in this report. In addition, NHPA charges the SHPO with establishing a state historic preservation program, which is described in detail in Section 101 of the act.<sup>23</sup>

---

<sup>17</sup> P.L. 89-665, §301; 16 U.S.C. §470w(7); 36 C.F.R. §800.16(y).

<sup>18</sup> *Id.* See P.L. 102-575, §4019 for amendment.

<sup>19</sup> See *Business and Residents Alliance of East Harlem v. Jackson*, 430 F.3d 584 (2d Cir. 2005); *National Mining Association v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003); *Sheridan Kalorama Historical Association v. Christopher*, 49 F.3d 750 (D.C. Cir. 1995).

<sup>20</sup> See *Business and Residents Alliance of East Harlem v. Jackson*, 430 F.3d 584 (2d Cir. 2003) (holding that \$5 million in federal funding did not make block grant a federal undertaking under NHPA because the federal agencies did not have jurisdiction or control over the project).

<sup>21</sup> NHPA defines SHPO as the State Historic Preservation *Officer*, while the National Park Service uses the term as meaning the State Historic Preservation *Office*. See NPS, *National Register of Historic Places Fundamentals*, at [http://www.nps.gov/nr/national\\_register\\_fundamentals.htm](http://www.nps.gov/nr/national_register_fundamentals.htm). This distinction does not appear to be material.

<sup>22</sup> 36 C.F.R. §800.2(c)(1).

<sup>23</sup> P.L. 89-665, §101; 16 U.S.C. §470a(b). *State* is defined for the purposes of a SHPO as the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands. See 16 U.S.C. §470w(2).

## **Advisory Council on Historic Preservation**

NHPA created the Advisory Council on Historic Preservation (ACHP or the Council), which is an independent agency consisting of federal, state, and tribal governments members, as well as experts in historic preservation and members of the general public.<sup>24</sup> The ACHP has many responsibilities,<sup>25</sup> some of which relate to the Section 106 process. NHPA authorizes the Council to promulgate rules on the Section 106 process,<sup>26</sup> including when projects are exempt from review.<sup>27</sup> While all agencies follow ACHP regulations, agencies may have additional regulations that are more specific to their missions. The law requires that the ACHP have the opportunity to comment on undertakings,<sup>28</sup> but does not require it to comment. According to the NTHP Report, formal comments by the Council are issued in less than 0.01% of all projects.<sup>29</sup> Where the federal agency and the SHPO or any consulting party dispute the historicity of a site or the effects of an undertaking, the agency may refer the matter to the ACHP for review.<sup>30</sup>

To facilitate project review, federal agencies provide funding for almost one-third of the ACHP's review staff. The agencies providing this funding are (1) Natural Resources Conservation Service of the Department of Agriculture; (2) Department of Veterans Affairs; (3) Department of the Army; (4) Department of Energy; (5) Bureau of Land Management of the Department of the Interior; (6) Federal Highway Administration of the Department of Transportation; and (7) the General Services Administration.<sup>31</sup> While such arrangements may aid efficiency by increasing the number of reviewers, some may worry that they could create conflicts of interest between the reviewer and the funding agencies, potentially affecting the integrity of the process.

## **National Register of Historic Places**

The National Register of Historic Places (sometimes known as the National Register) is a list of “districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture.”<sup>32</sup> The National Park Service (NPS) maintains the National Register, with the Keeper of the National Register as the official custodian. Properties may be placed on the register in five different ways:

- acts of Congress or executive orders creating historic areas administered by NPS;
- properties declared by the Secretary of the Interior to be of national significance and designated as a National Historic Landmark;
- properties nominated by SHPOs and approved by NPS;

---

<sup>24</sup> P.L. 89-665, §201; 16 U.S.C. §470i.

<sup>25</sup> See P.L. 89-665, §202; 16 U.S.C. §470j.

<sup>26</sup> P.L. 89-665, §211; 16 U.S.C. §470s.

<sup>27</sup> See 36 C.F.R. part 800.

<sup>28</sup> P.L. 89-665, §106; 16 U.S.C. §470f.

<sup>29</sup> NTHP Report, p. 3.

<sup>30</sup> 36 C.F.R. §§800.4(d)(1)(ii), 800.5(c)(2).

<sup>31</sup> Ralston Cox, Director, Office of Administration, Advisory Council on Historic Preservation, via e-mail to the author (April 23, 2012).

<sup>32</sup> P.L. 89-665, §101; 16 U.S.C. §470a(a)(1)(A).



- properties nominated by any person or local government in a state without an SHPO and approved by NPS; and
- federal properties nominated by federal agencies via the Federal Preservation Officer (<http://www.achp.gov/fpo.html>) and approved by NPS.<sup>33</sup>

NPS established the criteria for eligible properties.<sup>34</sup> In general, eligible property must be at least 50 years old, have historic integrity, and have distinctive or significant characteristics of its era. The full criteria are provided in the **Appendix** to this report.

## **Consultation**

Consultation is the backbone of the Section 106 process. It is an interactive process in which an agency evaluates an undertaking's effects on a historic site with input from *consulting parties*. Consulting parties include the SHPO; the THPO; applicants for the relevant license or permit; representatives of local government; affected Indian tribes or Native Hawaiian organizations; and parties with a demonstrated interest in the undertaking.<sup>35</sup> Consultation is a process where all parties share information so that a well-informed decision regarding the project may be made. It ends with an agreement among the interested parties, or when terminated by the agency, SHPO, or THPO. The Council assumes a role in completing the Section 106 process when termination occurs.<sup>36</sup> Additionally, the agency is required to seek the views of the public during a Section 106 review. According to the regulations, "the views of the public are essential to informed Federal decision-making in the section 106 process. The agency official shall seek and consider the views of the public."<sup>37</sup>

## **The Section 106 Process**

### **Commencing the Section 106 Process**

When a federal agency finds its project is an undertaking under NHPA, it begins the Section 106 review process by identifying the consulting parties, the area of potential effects, and the historic properties within that area.

### ***Identifying Consulting Parties***

To begin consultation, the agency must identify the appropriate consulting parties, which are described within 36 C.F.R. Section 800.2. The SHPO/THPO is a key party, meaning an agency cannot continue consultation without the SHPO/THPO's participation absent the ACHP's involvement.<sup>38</sup> Other parties entitled to participate are the applicant, tribes,<sup>39</sup> and local

---

<sup>33</sup> 36 C.F.R. §60.1(b).

<sup>34</sup> 36 C.F.R. §60.4.

<sup>35</sup> 36 C.F.R. §800.2(c). While the agency may continue consultation if Indian tribes and Native Hawaiian organizations that are invited choose not to participate, if a native group submits a written request to be a consulting party, it must be made one. 36 C.F.R. §800.2(f)(2).

<sup>36</sup> For more on termination, see "No Effects on Historic Properties Found—Termination," below.

<sup>37</sup> 36 C.F.R. §800.2(d).

<sup>38</sup> 36 C.F.R. §800.22(c)(1). If the SHPO/THPO refuses to participate or if that office does not exist, the regulations (continued...)

government officials.<sup>40</sup> The agency must invite these potential participants, although the consultation may proceed without their input.<sup>41</sup> Additionally, members of the public with an interest in the project may request to participate in the consultation and are allowed at the discretion of the agency in further consultation with the SHPO/THPO.<sup>42</sup> Under the regulations, a member of the public has two ways to demonstrate an interest in the project: (1) a legal or economic relationship to the undertaking or affected properties; or (2) concern with the undertaking's effects on historic properties.<sup>43</sup> For interested parties, becoming a consulting party increases their influence over the Section 106 process, allowing them to comment on proposals early in the process, and possibly conferring standing to enforce any agreement reached.<sup>44</sup>

### *Identifying the Area of Potential Effects*

The next step is for the agency to identify the area that may be affected by the project, known as the *area of potential effects* (sometimes abbreviated as APE). The regulations define *area of potential effects* as “the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties.”<sup>45</sup> Identification of the APE is done in consultation with the SHPO.<sup>46</sup> This initial determination is significant, as it provides the scope of the Section 106 review. Only those properties within the APE are evaluated for project impacts.

The size of the APE is related to the federal undertaking, and not to a project as a whole, although sometimes that distinction is blurry. According to the regulations, the area of potential effects “is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.”<sup>47</sup>

---

(...continued)

allow consultation to continue via the ACHP. 36 C.F.R. §800.3(c)(4).

<sup>39</sup> The consulting relationship with tribes changes depending on whether the project is on tribal property (36 C.F.R. §800.2(c)(2)(i)) or whether the property is culturally significant (36 C.F.R. §800.2(c)(2)(ii)). The regulations require that the agency “shall make a reasonable and good faith effort to identify” Indian tribes and Native Hawaiian organizations. 36 C.F.R. §800.3(f)(1).

<sup>40</sup> 36 C.F.R. §§800.3(f)(1)-(2).

<sup>41</sup> The regulations require that the agency “shall invite any local governments” (36 C.F.R. §800.3(f)(1)), and “make a reasonable and good faith effort to identify [tribal groups].” 36 C.F.R. §800.3(f)(2). See *City of Oxford v. Federal Aviation Administration*, 428 F.3d 1346, 1357 (11<sup>th</sup> Cir. 2005) (finding that NHPA “simply required the [agency] to identify consulting parties and invite them to participate.... The regulations do not speak to the form and content of written invitations to meetings with consulting parties”).

<sup>42</sup> 36 C.F.R. §800.3(f)(3).

<sup>43</sup> 36 C.F.R. §800.2(c)(5).

<sup>44</sup> Courts have held that the ability of an interested party to challenge compliance with a Section 106 agreement depends on the phrasing of the agreement. See *Coalition of 9/11 Families, Inc. v. Rampe*, No. 04-civ-6941, 2005 WL 323747 (S.D.N.Y. Feb. 8, 2005) (holding that consulting party status for interested parties could create standing to enforce a Section 106 agreement only where that agreement provided third-party rights); *Tyler v. Cuomo*, 236 F.3d 1124, 1135 (9<sup>th</sup> Cir. 2000) (non-signatories to Section 106 agreement had standing to enforce only those provisions that granted members of the public the right to be heard).

<sup>45</sup> 36 C.F.R. §800.16(d).

<sup>46</sup> 36 C.F.R. §800.4(a)(1).

<sup>47</sup> 36 C.F.R. §800.16(d).

In one case related to the size of the APE, the Fourth Circuit criticized the Corps of Engineers for limiting its review of a fill permit to only the area where the fill was used, rather than considering how the improved road allowed by the permit would affect eligible property.<sup>48</sup> Although the court did not use the term *area of potential effects*, it noted that NHPA regulations and the Corps' regulations required consideration of effects outside the permit area.<sup>49</sup>

In contrast, in the case of a 2-mile state road project that would require demolition of a historic home listed in the National Register, the court found that the federal undertaking was limited to Corps of Engineers' permits for two stream crossings. The court rejected arguments that those permits dictated the route of the project and that separating the permits from the rest would be an illegal segmentation.<sup>50</sup> The court held that the permit did not affect the historic home and allowed the Corps to limit the APE to the right of way approaching the stream and the crossing.<sup>51</sup> Thus, any effects outside that area did not need to be considered in the Section 106 process. The homeowners filed an appeal.

In another case, a court upheld a variable APE,<sup>52</sup> meaning different areas were used for different impacts from the undertaking. The undertaking was a federal highway project, and the agency measured effects in areas between 150 feet to 500 feet from the edge of the project roadway, depending on the effect. For example, where the roadway was not visible from a property, the APE was smaller. The court found this practice consistent with NHPA.

### *Identifying Historic Properties*

Next, the agency identifies any historic properties in the APE in consultation with the SHPO. Historic properties include those on the National Register of Historic Places, and those eligible to be listed on the register.<sup>53</sup> While the register should enable the agency to find listed properties, eligible properties may be harder to identify. Typically, agencies ask the SHPO to identify such properties. The agency may also consult other parties with regard to such properties.

Simply because something is old, does not mean it is historic under the act. To be eligible for listing on the National Register, and thus identified as a historic property under NHPA, a property must also be linked to history via association to significant events or persons, by possessing distinct characteristics of an era, or by having integrity of location, materials, workmanship, or association.<sup>54</sup> The Council describes the issue of integrity as whether the site “look[s] much the way as it did in the past.”<sup>55</sup> *Association* means the property is linked to a historic event or has a culturally significant heritage. Accordingly, a court found that an agency failed to consider the historicity of a hundreds-year-old oak tree when identifying historic properties.<sup>56</sup> However, once

---

<sup>48</sup> *Pye v. United States*, 269 F.3d 459 (4<sup>th</sup> Cir. 2001).

<sup>49</sup> *Id.* at 469.

<sup>50</sup> *McGehee v. U.S. Army Corps of Engineers*, No. 3:110CV-160, 2011 WL 2009969 (W.D. Ky. May 23, 2011).

<sup>51</sup> *Id.* at \*4.

<sup>52</sup> *Valley Community Preservation Commission v. Mineta*, 373 F.3d 1078 (10<sup>th</sup> Cir. 2004).

<sup>53</sup> P.L. 89-665, §106; 16 U.S.C. §470f. The phrase “or eligible for inclusion in” was amended to the act in 1976. P.L. 94-422. Prior to that, only listed properties were covered.

<sup>54</sup> 36 C.F.R. §60.4. The entire listing criteria are provided in the **Appendix**.

<sup>55</sup> See ACHP, *Protecting Historic Properties: A Citizen's Guide to Section 106 Review*, p. 6, available at <http://www.achp.gov/docs/CitizenGuide.pdf>.

<sup>56</sup> *Hatmaker v. Georgia Department of Transportation*, 973 F. Supp. 1047 (M.D. Ga. 1995).

the historic review was completed, the court upheld the finding that the tree lacked associations of historic significance and was not eligible for listing.<sup>57</sup>

Additionally, something historic is not eligible for protection unless it can be identified with some specificity. For example, a court held that a site was not eligible for the National Register despite being a culturally significant path of retreat for the Kiks.adi of Alaska because there was no consensus on the route.<sup>58</sup> The court stated that despite extensive efforts of the agency to identify the site, showing “a general unbounded and imprecisely located area has important cultural significance is not enough” for NHPA eligibility.<sup>59</sup>

Finally, when something is historically significant, the age does not matter. Consider the historic status of the ruins of the World Trade Center towers, for which an agency conducted a Section 106 review.<sup>60</sup>

While the NHPA regulations require agencies to make a “reasonable and good faith effort” to identify historic properties,<sup>61</sup> what constitutes a “reasonable and good faith effort” is subject to debate. Questions regarding whether an agency made sufficient efforts to identify eligible properties frequently arise in the context of identifying cultural resources of Indian tribes, due to tribal concerns about revealing sacred sites. The NHPA regulations caution agencies regarding this potential problem, advising that “an Indian tribe or Native Hawaiian organization may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites.”<sup>62</sup>

At least two different federal courts of appeals have reviewed claims that federal agencies failed to make reasonable efforts to identify tribal cultural properties. In one case, *Pueblo of Sandia v. United States*,<sup>63</sup> the agency mailed letters to identified Indian tribes and invited them to meetings. The Indian tribes did not provide information regarding location and historicity of traditional cultural sites, and the agency did not include any sites in the APE. The Tenth Circuit found that the agency did not act reasonably because it had information from reliable sources that culturally significant sites were in the area.<sup>64</sup> Additionally, the court found that the agency did not act in good faith because it had withheld documentation from the SHPO until after the SHPO issued its concurrence.

In another case, the Ninth Circuit held that the agency had acted in compliance with NHPA. The court noted that the agency did not withhold information from the SHPO, made continued efforts to obtain information from the Indian tribe, and conducted research on its own to identify cultural properties.<sup>65</sup> A district court case compared the actions of the agency to those in *Pueblo of Sandia*,

---

<sup>57</sup> *Hatmaker v. Georgia Department of Transportation*, 973 F. Supp. 1058 (M.D. Ga. 1997).

<sup>58</sup> *Hoonah Indian Association v. Morrison*, 170 F.3d 1223 (9<sup>th</sup> Cir. 1999).

<sup>59</sup> *Id.* at 1232.

<sup>60</sup> *Coalition of 9/11 Families, Inc. v. Rampe*, No. 04-civ-6941, 2005 WL 323747 (S.D.N.Y. Feb. 8, 2005).

<sup>61</sup> 36 C.F.R. §800.4(b)(1). ACHP has guidance for reasonable and good faith efforts. ACHP, *Meeting the “Reasonable and Good Faith” Identification Standard in Section 106 Review* (Nov. 10, 2011), available at [http://www.achp.gov/rgfe\\_guidance.pdf](http://www.achp.gov/rgfe_guidance.pdf).

<sup>62</sup> 36 C.F.R. §800.4(a)(4).

<sup>63</sup> 50 F.3d 856 (10<sup>th</sup> Cir. 1995).

<sup>64</sup> *Id.* at 860-61.

<sup>65</sup> *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 807 (9<sup>th</sup> Cir. 1999).

and found that, in the case before it, the agency had acted reasonably and in good faith to identify traditional cultural properties.<sup>66</sup> The court held that by conducting interviews and field studies in addition to requesting information from the tribes, the agency had met its NHPA obligations for identifying properties.<sup>67</sup>

### **Assessing Adverse Effects**

Once the agency has identified the affected historic properties, the agency determines whether the undertaking adversely affects those properties.<sup>68</sup> In making this determination, the agency consults with the SHPO, as well as with any tribal group that attaches religious and cultural significance to the property.<sup>69</sup> Under the NHPA regulations, alterations in “any of the characteristics of an historic property that qualify the property for inclusion in the National Register” constitute adverse effects.<sup>70</sup> In determining whether the project has an adverse effect, the agency considers the integrity of the following aspects of the property:

- location,
- design,
- setting,
- materials,
- workmanship,
- feeling, or
- association.<sup>71</sup>

NHPA regulations clarify that both direct and indirect effects of the project must be considered,<sup>72</sup> as well as reasonably foreseeable effects that may occur later in time, at some distance, or are cumulative.<sup>73</sup> A Memorandum of Agreement resolves how an agency will address adverse effects (see below).

Simply because an undertaking will occur in an area with historic properties does not mean that those properties will be adversely affected. For example, a plan by the National Park Service to kill deer in Gettysburg National Military Park was held not to affect the contemplative nature of the park.<sup>74</sup> Another court rejected the claim that construction of a hotel and parking garage in the view of a historic district in Philadelphia adversely affected the historic area.<sup>75</sup> A revised flight

---

<sup>66</sup> *Pit River Tribe v. Bureau of Land Management*, 306 F. Supp. 2d 929, 944-45 (E.D. Cal. 2004).

<sup>67</sup> *Id.*

<sup>68</sup> P.L. 89-665, §106; 16 U.S.C. §470f.

<sup>69</sup> 36 C.F.R. §800.5(a).

<sup>70</sup> 36 C.F.R. §800.5(a)(1).

<sup>71</sup> *Id.*

<sup>72</sup> 36 C.F.R. §800.16(d).

<sup>73</sup> 36 C.F.R. §800.5(a)(1).

<sup>74</sup> *Davis v. Latschar*, 202 F.3d 359 (D.C. Cir. 2000) (plaintiffs argued that gunfire would alter the historic nature of the battlefield).

<sup>75</sup> *Society Hill Towers Owners' Association v. Rendell*, 210 F.3d 168 (3d Cir. 2000).

plan that would bring aircraft over culturally significant tribal property was held not to affect historic properties, not because of a lack of eligible sites, but because there were no effects.<sup>76</sup>

### ***No Effects on Historic Properties Found—Termination***

If no historic properties will be affected by the undertaking (either because no properties are present or because properties will not be affected), the agency terminates the Section 106 process. However, the agency does not have unilateral authority over when the process ends.<sup>77</sup> The regulations require the agency to document its decision to the SHPO/THPO and notify all consulting parties of the decision and the availability of the documentation.<sup>78</sup> If the SHPO/THPO does not comment within 30 days, the consultation is terminated.<sup>79</sup>

If the SHPO objects to the finding, the agency must attempt to resolve the conflict, either directly with the SHPO, or by advancing the dispute to the ACHP.<sup>80</sup> The Council has 30 days to act. If it does nothing, the consultation is terminated. If the Council objects to the agency's finding of no effect on historic properties, the Council must provide its opinion to the agency.<sup>81</sup> However, the ACHP's opinion is not binding on the agency.<sup>82</sup> While the agency is the ultimate decision maker, the agency's decision to terminate consultation must be supported by the documentation. For example, in a case where the agency ignored the contrary opinions of the ACHP and the Keeper of the National Register to find that no historic properties would be affected, the court held the agency had violated NHPA.<sup>83</sup> If the agency affirms the finding of no effect, the Section 106 process ends. Otherwise, the agency and consulting parties continue consultation based on the revised opinion.

### **Resolving Adverse Effects—Memorandum of Agreement**

When historic properties are adversely affected, the agency and the SHPO/THPO enter into a binding agreement known as a Memorandum of Agreement (MOA). The MOA “govern[s] the undertaking and all of its parts,” including how the agency will address adverse effects.<sup>84</sup> Additional parties that have participated in the consultation, such as the Council, also may sign, and acquire rights to enforce or alter the agreement.<sup>85</sup> The agency provides the MOA and documentation to the Council.

---

<sup>76</sup> *Morongo Band of Mission Indians v. Federal Aviation Administration*, 161 F.3d 569 (9<sup>th</sup> Cir. 1998).

<sup>77</sup> See *Sayler Park Village Council v. U.S. Army Corps of Engineers*, 2002 WL 32191511 (S.D. Ohio Dec. 30, 2002) (holding that the Corps improperly terminated consultation over the objections of the SHPOs).

<sup>78</sup> 36 C.F.R. §800.4(d)(1).

<sup>79</sup> 36 C.F.R. §800.4(d)(1)(i).

<sup>80</sup> 36 C.F.R. §800.4(d)(1)(ii).

<sup>81</sup> 36 C.F.R. §800.4(d)(1)(iv)(A).

<sup>82</sup> See *Vieux Carre Property Owners, Residents and Associates, Inc. v. Brown*, 948 F.2d 1436, 1447 (5<sup>th</sup> Cir. 1991); *Hough v. Marsh*, 557 F. Supp. 74 (D. Mass. 1982).

<sup>83</sup> *Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transportation Board*, 252 F.3d 246 (3d Cir. 2001).

<sup>84</sup> 36 C.F.R. §800.6(c)(1).

<sup>85</sup> 36 C.F.R. §800.6(c)(2). See *Don't Tear It Down v. Penn Ave. Development Corp.*, 642 F.2d 527, 531 (D.C. Cir. 1998).



An agency must consider mitigating adverse effects of an undertaking.<sup>86</sup> There is no requirement, however, that an undertaking avoid harming historic properties. Instead, the agency is directed to consult “to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.”<sup>87</sup>

For example, when an agency knew its undertaking would damage a historic farm, it planned mitigation to limit the harm and restore the damaged areas. The court held that the agency had met its NHPA obligations.<sup>88</sup> In the case of a large land management project that would affect areas with religious and culturally significant places, the mitigation would avoid those features that made the site eligible for listing but not avoid the area altogether. The court upheld that approach, stating “NHPA requires that the [agency] protect only against adverse effects on the features of these areas that make them eligible for the National Register.”<sup>89</sup> Similarly, where timber harvesting would adversely affect a culturally significant ceremonial district of the Karuk Tribe, the agency developed a mitigation plan that would avoid logging in the sensitive areas.<sup>90</sup> The court upheld the agency plan for mitigation, but suspended the timber harvest until the logging company could be made aware of the avoidance plan.<sup>91</sup>

Adequate mitigation may include documenting a site that will be demolished. The plan to mitigate effects of removing remnants of the World Trade Center towers following the attacks of September 11, 2001, involved photographing the site. The court upheld this method of mitigating “potentially adverse effects to structural remnants.”<sup>92</sup> However, where other mitigation would serve, documentation may not be adequate. In the case of a timber project that would adversely affect a culturally significant trail, the appellate court rejected the agency plan to mitigate the effects by mapping the trail and photographing significant points.<sup>93</sup> The court suggested that the project could be moved to avoid the trail.<sup>94</sup>

The agency is required to provide adequate documentation of its findings regarding adverse effects, make the documentation available to the public, and provide an opportunity for comment.<sup>95</sup> Specific information must be included whether adverse effects are found or not:

1. A description of the undertaking, specifying the federal involvement, and its area of potential effects, including photographs, maps, and drawings, as necessary;
2. A description of the steps taken to identify historic properties;
3. A description of the affected historic properties, including information on the characteristics that qualify them for the National Register;
4. A description of the undertaking’s effects on historic properties;

---

<sup>86</sup> 36 C.F.R. §800.6(a).

<sup>87</sup> 36 C.F.R. §800.6(c).

<sup>88</sup> *Northwest Bypass Group v. U.S. Army Corps of Engineers*, 453 F. Supp. 2d 333 (D.N.H. 2006).

<sup>89</sup> *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Department of the Interior*, 608 F.3d 592, 611 (9<sup>th</sup> Cir. 2010).

<sup>90</sup> *Karuk Tribe v. Kelley*, No. 10-02039, 2011 WL 2444668 (N.D. Cal. June 13, 2011).

<sup>91</sup> *Id.* at \*14.

<sup>92</sup> *Coalition of 9/11 Families, Inc. v. Rampe*, No. 04-civ-6941, 2005 WL 323747 (S.D.N.Y. Feb. 8, 2005).

<sup>93</sup> *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 809 (9<sup>th</sup> Cir. 1999).

<sup>94</sup> *Id.*

<sup>95</sup> 36 C.F.R. §800.6(a)(4).

5. An explanation of why the criteria of adverse effect were found applicable or inapplicable, including any conditions or future actions to avoid, minimize, or mitigate adverse effects; and
6. Copies or summaries of any views provided by consulting parties and the public.<sup>96</sup>

The alternative to reaching a MOA is terminating consultation, which is similar to the termination process at the stage of finding no adverse effects.<sup>97</sup> The agency must make its termination decision and supporting documents available to the public and all consulting parties.<sup>98</sup> While the agency is the ultimate decision maker, it must consider the comments of the Council and all consulting parties. More time is provided for those comments than for termination at the earlier stage (45 days rather than 30), and the head of the agency cannot delegate the decision.<sup>99</sup>

For example, the Secretary of the Interior terminated consultation for a wind turbine project off the coast of Cape Cod, MA, when no MOA could be reached. In this case, the indirect effects to viewsheds of historic properties and culturally significant properties could not be mitigated to the satisfaction of the affected parties.<sup>100</sup> In the notice of termination, the Secretary of the Interior discussed all of the factors supporting the termination, such as the dates of consultation meetings; the impacts to each property affected; mitigation that the agency would undertake; and mitigation measures that were proposed but would not be taken. The Secretary of the Interior's notice of termination referenced the ACHP statement that the agency "had done the work necessary" and that "termination would be appropriate" unless the affected Indian tribes agreed to mitigation.<sup>101</sup>

### *Effects on National Historic Landmarks*

Different standards apply when the undertaking is affecting a historic landmark. Historic landmarks are designated by the Department of the Interior under the Historic Sites Act (see above) and have a higher standard for protection than other historic properties. The agency must "to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark [that may be directly and adversely affected]."<sup>102</sup> Additionally, where adverse effects are found, the agency is required to request the participation of the ACHP and the Secretary of the Interior.<sup>103</sup> By providing for the Secretary of the Interior's participation, the National Park Service becomes a consulting party, which some argue may lead to stronger advocacy on behalf of preservation in the case of historic landmarks. Otherwise, the consultation steps outlined above apply.

---

<sup>96</sup> 36 C.F.R. §800.11(e).

<sup>97</sup> 36 C.F.R. §800.7.

<sup>98</sup> 36 C.F.R. §800.7(c)(4).

<sup>99</sup> 36 C.F.R. §800.7(c).

<sup>100</sup> Department of the Interior, *Termination of NHPA Section 106 Consultation for the Cape Wind Energy Project* (undated), available at [http://www.boemre.gov/offshore/renewableenergy/PDFs/CapeWind/Tripathi/Appendix\\_2\\_CW106.pdf](http://www.boemre.gov/offshore/renewableenergy/PDFs/CapeWind/Tripathi/Appendix_2_CW106.pdf).

<sup>101</sup> *Id.* at 6.

<sup>102</sup> 16 U.S.C. §470h-2(j). 36 C.F.R. §800.10(a).

<sup>103</sup> 36 C.F.R. §§800.10(b)-(c).



## Exception for Emergencies

NHPA provides an exception to the Section 106 requirement in certain emergency situations, authorizing the Secretary of the Interior to issue regulations waiving all or part of the process “in the event of a major natural disaster or an imminent threat to the national security.”<sup>104</sup> Under 36 C.F.R. Section 800.12 of the regulations, when the President, a tribal government, or a governor declares a disaster or emergency, an agency may follow its own established procedures, follow those under Section 800.14 regarding programmatic agreements (discussed below), or follow Section 800.12.<sup>105</sup>

If the agency has not established alternative procedures or a programmatic agreement, Section 800.12 waives consultation for immediate rescue and salvage activities, and provides an abbreviated consultation for any undertakings that will be implemented within 30 days of the declaration of the emergency or disaster.<sup>106</sup> The agency should notify the Council, the SHPO/THPO, and any affected tribal group of the proposed undertaking.<sup>107</sup> Those groups have seven days to comment. No other Section 106 requirements apply. If there is not time for even that procedure, the regulations allow agencies to invite comment from the Council, the SHPO/THPO, and tribal groups in the time available.<sup>108</sup>

## Programmatic Agreements

In some cases, agencies may establish Programmatic Agreements to serve as the Section 106 process for a type of project, thus promoting efficiency by avoiding duplicate consultations. The agreements may also be established for emergency circumstances in lieu of following Section 800.12. A Programmatic Agreement (PA) establishes procedures and standards for specific circumstances. Where a PA is in place, the NHPA regulations do not have to be followed. Some examples of PAs are:

- Bureau of Land Management—Section 106 reviews;
- National Park Service—Section 106 reviews;
- Federal Communication Commission—Section 106 reviews;
- Forest Service—Rangeland Management Activities on National Forest System Lands; and
- Environmental Protection Agency and others—Emergency Response under the National Oil and Hazardous Substance Spill Pollution Contingency Plan.<sup>109</sup>

Under the regulations, a PA may be used for routine management activities and for similar, repetitive projects.<sup>110</sup> The agreements may also be used when the effects of an undertaking cannot

---

<sup>104</sup> 16 U.S.C. §470h-2(j).

<sup>105</sup> 36 C.F.R. §800.12(b).

<sup>106</sup> 36 C.F.R. §800.13(d).

<sup>107</sup> 36 C.F.R. §800.12(b)(2).

<sup>108</sup> *Id.*

<sup>109</sup> See ACHP, *Nationwide Programmatic Agreements in Effect as of June 2007*, available at <http://www.achp.gov/palist.html>.

be determined prior to the project's start, or when a non-federal actor has the major decision making responsibilities.<sup>111</sup>

In developing the PA, the agency will consult with the SHPO/THPO, Indian tribes, and members of the public.<sup>112</sup> This makes national PAs difficult—over 500 Indian tribes must be consulted. For national or multi-state PAs, the National Conference of SHPOs may be consulted as well.

## Legislation in the 112<sup>th</sup> Congress

The 112<sup>th</sup> Congress is considering legislation that would limit NHPA reviews for certain projects, such as reconstructing highways or bridges destroyed in a disaster (H.R. 7, §3003; H.R. 2112, §127 [public print version only, not as introduced or enrolled]; H.R. 3347; S. 1389); and transferring Bureau of Land Management (BLM) land in the Mohave Valley for a shooting range (S. 526 [introduced version]). Additionally, the American Energy and Infrastructure Jobs Act of 2012 (H.R. 7) would change NHPA by excluding some properties from consideration under Section 106, and accepting state procedures for highway projects in place of Section 106 when they are found to be substantially equivalent.

The highway bills—H.R. 7, Section 3003; H.R. 2112, Section 127; H.R. 3347; and S. 1389—would allow reconstruction of a road, highway, or bridge destroyed in a natural disaster without having to undergo a Section 106 review (or review under several other laws). Similarly, H.R. 7, Section 22911, exempts reconstruction of railroad, tracks, bridges, and other facilities destroyed in a disaster from NHPA review. Since the regulations already provide for a much-abbreviated review process for projects that must be executed within 30 days following a disaster, these bills would appear to expedite only those undertakings having a longer planning schedule. Some may suggest that since planning was going to take longer, there would be time to conduct a Section 106 review.

As introduced, S. 526, which would transfer BLM land for a shooting range, included language to exclude the transfer from Section 106 review.<sup>113</sup> However, the reported version struck that language and instead ensured that the conveyance would include “appropriate conditions to address the impact of the shooting range on cultural resources.”<sup>114</sup>

H.R. 7, the American Energy and Infrastructure Jobs Act of 2012, includes language to change the federal aid highway construction process. Two sections of the bill would exclude some types of property from consideration under Section 106. Section 3010 of H.R. 7 would eliminate consideration of adverse effects on properties being sold or leased unless they were listed on the National Register. Under this bill, Section 106 reviews for federal aid highway projects involving selling or leasing properties would not have to consider the effects on properties *eligible* for listing. This would speed the review process for certain highway projects by eliminating the

---

(...continued)

<sup>110</sup> 36 C.F.R. §800.14(b)(1).

<sup>111</sup> 36 C.F.R. §800.14(b)(1).

<sup>112</sup> 36 C.F.R. §800.14(b).

<sup>113</sup> S. 526.IS, §4(b).

<sup>114</sup> S. 526.RS, §3.

search and evaluation of prospective National Register places, but may also lead to the destruction of historic properties, especially in those areas without active local preservation groups. H.R. 7, Section 22907, would exempt railroads subject to the Federal Railway Administration's safety laws from being considered historic under Section 106, except if the railway were already operated as a historic site. Individual elements of a railroad, such as depots and bridges, may still be considered historic at the discretion of the Secretary of Transportation with input from the Secretary of the Interior.

Under H.R. 7, Section 3015, if the Secretary of Transportation found a state program were substantially equivalent to NHPA, the project could be evaluated under such state laws instead of NHPA. H.R. 7, Section 3007, would establish that if a MOA regarding a historic property were in place under Section 106, no additional MOA would be required. Rather than amending NHPA, Section 3007 would change the Federal Highway Administration's obligations under 23 U.S.C. Section 138 to protect parks and historic places.<sup>115</sup>

---

<sup>115</sup> Those obligations are required under what is known as Section 4(f) (from P.L. 89-670, §4(f)).

## **Appendix. Criteria for Evaluation for the National Register**

Source: 36 C.F.R. Section 60.4.

### **National Register Criteria for Evaluation**

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:

- (a) That 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 significant persons in or 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 and 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.

### **Criteria Considerations**

Ordinarily cemeteries, birthplaces, graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years shall not be considered eligible for the National Register. However, such properties will qualify if they are integral parts of districts that do meet the criteria or if they fall within the following categories:

- (a) A religious property deriving primary significance from architectural or artistic distinction or historical importance; or
- (b) A building or structure removed from its original location but which is primarily significant for architectural value, or which is the surviving structure most importantly associated with a historic person or event; or
- (c) A birthplace or grave of a historical figure of outstanding importance if there is no appropriate site or building associated with his or her productive life; or
- (d) A cemetery that derives its primary importance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events; or

(e) A reconstructed building when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan, and when no other building or structure with the same association has survived; or

(f) A property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance; or

(g) A property achieving significance within the past 50 years if it is of exceptional importance.

This exception is described further in NPS “How To” #2, entitled “How to Evaluate and Nominate Potential National Register Properties That Have Achieved Significance Within the Last 50 Years” which is available from the National Register of Historic Places Division, National Park Service, United States Department of the Interior, Washington, DC 20240.

## **Author Contact Information**

Kristina Alexander  
Legislative Attorney  
kalexander@crs.loc.gov, 7-8597