

Overview of the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470 *et seq.*

The NHPA protects historic resources and applies to actions undertaken by the federal government. An “historic resource” is any prehistoric or historic district, site, building, structure or object included in, or eligible for inclusion on, the National Register of Historic Places (16 U.S.C. § 470w(5)). Traditional cultural properties – properties that reflect traditional religion, beliefs, customs, and practices – may be eligible for inclusion on the National Register of Historic Places. A federal undertaking is “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency,” and includes those actions that require a federal permit, license, or approval (16 U.S.C. § 470w(7)). “Historic resource” has a specific meaning under the NHPA and is not interchangeable with “cultural resource,” which is not defined in federal law and includes a larger universe of resources.

NHPA Section 106 requires a federal agency (including an independent agency having authority to license any undertaking) to take into account the effect of the undertaking on historic resources and to provide the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking (16 U.S.C. § 470f). The Advisory Council is an independent federal agency which was created in the NHPA; the Council is authorized to issue regulations to govern the implementation of Section 106, and those regulations are codified at 36 CFR Part 800.

The federal agency with jurisdiction over an undertaking is responsible for compliance with Section 106. Absent statutory authority to do so, this responsibility cannot be delegated. The agency must independently make and is legally responsible for the findings and determinations required by the NHPA regulations. The Section 106 review process must be completed prior to the approval of the expenditure of any federal funds or the issuance of the license. To ensure that the review is based on meaningful consultation, the regulations require that the agency initiate the Section 106 process early in project planning when a broad range of alternatives can be considered.

The following describes the steps in the Section 106 review process:

1. ***Initiating the process*** – once it is established that an activity is an “undertaking” as defined in the NHPA, the agency must determine whether the activity has the potential to cause effects on historic resources; information regarding the presence or absence of historic resources is not relevant at this stage. If the agency determines that an undertaking is a type that has the potential to affect historic process, the agency must initiate consultation with other parties. These parties include the State Historic Preservation Officer (SHPO) and, if appropriate, Native Hawaiian organizations and Tribal Historic Preservation Officers (THPO). Local governments are also entitled to participate in the Section 106 process if an undertaking affects properties under their jurisdiction. Applicants for federal assistance, permits, licenses, or other approvals are also entitled to participate in the consultation process. In some circumstances (e.g., if a National Historic Landmark may be affected), the National Park Service may also be a consulting party. The agency must also seek and consider the views of the public.

2. **Identification of historic resources** – the purpose of this step is to determine if there are any historic resources that may be affected by the undertaking. The agency is required to make a reasonable and good faith effort to carry out appropriate identification efforts. Although the federal agency can obtain help from applicants and others, this effort cannot be delegated and the agency must ensure that the work is carried out properly and must make appropriate use of the results.

In order to establish the scope of needed identification efforts, the agency must determine the undertaking's "area of potential effects" (APE), which is done in consultation with the SHPO/THPO. The APE should include:

- all alternative locations;
- all locations where the undertaking may result in ground disturbance;
- all locations from which elements of the undertaking may be visible or audible;
- all locations where the activity may result in changes in traffic patterns, land use, public access, etc.; and
- all areas where there may be indirect as well as direct effects.

If there is disagreement regarding the extent of the APE, the consulting parties may seek assistance from the Advisory Council; the Advisory Council can also elect to issue an advisory comment regarding the APE. The agency must consider the Advisory Council's views.

Reviewing known information and conferring with consulting parties and members of the public who may have knowledge of resources in the area, the agency proceeds to identify historic resources in the APE. If no historic properties – as defined in the NHPA – are identified and neither the SHPO/THPO nor the Advisory Council objects, then the Section 106 process is completed.

3. **Assessment of adverse effects** – when historic resources may be affected, the agency must assess whether the effects will be adverse. An adverse effect occurs when the integrity of the historic resource may be diminished by the undertaking through alteration of the characteristics that qualify the property for the National Register. A *finding of no adverse effect* is appropriate when none of the undertaking's anticipated effects meets the criteria of adverse effect or the agency, after consultation with the SHPO/THPO, modifies the undertaking or agrees to conditions that will avoid adverse effects. The agency may proceed with its undertaking without further review if the SHPO/THPO agrees with the no adverse effect determination and no other consulting party objects. If the SHPO/THPO or other consulting party disagree with the agency's finding of no adverse effect, the agency can either consult further until the disagreement is resolved or request that the Advisory Council review the finding in order to resolve the disagreement.

4. ***Resolution of adverse effects*** – after a finding of adverse effect, the agency works with the consulting parties to seek a solution that accommodates the needs of all concerned, serves the public interest, and promotes the protection and enhancement of historic resources. The usual result is a *Memorandum of Agreement* that describes the measures agreed to by the agency and the consulting parties. If agreement cannot be reached, then the Advisory Council issues formal comments on the undertaking, which the agency must consider before proceeding.

The NHPA regulations encourage streamlined consideration of the impact of federal projects on historic resources under Section 106 and under NEPA. The regulations allow the preparation of an environmental assessment or EIS under NEPA in lieu of the NHPA Section 106 review process, but only when the specific procedures of the NHPA regulations are followed. Compliance with NEPA and the NHPA can be combined, but compliance with NEPA alone does not indicate compliance with the NHPA.

With respect to a situation involving an applicant for federal approval or a federal permit or license, NHPA Section 110(k) (16 U.S.C. § 470h-2(k)) prohibits “anticipatory demolition” of historic resources by applicants in order to avoid NHPA requirements:

“Each Federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant who, with intent to avoid the requirements of section 106 of this Act, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant.”