Section 106 of the National Historic Preservation Act

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Prior to the approval of the expenditure of any federal funds on an undertaking, the NRCS must:

– Take into account the effects of the undertaking on historic properties; and

– Afford the Advisory Council on Historic Preservation a reasonable opportunity to comment
The Section 106 process

1. INITIATE the process
   - Determine undertaking
   - Notify SHPO/THPO, Indian tribes, and NHOs
   - Identify other Consulting Parties
   - Plan to involve the public

2. IDENTIFY historic properties
   - Determine APE
   - Identify historic properties
   - Consult with SHPO/THPO, tribes, NHOs, and other Consulting Parties
   - Involve the public

3. ASSESS adverse effects
   - Apply criteria of adverse effect
   - Consult with SHPO/THPO, tribes, NHOs, and other Consulting Parties
   - Involve the public

4. RESOLVE adverse effects
   - Notify ACHP
   - Avoid, minimize, or mitigate adverse effects
   - Consult with SHPO/THPO, tribes, NHOs, and other Consulting Parties
   - Involve the public

No undertaking/potential to cause effects
No historic properties present/affected
No historic properties adversely affected
Agreement (MOA)/PA or ACHP Comment
- STEP 1 -

INITIATING SECTION 106 PROCESS

NRCS:

- determines if there is an undertaking with the potential to affect historic properties
- identifies consulting parties, including SHPO/THPO, Indian tribe(s) or Native Hawaiian organizations
- develops plan to involve public
Agency official shall determine whether the proposed federal action is an undertaking, and if so, whether it is the type of activity that has the potential to cause effects on historic properties

*assuming such historic properties are present.*
IS THERE AN UNDERTAKING?
**Effect**: alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.
- STEP 2 -
IDENTIFYING HISTORIC PROPERTIES

NRCS, in consultation with SHPO/THPO:

- Determines the area of potential effects (APE)
WHAT ARE HISTORIC PROPERTIES?

The National Register of historic places is the official list of the Nation’s historic places worthy of preservation. Authorized by the National Historic Preservation Act of 1966, the National Park Service’s National Register of Historic Places is part of a national program to coordinate and support public and private efforts to identify, evaluate, and protect America’s historic and archeological resources.

Where to Start (How to list a property)

The National Register nomination process usually starts with your State Historic Preservation Office (SHPO). Contact your SHPO or check their website for National Register information, research materials, and necessary forms to begin the nomination process. If the property is on federal or tribal land, the process starts with the Federal Preservation Office or Tribal Preservation Office. (See on FPO and TPOs.)

How are Properties Evaluated?

To be considered eligible, a property must meet the National Register Criteria for Evaluation. This involves examining the property’s age, integrity, and significance.

- Age and integrity: Is the property old enough to be considered historic (generally at least 50 years old) and does it still look much the way it did in the past?
- STEP 2 -
IDENTIFYING HISTORIC PROPERTIES

NRCS, in consultation:

- Determines scope of identification effort (SHPO/THPO)
- Identifies historic properties (SHPO/THPO, Indian tribes, NHOs)
- Evaluates historic significance (SHPO/THPO, Indian tribes, NHOs)
TERMINOLOGY

- Historic properties vs. cultural resources
IDENTIFYING AND EVALUATING HISTORIC PROPERTIES

- Consultation
- Documentation
The section 106 process seeks to accommodate historic preservation concerns with the needs of federal undertakings through consultation.
CONSULTATION WITH INDIAN TRIBES

Government-to-government consultation:

- Agency official (NRCS State Conservationist) consults with the head of the tribe
- Cannot delegate tribal consultation to an applicant without prior written approval from the tribe
- Agreements between tribes and NRCS may be executed outlining consultation parameters
CONSULTATION WITH NATIVE HAWAIIAN ORGANIZATIONS

Federal agency must:

- Make reasonable & good faith effort to identify NHOs that might attach religious and cultural significance to historic properties

- Allow time to identify concerns including confidentiality of sensitive information
HISTORIC PROPERTIES OF RELIGIOUS AND CULTURAL SIGNIFICANCE

Summit of Haleakala, Hawai’i
HISTORIC PROPERTIES AFFECTED?

Apply the definition to an undertaking:

• Does not have to be a certainty
• Does not need to be direct and physical
• Reasonably foreseeable effects must also be considered
NO HISTORIC PROPERTIES AFFECTED
KEY POINTS

- Agency conveys its finding to SHPO/THPO in writing with supporting documentation
- Consulting parties notified
- If no objection, agency may proceed with the project following the 30-day review period
- The agency must maintain a record of the finding
OBJECTIONS TO FINDING

- Consult with SHPO/THPO.
- Refer finding to ACHP.
- 30 day review period.
- Respond to ACHP opinion with summary and rationale.
- Final decision.
- STEP 3 -

ASSESS ADVERSE EFFECTS
NO ADVERSE EFFECT KEY POINTS

- If the SHPO/THPO agrees with the agency’s finding, it may proceed with the project following the 30-day review period.
- If the SHPO/THPO does not respond in 30 days, the agency may proceed.
- The agency must maintain a record of the finding.
STATE LEVEL AGREEMENTS
RESOLVING ADVERSE EFFECTS

NRCS:

- Consults to find measures to avoid, minimize or mitigate adverse effects; and

- Enters into an agreement requiring it to ensure those measures are carried out.

- If an agreement can’t be reached, NRCS requests ACHP comments
ACHHP RULES OF ENGAGEMENT: APPENDIX A CRITERIA

1. Substantial impacts on important historic properties
2. Important questions of policy or interpretation
3. Potential for procedural problems
4. Issues of concern to Indian tribes and Native Hawaiian organizations
CONSULTATION TIPS

- Consult before decisions are made
- Use non-threatening venues
- Allow adequate time
- Approach consultation with an open mind
- Be honest and clear about existing parameters
- Be open to suggestions for new alternatives
- Address concerns or explain why you cannot
DOCUMENTING CONSENSUS WITH AN MOA

- Decisions recorded in a Memorandum of Agreement (MOA)
- MOA is a legally binding document
- MOA is the road map for implementation
WHO SIGNS THE AGREEMENT?

- **Signatories**
  - Federal agency
  - SHPO/THPO
  - ACHP (if participating)
- **Invited Signatories**
  - May include applicants, Indian tribes or NHOs, others assuming responsibilities under the agreement
- **Concurring Parties**
  - Can be invited to concur at NRCS’ discretion
PROJECT PROGRAMMATIC AGREEMENT VS. MOA

Format is very similar

- Preamble
- Stipulations
- Signatures

- Complex project vs. discrete project
- Same consultation process under Section 800.6
QUESTION:

Is an action categorically excluded from NEPA also categorically excluded from Section 106?
Coordinating Section 106 and NEPA Review - Categorical Exclusions

**Section 106**
- INITIATE the process
- IDENTIFY historic properties
- ASSESS adverse effects
- RESOLVE adverse effects

**CE**
- Proposed Action is Described in Agency CE
- Does the Proposal Have Extraordinary Circumstances
- Decision
  - Implementation with Monitoring as Provided in the Decision

*Agreement (MOAIPA) or Council Comment*
Coordinating Section 106 and NEPA Review - Environmental Assessments

Section 106 and EA

INITIATE the process
IDENTIFY historic properties
ASSESS adverse effects
RESOLVE adverse effects

Agreement (MOA/IPA), Or Council Comment

Significant Environmental Effects
Uncertain or No Agency CE

Develop EA with Public Involvement to the Extent Practicable

Significant Environmental Effects?

FONSI

Implementation with Monitoring as Provided in the Decision
Coordinating Section 106 and NEPA Review - Environmental Impact Statements

Section 106 and EIS

- **INITIATE the process**
- **IDENTIFY historic properties**
- **ASSESS adverse effects**
- **RESOLVE adverse effects**

Agreement (MOA/PA) or Council Comment

Significant Environmental Effects May or Will Occur

- Notice of Intent
- Public Scoping and Appropriate Public Involvement
- DEIS
- Public Review and Comment and Appropriate Public Involvement
- Final EIS
- Public Availability
- ROD
- Implementation with Monitoring as Provided in the Decision
SPECIAL SITUATIONS

- Emergencies (36 CFR 800.12)
- Post-review discoveries (36 CFR 800.13)
- Anticipatory demolition (36 CFR 800.9(c))
- Foreclosure (36 CFR 800.9(b))
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