Unit I:
INTRODUCTION

Course information

Purposes

The broad purposes of this course are to

- Explain the responsibilities of Federal agencies under Section 106 of the National Historic Preservation Act (NHPA),
- Describe the review process required under Section 106,
- Enable government officials to achieve program objectives more efficiently by understanding and anticipating historic preservation responsibilities, and
- Enable State Historic Preservation Officers, Tribal Historic Preservation Officers, local governments, applicants for Federal permits or assistance, and interested organizations and individuals to understand and more effectively participate in the Section 106 process.

Development

This course has been developed by the Advisory Council on Historic Preservation, an independent Federal agency. The mission of the Council is to promote the protection and enhancement of our nation's historic resources. One of its long-range goals is to promote the thorough, thoughtful integration of preservation into the conduct of Federal agency programs and activities. This course is offered to help you understand the requirements of Section 106 and integrate them into the way you do business.

Objectives

When you leave this course, you should understand:

- the roles and responsibilities of the participants in Section 106 review,
- the steps that make up the review process,
- how to identify and evaluate historic resources, and
- how to assess and resolve adverse effects of a Federal undertaking on historic resources.

Definitions

Three sometimes misunderstood "terms of art" will be used repeatedly throughout this course. All of them have specific definitions under the National Historic Preservation Act.

Historic property (or historic resource). This term means "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register of Historic Places, including artifacts, records, and material remains related to such a property or resource." [16 U.S.C. 470w (5)] "Historic property" is not interchangeable with the term "cultural resource." The latter is not defined in any Federal statute or regulation and includes a larger universe of resources.

Historic preservation. This term includes "identification, evaluation, recordation, documentation, curation, acquisition, protection, management, rehabilitation, restoration, stabilization, maintenance, research, interpretation, conservation, and education and training regarding the foregoing activities or any combination of the foregoing activities." [16 U.S.C. 470w (8)] Under NHPA, "historic preservation" is used in the broadest sense of the term;

preservation does not always have to mean retaining a property.

Undertaking. As defined in the Council's regulations, means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal assistance; and those requiring a Federal permit, license, or approval.

These are the types of activities that will necessitate Federal agency compliance with Section 106 of NHPA. It is a broad list that encompasses most types of actions where there is Federal involvement.

National Historic Preservation Act (NHPA)

When Congress passed the National Historic Preservation Act in 1966, it sought to ensure that the impacts of growth and development are considered as Federal projects and programs are planned and carried out. The Act's passage reflected the growing perception throughout the Nation that through modern development – important and necessary as that development might be – we were often losing something that everyone had reason to treasure: the character of our communities and our cultural roots, as expressed in historic properties.

The intent of Congress, as stated in the opening section of NHPA, is that "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people." [16 U.S.C. 470b(2)] Through the Act, Congress recognized that historic resources are valuable for knowing and understanding our past, providing a sense of roots and identity, recognizing and commemorating the past, and inspiring future generations.

In the NHPA, Congress declared that it would be the policy of the Federal Government "to foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony." It established that the Federal government would provide leadership in historic preservation and be a responsible steward of historic properties under its jurisdiction or control. NHPA

also created the structure for a national preservation program, wherein the Federal government would assist and cooperate with State and local governments, Indian tribes and Native Hawaiian organizations, and the private sector to encourage preservation. [16 U.S.C. 470-1]

NHPA makes Federal agencies responsible for the impact of their actions on historic properties and publicly accountable for their decisions. **Section 110** lays out broad, affirmative agency responsibilities to identify, utilize, and manage historic properties. Under Section 110, agencies must establish historic preservation programs, meet standards for effective stewardship and management of historic properties under their jurisdiction or control, and give historic properties full consideration when planning or approving an action that might affect them. **Section 106**, the focus of this course, requires that Federal agencies consider the effects of all of their undertakings on historic properties (whether federally owned or not).

Section 106 of the NHPA

Section 106 states:

> *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.* [16 U.S.C. 470f]

Thus, Section 106 requires Federal agencies – prior to taking action to implement an undertaking – to do two things:

1. **Take into account the effects of their undertaking on**

historic properties.

For the purposes of Section 106, historic properties are limited to those that are listed on or eligible for listing on the **National Register of Historic Places.** The National Register was created by the NHPA. It is a list maintained by the National Park Service which includes historic properties found to be of importance to the Nation, to the States, and to local communities.

2. **Afford the Advisory Council on Historic Preservation a reasonable opportunity to comment regarding such an undertaking.**

   The NHPA also created the **Advisory Council on Historic Preservation** to advise the President and Congress on historic preservation matters and to review actions under Section 106.

Advisory Council on Historic Preservation

The Council is an independent Federal agency, established under NHPA, which

- advises the President and Congress on historic preservation policy, including issuing annual reports on preservation issues and activities, producing special reports and policy recommendations on preservation topics, and providing advice, technical assistance, and testimony on legislative proposals;
- oversees the operation of the Section 106 process and carries out Section 106 reviews;
- reviews Federal agency programs and policies and provides recommendations to improve consistency with the NHPA;
- provides and encourages education and training on historic preservation; and
- encourages public interest and participation in historic preservation.

The Council's regulations implement the requirements of Section 106.

Council membership

The Advisory Council on Historic Preservation comprises the following twenty members:

- Four members of the general public* (including the chairman);
- Four historic preservation experts*;
- One member of an Indian tribe or Native Hawaiian organization*;
- Secretary of the Interior*;
- Secretary of Agriculture*;
- Architect of the Capitol*;
- Four Federal agency heads* ;
- One governor* and one mayor*;
- President, National Conference of State Historic Preservation Officers; and
- Chairman, National Trust for Historic Preservation.

Members marked by an asterisk are appointed by the President.

The Council members generally meet 4 times a year to deal with policy issues and some controversial projects. The Chairman appoints special task forces or standing committees to address a variety of issues and situations.

Professional staff

The day-to-day work of the Council is carried out by its professional staff. The Council's staff is small, comprising about 35 persons trained in a variety of disciplines, such as history, architectural history, archeology, community

planning, and law. Council offices are located in Washington, DC, and in Lakewood, Colorado.

The Council's regulations: 36 CFR Part 800

The Council is authorized by Section 211 of NHPA to issue regulations to govern the implementation of Section 106. These regulations, "Protection of Historic Properties" (36 CFR Part 800), establish the process that Federal agencies must follow in order to take into account the effects of their undertakings on historic properties and provide the Council its required opportunity to comment. The most recent edition of the Council's regulations took effect in January 2001 and was amended in the summer of 2004.

The Council and project review under Section 106

The current 36 CFR Part 800 is the fifth edition of such regulations. In each revision of the regulations, the Council has reduced its role in the review of individual undertakings, recognizing the growing capability of agencies and other participants in the process to carry out such review. As a result, active Council participation in the review of individual undertakings under Section 106 is not required in all cases.

Under certain circumstances, the Federal agency must invite the Council to consult or must seek the Council's review of certain findings. The Council may also elect to participate in review on its own initiative or at the request of other parties. But the Council will generally be involved only when necessary to opine on disputes among other parties and when it believes it necessary in order to ensure that the purposes of Section 106 and NHPA are being met. [36 CFR § 800.2(b)(1)]

Even if the Council is not formally involved in review of a project, participants in the process are encouraged to seek advice and guidance from the Council in resolving questions. [36 CFR § 800.2(b)(2)]

The regulations also provide an important check and balance whereby participants in the process or members of the public can request that the Council examine an agency's findings.

In accordance with Section 800.9(a), the Council can provide an agency with an advisory opinion on its compliance regarding a particular undertaking at any time in the process. In this circumstance, the agency must consider the Council's views in reaching a decision on the matter in question.

When the Council decides to get formally involved in reviewing a project, it is guided by criteria set forth in Appendix A of the regulations. These criteria focus the Council's attention on those situations where its expertise and national perspective can enhance the consideration of historic preservation issues. When getting involved in a case, the Council must document that at least one of these criteria is met.

In accordance with Appendix A, the Council is likely to enter the process when the undertaking:

- has substantial impacts on important historic properties;
- presents important questions of policy or interpretation;
- has potential for procedural problems; or
- presents issues of concern to Indian tribes or Native Hawaiian organizations.

Basic regulatory philosophy

Before looking at the specifics of the Council's regulations, several general observations about their nature and purpose are in order.

1. The regulations are designed to provide a framework for problem solving. They do not ordain an outcome, but they do ordain a process. That process is designed to integrate consideration of historic preservation concerns with the planning and execution of Federal undertakings, and to resolve any conflicts through consultation. The emphasis should be on making the process and its requirements as reasonable and unburdensome as possible.

2. The process, if properly approached, can encourage

creativity and a common-sense approach to problem solving.

3. The regulations emphasize open, good-faith consultation and the development of binding agreements.

4. The regulations provide for participation in the process by all interested parties, and by the public in general.

5. Historic preservation is not the only useful public purpose. Agency missions are also important, and sometimes preservation needs have to yield in order to accommodate necessary economic development, national defense, public safety, and other valuable purposes.

6. The law is enforced primarily by litigation brought by private parties against Federal agencies. Litigation is fairly rare and is definitely the last resort in enforcement; consultation through the 106 process resolves most cases. Enforcement usually comes about through the actions of citizens who value historic properties and who are increasingly sophisticated in environmental litigation. The best insurance for agencies against court challenges is being able to document their good faith compliance with the review process mandated by the regulations.

   Examples of litigation involving Section 106 can be found in the Council's publication, *Federal Historic Preservation Case Law, 1966-1996*, which can be found at http://www.achp.gov/book/COVER1.html

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The 4-step Section 106 process

The Section 106 review process set forth in 36 CFR Part 800 starts by considering the broad environmental consequences of an undertaking and then progressively narrowing the focus until specific problems can be identified, understood, and resolved. The process consists of four primary sequential steps:

Step 1: Initiation of the Section 106 process

Step 2: Identification of historic properties

Step 3: Assessment of adverse effects

Step 4: Resolution of adverse effects

Unit II:
INITIATION OF THE PROCESS

Step 1: Initiating the Section 106 process

The purpose of the first step in the process is to determine whether the Federal activity in question is subject to Section 106 and, if so, who should be consulted during the review.

Federal agency compliance responsibility

It is the responsibility of the Federal agency with jurisdiction over an undertaking to comply with Section 106. [36 CFR § 800.2(a)] The requirements of Section 106 extend to all agencies of the executive branch, though some agencies undertake actions requiring Section 106 compliance more frequently than others do. Examples of agencies with frequent involvement with Section 106 and its requirements include:

- land-managing agencies (such as BLM, FS, NPS, FWS, Defense);
- agencies involved with construction (such as Corps of Engineers, Bureau of Reclamation, DOT);
- agencies that grant and lend funds (such as HUD, EDA, EPA, Farm Service Agency);
- agencies that issue permits and licenses (such as Corps of Engineers, Coast Guard, FERC, FCC, FDIC); and
- property managers (such as all branches of the military, VA, GSA, Postal Service).

If more than one agency is involved in an undertaking, they may (but are not required to) designate a **lead Federal agency** for Section 106 compliance purposes. The lead

agency would carry out the responsibilities under Section 106 for all aspects of the undertaking, and the other agencies may assist the lead agency as they mutually agree. When compliance is completed, the other agencies may use the outcome to document their own compliance with Section 106 and must implement any provisions that apply to them. An agency is not prohibited from independently pursuing compliance, but this should be carefully coordinated with the lead Federal agency. [36 CFR § 800.2(a)(2)]

A Federal agency's responsibility to comply with Section 106 **cannot be delegated to others**, with very few exceptions specified by Federal statute. For instance, the Department of Housing and Urban Development (HUD) is permitted by statute to delegate its Section 106 responsibilities to local governments in certain programs, including the Community Development Block Grant Program, Emergency Shelter Grant Program, and the HOME Program. For undertakings funded by these programs, the local community functions as the Federal agency for Section 106 purposes. [36 CFR § 800.2(a)]

In fulfilling their responsibilities under Section 106, agencies can use the services of applicants or consultants to prepare information, analyses, and recommendations. [36 CFR § 800.2(a)(3)] However, an agency must independently make, and is legally responsible for, the findings and determinations required by the Council's regulations. The agency must also ensure that any work done by other parties on its behalf meets applicable standards and guidelines. Also, agencies that provide authorizations to applicants remain responsible for their government-to-government relationships with Indian tribes.

Each agency is required by Section 110(c) of the NHPA to have a Federal Preservation Officer (FPO) to coordinate the agency's activities under the NHPA, including the agency's overall program and policies regarding Section 106 compliance. A list of contact information for agency FPOs can be found on the Council's web site at www.achp.gov/fpolist.html.

Timing of review: The importance of early planning

Section 106 requires completion of the review process "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license." To ensure that the review is based on meaningful consultation, the Council's regulations require that agencies initiate the Section 106 process early in project planning, when a broad range of alternatives can be considered. [36 CFR § 800.1(c)] Early planning allows an agency to take the initiative in handling the compliance process, rather than reacting to surprises that crop up as project planning proceeds. Surprises and late-stage review result in tight turnaround time, extra costs due to delays, and hasty, pressured decision making. If an agency waits until too late in project planning to initiate Section 106 review, it may not be able to fulfill its responsibilities under Section 106 and the Council's regulations.

Establishing "undertaking"

The first action that an agency takes to initiate the Section 106 process is to determine whether the project, activity, or program in question constitutes an "undertaking." The Council's regulations define "undertaking" as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal assistance; and those requiring a Federal permit, license, or approval."

Therefore, there must be Federal involvement for an activity to be an undertaking for Section 106 purposes. This may be Federal funding, non-financial Federal assistance, or any form of Federal approval, including Federal permits and licenses.

Determining the undertaking's potential to affect properties

If an activity is an undertaking, the agency then determines whether it is "a type of activity that has the potential to cause effects on historic properties." [36 CFR § 800.3(a)] According to the regulations, "effect" means:

> *. . .alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.* [36 CFR § 800.16(i)]

Undertakings have the potential to affect historic properties if they could:

- change a building, structure, or landscape in any way;
- disturb the ground;
- alter noise levels in an area, or change its visual characteristics; or
- change traffic patterns or land use of an area.

Examples of Federal undertakings that do **not** have the potential to affect historic properties include actions like Social Security payments, student loans, or grants for libraries to acquire books.

If an agency determines that its activity is not an undertaking, or that the undertaking is not a type of activity with the potential to affect historic properties, then no further action is required under the regulations, and the agency may proceed to implement the undertaking. [36 CFR § 800.3(a)(1)]

Establishing whether an activity is or is not an undertaking is a unilateral agency determination. However, if evidence questioning the validity of an agency's determination is brought to the Council's attention, the Council can review the agency's decision and offer an advisory opinion. [36 CFR §800.9(a)] If this occurs, the agency has to consider the views of the Council in reaching a final decision.

Information on historic properties irrelevant at this stage

At this early stage in the process, an agency is not likely to know whether historic properties are in the area, much less why any might qualify for the National Register. This is because the determination whether an undertaking is a type of activity with the potential to affect historic properties is prospective – that is, it occurs before any effort is made to identify historic properties. An agency does not have to

know whether or not historic properties are present to consider the potential effects of an undertaking.

Conversely, if the agency **is** already aware of the presence of specific historic properties, the agency's belief that the project won't affect those properties cannot justify a determination that the project is not an undertaking subject to further review. There is always the possibility that there are other, as yet unrecognized, historic properties that might be impacted. Also, other parties might not agree with the agency's belief that specific properties would not be affected. If the project is "a type of activity" that **could** affect historic properties, it is an undertaking subject to Section 106 review, regardless of any initial assumptions regarding impacts to specific properties. Only by proceeding with the Section 106 process can any assumptions be validated through research and consultation with other participants.

Coordinating with other reviews

Federal agencies also have responsibilities under a number of other laws that may influence the way they carry out their Section 106 duties. Some of the other Federal laws related to NHPA with which agencies have to comply are the:

- National Environmental Policy Act of 1969 (NEPA);
- Archeological and Historic Preservation Act of 1974 (AHPA);
- Archaeological Resource Protection Act of 1979 (ARPA); and the
- American Indian Religious Freedom Act of 1978 (AIRFA); and
- Native American Graves Protection and Repatriation Act of 1990 (NAGPRA).

Compliance with one or more of the other statutes does **not** substitute for compliance with 36 CFR Part 800. However, the Council's regulations specifically encourage coordination of Section 106 responsibilities with the steps taken to satisfy

other historic preservation and environmental laws. Planning to do so should begin during this initial step in the Section 106 process. Information developed for other reviews can often be used to meet documentation requirements under the Council's regulations. [36 CFR § 800.3(b)]

Section 106 and NEPA

To discourage duplication of effort, the Council's regulations encourage streamlined consideration under Section 106 and NEPA of the impact of Federal projects on historic properties. Detailed discussion of such coordination is beyond the scope of this introductory class. It is important to note, however, that Section 800.8 provides:

- guidance on coordinating compliance under the two statutes; and
- a process whereby agencies can use preparation an Environmental Assessment (EA) or Environmental Impact Statement (EIS) under NEPA in lieu of the usual Section 106 review process.

Using preparation of an EA or EIS to comply with Section 106 can be done **only** when specific procedures in Section 800.8(c) are followed. This is to ensure that the purposes and the spirit of Section 106 are not lost by this streamlining. Agencies cannot simply handle their NEPA compliance as they normally do and then assume that they've taken care of their Section 106 responsibilities.

Initiating consultation

Once an agency has determined that an undertaking is a type that has the potential to affect historic properties, the agency proceeds with the Section 106 process by initiating consultation with other parties. Such **consultation** with stakeholders is central to the Section 106 process. Consultation is defined in the Council's regulations as:

> *. . . the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 process. . .* [36 CFR § 800.16(f)]

The first step in consultation is to identify the appropriate participants and clarify their roles. The organizations and individuals that Federal agencies must consult are called "consulting parties." The objective is to bring these consulting parties into the process at an early point. However, the agency should also be sensitive to the possibility of needing to involve additional consulting parties at later stages in the process, as historic properties are identified, potential project impacts become better understood, and the interests of other parties become clearer. The goal is to ensure that the Federal agency will adequately consult with those who have significant interests in historic preservation issues. Doing this early is in everyone's best interest, to avoid having problems emerge later in the Section 106 process.

State Historic Preservation Officers

The NHPA provides for each State to develop a historic preservation program coordinated by a State Historic Preservation Officer (SHPO) who works with others to ensure consideration of historic properties at all levels of planning and development. The SHPO plays a central role in the review of Federal undertakings under Section 106 and is a consulting party. [36 CFR § 800.2(c)(1)(i)] In the first step of the process, the agency identifies and initiates consultation with the appropriate SHPO(s) for the State or States where the undertaking will occur or may affect historic properties. [36 CFR § 800.3(c)]

As defined by the NHPA, the term "State" includes: the fifty states; the District of Columbia; the Commonwealth of Puerto Rico; Guam; the Virgin Islands; American Samoa; the Commonwealth of the Northern Mariana Islands; the Republic of the Marshall Islands; the Federated States of Micronesia; and the Republic of Palau. Therefore, each has a Historic Preservation Officer. Appointed by the governor, SHPO placement in State government varies from State to State – he or she may be part of State park agencies, State archives, State natural resource agencies, or State historical societies.

When a State's historic preservation program has been

approved by the Secretary of the Interior, the SHPO is eligible to receive Federal funds to carry out a wide range of historic preservation activities, including participation in Section 106 review.

Major SHPO responsibilities under NHPA

The SHPO:

- ensures comprehensive statewide historic preservation planning;
- conducts a statewide survey to identify historic properties;
- nominates properties to the National Register of Historic Places;
- participates in the review of Federal, State, and local undertakings that may affect historic properties – the SHPO is a consulting party in Section 106 review; advises and assists in Federal, State, and local historic preservation projects;
- assists local governments with historic preservation programs and certification;
- administers the State program of Federal assistance for historic preservation within the State; and
- provides public information, education, training, and technical assistance.

If multiple States are involved in reviewing an undertaking under Section 106, they may designate a lead SHPO for purposes of that review. [36 CFR § 800.3(c)(2)]

The SHPOs have also joined together to form the National Conference of SHPOs, which represents the views of the States on national preservation issues. The president of NCSHPO is a member of the Council by statute.

A list of SHPO addresses, phone numbers, and e-mail addresses is available on the Council's web site at www.achp.gov/shpo.html.

Indian tribes, Native Hawaiian organizations, and Tribal Historic Preservation Officers

The NHPA provides for Indian tribes and Native Hawaiian organizations to participate as key players in the national historic preservation program, including the Section 106 review process. Thus, Indian tribes and Native Hawaiian organizations are consulting parties. In the first step of the process, the agency identifies and initiates consultation with the appropriate Indian tribes or Native Hawaiian organizations. It is critical for the Agency to determine whether its undertaking may occur on, or have the potential to affect historic properties on, tribal lands. The Agency also must seek to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to properties in the area of potential effects, whether or not such properties are on tribal lands.

Definitions

As defined in the NHPA and the Council's regulations, Indian tribes are those tribes (including Alaska Native villages and Corporations) that have received formal recognition by the United States.

> *Tribe means an Indian tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.* [16 U.S.C. 470w(4) & 36 CFR § 800.16(m)]

The list of federally recognized tribes is available at http://www.doi.gov/bia/tribes/entry.html .

The Council's regulations also have specific definitions for "Native Hawaiian organization" and "Native Hawaiian." (Definitions of these terms in the NHPA are almost identical.)

> *Native Hawaiian organization means any organization which serves and represents the*

> *interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians. Native Hawaiian means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.* [36 CFR § 800.16 (s)]

Tribes that are not federally recognized, as well as Native people of the western Pacific islands specified in the NHPA definition of "State," can participate in the Section 106 process as members of the public. They do not, however, have the specified rights of Indian tribes and Native Hawaiian organizations that are discussed below.

Tribal sovereignty

Tribes are unique in that they are sovereign governments which exist within the boundaries of the United States. The U.S. government has a unique relationship with Indian tribes that derives from the Constitution, treaties, Supreme Court decisions, and Federal laws and authorities. The Federal Indian trust responsibility is a legally enforceable fiduciary obligation on the part of the United States to protect tribal lands, resources, and treaty rights, as well as a duty to carry out the mandates of Federal law with respect to tribes. In the context of Section 106 compliance, the Council's regulations require government-to-government consultation with Indian tribes. [36 CFR § 800.2(c)(ii)(B) & (C)]

In recognition of tribal sovereignty, and consistent with Section 101(d)(6) of the NHPA, tribes must be consulted whenever an undertaking occurs on or affects **historic properties on tribal lands.** "Tribal lands" are defined in NHPA and the Council's regulations as

> *. . . all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.* [16 U.S.C. 470w(14) & 36 CFR § 800.16(x)]

Consultation on Tribal Lands

When an undertaking occurs on or affects historic properties on tribal lands, the agency must consult with a representative designated by the tribe. [36 CFR § 800.2(c)(2)(i)] Some tribes have formally assumed the responsibilities of the SHPO on their tribal lands under Section 101(d)(2) of NHPA, which authorizes tribes to submit a plan for assuming SHPO responsibilities to the Secretary of the Interior for approval. By Spring 2004, 47 tribes had approved programs. They are identified on the Council's web site at www.achp.gov/thpo.html. Each of these tribes has a formally designated Tribal Historic Preservation Officer (THPO) who is the tribe's official representative for Section 106 matters and with whom the agency should initiate consultation. [36 CFR § 800.3(c) & (c)(1)]

Tribes that have not assumed SHPO functions on tribal lands designate a representative to consult with agencies and other consulting parties for Section 106 purposes. This is the representative whom the agency should contact to initiate consultation. Such tribes have the same consultation and concurrence rights as THPOs and are consulted in addition to, and on the same basis as, SHPOs. [36 CFR § 800.3(d)]

Roles of Indian tribes and SHPOs in consultation concerning tribal lands

If an undertaking will occur on or affects historic properties on tribal lands, the agency must consult the THPO **in lieu of** the SHPO, since the THPO has formally assumed the SHPO's Section 106 responsibilities. [36 CFR §800.2(c)(2)(i)(A); 36 CFR §800.3(c)(1)]

There are several situations, however, when the SHPO and the THPO or officially designated tribal representative must be consulted **on an equal basis** when tribal lands are involved:

- When the tribe has not formally assumed SHPO responsibilities. [36 CFR §800.2(c)(2)(i)(B); 36 CFR § 800.3(d)]

- When a non-tribal property owner within the boundaries of the tribal lands requests that the SHPO participate in consultation with respect to that property. Such requests

are authorized by Section 101(d)(2)(D)(iii) of the NHPA. [36 CFR §800.3(c)(1)]

- When the SHPO would not otherwise be involved in a consultation involving tribal lands, but asks to participate. The Federal agency can consider such a request and approve it, but only if the tribe agrees. [36 CFR §800.3(f)(3)]

- When historic properties off tribal lands are also affected. [36 CFR §800.2(c)(1)(ii) and §800.3(f)(3)].

In the Council's regulations , the term "SHPO/THPO" is frequently used in recognition that a Federal agency may need to consult with the SHPO or the THPO or both, depending on the circumstances. Remember that tribes that have not assumed SHPO functions on tribal lands have the same consultation and concurrence rights as THPOs, except that they are **consulted in addition to, and on the same basis as, the SHPO**.

Consultation with Indian tribes and Native Hawaiian organizations off of tribal lands

While the THPO or officially designated tribal representative must be consulted when a project occurs on or affects historic properties on tribal lands, many historic properties of religious and cultural significance to Indian tribes or Native Hawaiian organizations are not located on tribal lands. Many are on ancestral homelands. For example, many sites in the southeastern states are still of such significance to the Cherokee Nation of Oklahoma, whose ancestors were forcibly removed from the area early in the 19th century. [36 CFR § 800.2(c)(2)(ii)(D)]

Section 101(d)(6) of NHPA states that properties of traditional religious and cultural importance to tribes and Native Hawaiians can be eligible for the National Register. This section goes on to require that agencies consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to such properties. This consultation requirement applies regardless of whether such properties **are on or off tribal lands**, since the law does not distinguish between the two. [36 CFR § 800.2(c)(2)(ii)]

Under the Council's regulations, Federal agencies are responsible for making a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to properties that may be affected by an undertaking. During the first step of the process, the Agency should consult with the SHPO to help identify such tribes and Native Hawaiian organizations and then invite them to participate in consultation.

The agency may have to look beyond tribal lands in the project's vicinity to seek information on tribes that had been historically located in the area, but are no longer there. [36 CFR § 800.3(f)(2); 36 CFR § 800.2(c)(2)(ii)(A)&(D] Sources for information on tribes and tribal contacts include: the National Park Service Tribal Preservation Program (*www2.cr.nps.gov/tribal/ index.htm)*; National Park Service Archeology and Ethnography Program (*www.cr.nps.gov/aad/nacd/*); and the Bureau of Indian Affairs (*www.doi.gov/bureau-indian-affairs.html*).

Local governments

When a project affects properties under their jurisdiction, local governments are always entitled to participate in the Section 106 review process as consulting parties. In the first step of the process, in consultation with the SHPO/THPO, the Federal agency identifies local governments and invites them to consult. [36 CFR § 800.3(f)(1)] As mentioned earlier, for certain HUD-funded projects, local governments are given statutory authority to act as a Federal agency for compliance with Section 106 for certain HUD programs. [36 CFR § 800.2(c)(3)]

Applicants for Federal assistance, permits, licenses and other approvals

Given their obvious interest in the impact of Section 106 review on their projects, applicants are entitled to participate in consultation as consulting parties. In the first step of the process, in consultation with the SHPO/THPO, the Federal agency identifies applicants and invites them to consult. [36 CFR § 800.3(f)(1)]

Applicants, or groups of applicants, may also be authorized by the agency to initiate Section 106 consultation. When an applicant (or group of applicants) is authorized to initiate the review process, the agency must notify the SHPO/THPO. A Federal agency may also authorize all applicants in a specific program by providing notice to all SHPOs/THPOs. Note that the authority of the applicant to initiate consultation does not extend to making actual determinations on behalf of the Federal agency. The applicant may offer suggestions to the agency, but the latter must make all required findings and determinations. The Federal agency also remains responsible for its government-to-government consultation with Indian tribes. [36 CFR § 800.2(c)(4)]

Applicants (and consultants) may also carry out certain work relevant to the process, such as gathering and analyzing information. However, responsibility for seeing that the process is carried out properly belongs to the involved Federal agency. The agency is legally responsible for all findings and determinations required by the regulations and must ensure that the work done by others meets applicable Federal requirements. The Federal agency also remains responsible for its government-to-government consultation with Indian tribes. [36 CFR § 800.2(a)(3) & § 800.2(c)(4)]

Department of the Interior/National Park Service (NPS)

In most reviews under Section 106, except those involving National Historic Landmarks, NPS has no specifically stipulated role in the Section 106 process beyond that of any other Federal agency. NPS does, however, perform several functions that are relevant to Section 106 review.

If it is known at this early stage in the process that a National Historic Landmark (NHL) may be affected, the Federal agency should keep in mind that NPS may become a consulting party. NPS administers the NHL Program, and agencies must notify the Secretary of the Interior of Section 106 consultations involving NHLs. NHLs are National Register properties that have been determined to have exceptional value in commemorating and illustrating American history. Agencies must invite the Secretary of the Interior (represented by NPS) to participate as a consulting

party when a NHL will be adversely affected by an undertaking. We will discuss this requirement further in Unit V. [36 CFR § 800.10]

For most other Section 106 cases, NPS's role as administrator of the National Register of Historic Places is its principal role. Also, NPS preservation-related standards, guidelines, and technical guidance provide the context for assessing alternatives during Section 106 review. In addition, because it administers the Historic Preservation Fund program, NPS establishes standards that SHPOs/THPOs must meet and periodically reviews the SHPOs/THPOs. Thus, NPS can be an important influence on the ways that SHPOs/THPOs do their work, including Section 106 work.

Conducting consultation

Beginning with the initial consultation that takes place with the SHPO/THPO, the agency should conduct consultation in an appropriate manner, taking several factors into account. [36 CFR §800.3(c)(3), 36 CFR §800.2(a)(4)]

- The timing of consultation and the agency's planning process for the undertaking should be in accord with each other. It is important that agencies keep in mind, when planning and establishing a project schedule, that the regulations require initiation of the Section 106 process early in project planning.

- The desirability of coordinating with the requirements of other statutes can impact consultation. As discussed earlier, consultation under Section 106 should be coordinated with the requirements of other environmental review laws, and consultation strategies should be developed accordingly.

- The scope of Federal involvement and the scale and nature of the undertaking may affect how consultation is carried out.

- As they are determined, the nature of effects on historic properties should shape the consultation process.

The last two factors reflect the need for consultation to be commensurate with the scale of the project. For example,

construction of a new highway in an area rich in historic and prehistoric resources will typically involve more consulting parties and more extensive consultation than a simpler project, such as a modest rehabilitation project in an urban area.

Failure of the SHPO/THPO to respond

As consultation proceeds, the SHPO/THPO must respond within 30 days when an agency submits a finding or determination for review. If they do not, the agency is authorized to proceed with the review process based on the finding or determination. The agency also has the option of consulting with the Council regarding the finding or determination. Lack of response by the SHPO/THPO at any time does not mean that they forfeit all further opportunity to participate in later stages of the review process. It does mean, however, that the finding or determination in question need not be revisited by the agency at a later date based on a request by the SHPO/THPO. [36 CFR §800.3(c)(4)]

If both the SHPO and the THPO or other officially designated tribal representative are involved in a consultation involving tribal lands, and the SHPO withdraws its participation, the agency can still proceed to finalize the review process in consultation with the THPO or other officially designated tribal representative. [36 CFR §800.3(d)]

Agreements to guide consultation with Indian tribes and Native Hawaiian organizations

Under the Council's regulations, Indian tribes and Native Hawaiian organizations can enter into bilateral agreements with Federal agencies specifying how they will consult under Section 106. This is not mandatory, but is available as an option. While this can be used to enhance the role of the tribe or Native Hawaiian organization, it cannot be used to diminish any other participant's role unless they agree. For example, if historic properties of religious and cultural significance to a particular tribe are located on Federal land, the Federal agency might enter into an agreement setting forth how it would consult with that tribe. The agency and the tribe could not, however, agree that the SHPO would not be consulted unless the SHPO agreed to

such an arrangement. The agency is responsible for providing the Council and the relevant SHPO or SHPOs with a copy of any such agreement. [36 CFR §800.2(c)(2)(ii)(E)]

Planning to involve the public

Agencies must seek and consider the views of the public when carrying out the Section 106 process. The regulations state that, "The views of the public are essential to informed Federal decisionmaking in the Section 106 process." [36 CFR § 800.2(d)(1)] Agencies must provide the public with an opportunity to learn about a project and its effects on historic properties and to express their views.

At this early stage in the process, the agency needs to plan how and when it will involve the public. In doing so, the agency consults with the SHPO/THPO. The agency does not have to develop a formal plan, but it must identify the appropriate points for seeking public input and otherwise figure out how it will notify and inform the public. [36 CFR § 800.3(e)]

The regulations establish a basic public notice standard. In planning its strategy for public involvement, the agency must make sure that the public will have the opportunity to both obtain information and provide views. Notice – with sufficient information to allow meaningful comments – has to be provided so that the public can express its views during the various stages and decision making points of the process. Public notice often can be accomplished using existing agency procedures. It is important to note, however, that the public can express their views at any time, without waiting for a formal agency request for their views. [36 CFR § 800.2(d)(2), 36 CFR § 800.2(d)(3)]

The Council's regulations also establish benchmarks against which to measure agency efforts to involve the public. [36 CFR § 800.2(d)(1)] The intent is for agency efforts to be adequate, yet commensurate with the scale of the project. The extent of the agency's efforts need to reflect:

- the nature and complexity of the undertaking and its effects;

- the relationship of the Federal involvement to the total undertaking;
- the level of likely public interest; and
- confidentiality concerns.

These factors are to be considered together; one factor cannot be singled out to justify a lesser or greater obligation. The outcome should be a reasonable response that acknowledges all of the factors cited.

Members of the public as consulting parties

Various individuals and organizations may have a demonstrated interest in a project and its effects on historic properties and wish to be consulting parties. Owners of property affected by an undertaking are likely to be particularly interested in the undertaking and its effects. This includes owners of affected non-historic properties. Likewise, the constituencies of private sector groups may take an interest in undertakings and their effects. Such groups may be locality oriented – such as neighborhood organizations – or interest oriented – such as preservation or historical organizations – or they may rally around specific issues or causes. [36 CFR § 800.2(c)(5)]

Although not automatically entitled to be consulting parties, such parties may ask to be consulting parties at any point in the process. The Federal agency must consider written requests, in consultation with the SHPO/THPO, and make a determination regarding their recognition as a consulting party. The Federal agency makes the ultimate decision. However, the Council can exercise its authority under Section 800.9(a) to provide an advisory opinion to the agency regarding its determination in response to a request from any party denied consulting party status. [36 CFR § 800.3(f)(3); 36 CFR § 800.9(a)]

Issues of confidentiality

As consultation proceeds, the agency will need to make information available to the consulting parties and the public.

The agency has to keep in mind, however, that there may be valid reasons for withholding some information. Section 304 of the NHPA outlines situations in which information about an historic property may need to be withheld. These include situations in which releasing certain information would:

- cause a significant invasion of privacy;
- risk harm to the historic resource; or
- impede the use of a traditional religious site by practitioners.

For example, release of information on an archeological site could put that site at risk for pot-hunting. Or, providing the public with information on the location and use of an Indian sacred site might lead to disruption of its use by curious or ill-intentioned people from outside the tribal community. Indian tribes and Native Hawaiian organizations often desire that information on the nature and location of their religious and cultural sites remain secret in order to protect them.

Section 800.11(c) sets forth a process for determining what information may be disclosed when confidentiality issues are raised. In situations covered by Section 304, the Secretary of the Interior is empowered to decide who can have access to information on the property. In the context of Section 106 review, the Secretary must consult with the Council when making the decision regarding access. [36 CFR §800.11(c)(2)]

There are also other situations where Federal law or Federal program requirements may limit public access to information, particularly information supplied by non-governmental applicants, including business plans and other proprietary information. Under such laws and programs, agencies may need to withhold certain information about undertakings and their effects from the public during the Section 106 process. [36 CFR §800.2(d)(2); 36 CFR §800.11(c)(3)] For example, it may be inappropriate to make public a mining company's exploratory geophysical data used in connection with Section 106 review of a project when other companies are competing for mineral leases in the area.

Summary of Step 1

An agency proceeds to the next step in the process if its activity is an undertaking that is of a type that has the potential to affect historic properties. The agency lays the groundwork for doing so by coordinating with other reviews, by identifying and initiating consultation with the appropriate consulting parties, and by beginning to plan to involve the public.

Unit III:
IDENTIFICATION OF HISTORIC PROPERTIES

Step 2: Identifying historic properties

After an agency establishes that it has an undertaking that requires further review and initiates the Section 106 review process, it then moves forward with Step 2 in the process, identifying historic properties. The purpose of this step in the Section 106 process is to determine if there are any properties that may be affected by the undertaking which are included in or eligible for inclusion in the National Register of Historic Places. If a property is not included in or eligible for inclusion in the Register, it is not a historic property for purposes of NHPA and does not need to be considered under Section 106.

The National Register of Historic Places

A property is **included** in the National Register if it has been formally nominated and accepted by the Secretary of the Interior, who is represented for purposes of the decision by the Keeper of the National Register. A property is **eligible for inclusion** in the National Register if it meets the National Register criteria, which are specified in Department of the Interior regulations at 36 CFR Part 60. **Both listed and eligible properties must be considered during Section 106 review.**

The National Register criteria

Properties listed in or eligible for the National Register fall into five broad categories:

- **Buildings** are constructions designed principally to shelter human activity and include houses, barns, commercial buildings, government buildings, etc.
- **Structures** are functional constructions not principally designed for human shelter, including bridges, canals, lighthouses, dams, boats, aircraft, etc.

- **Sites** are locations of significant events, or prehistoric or historic occupation or activity, and include ceremonial sites, battlefields, shipwrecks, trails, designed landscapes, archeological remains of habitation sites, natural features having cultural significance, etc.

- **Objects** are constructions that are relatively small in scale, frequently artistic in nature, and associated with a specific setting or environment. They are not museum objects. Objects include sculpture, monuments, fountains, boundary markers, etc.

- **Districts** are a concentration or continuity of sites, buildings, structures or objects that are united by their history or aesthetics. The identity of a district results from the interrelationship of its resources. Frequently encountered districts include residential areas, commercial areas, transportation networks, large farms, rural villages, groupings of habitation sites, and groupings of ceremonial sites.

Although it is called the "National" Register, eligible properties don't have to be nationally significant. Properties of State or local significance can be listed or be found eligible. As mentioned earlier, some nationally significant properties on the National Register have been designated National Historic Landmarks (NHLs) due to their exceptional value in commemorating and illustrating American history.

Regardless of their level of significance, properties listed in or eligible for listing in the National Register must be important in American history, architecture, archeology, engineering, or culture. A property is considered significant in these categories if it meets one or more of the following criteria from the National Register regulations.

> ***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 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 and distinguishable entity whose components may lack individual distinction; or

(d) that have yielded, or may be likely to yield, information important in prehistory or history. [36 CFR § 60.4]

In addition to being significant, a property must also have physical **integrity** to be listed in or be eligible for the Register. Integrity does not demand absolute purity, but the historic property must be a "preservable entity" that still communicates what makes it significant. Integrity should also be evaluated in the context of what makes a property significant; not all of the aspects of integrity – location, design, setting, materials, workmanship, feeling, and association – are necessarily valid or relevant for each property.

The decision regarding whether a property is significant enough to be listed in or eligible for listing in the National Register is entirely separate from the later decision regarding what is actually to be preserved. The fact that a property is deemed to be significant does not necessarily mean that it is inviolate; it simply means that the property should be taken into account in planning the undertaking. Additional information is available through the National Register's web site at http://www.cr.nps.gov/nr/nrhome.html .

Exceptions to the National Register criteria

Seven exceptions to the National Register criteria are also specified in 36 CFR § 60.4. These are properties that normally wouldn't be found to be eligible, except in certain situations.

Criteria considerations. *Ordinarily cemeteries, birthplaces, or 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 significant primarily 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 directly associated with his productive life; or*

*(d) A **cemetery** which derives its primary significance 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.* [36 CFR § 60.4; emphasis added]

Properties of traditional cultural value

Properties may meet the National Register criteria because of the role the property plays in a community's traditional religion, beliefs, customs, and practices. Examples of properties possessing such significance include:

- a location associated with the traditional beliefs of Indian tribes or Native Hawaiians concerning their religion, origins, cultural history, or the nature of the world;

- a rural community whose organization, buildings and structures, or patterns of land use reflect the cultural traditions valued by its long-term residents;

- an urban neighborhood that is the traditional home of a particular cultural group, and that reflects its beliefs and practices;

- a location where Native American religious practitioners have historically gone, and are known or thought to go today, to perform ceremonial activities in accordance with traditional cultural rules of practice; and

- a location where a community has traditionally carried out economic, artistic, or other cultural practices important in maintaining its historic identity.

A cultural value must be related to a tangible property or properties included in or eligible for the National Register in order to be considered in the Section 106 review process. Even an entirely natural feature, such as a mountain, lake, or waterfall, may be eligible as a site or district. For instance, a property that embodies traditional cultural values may be associated with events important in a community's past, and if so, may be eligible under National Register criterion A.

Eligibility and inclusion

If a property meets the criteria for inclusion in the National Register, this doesn't automatically result in its being listed. To be listed, a property must be formally nominated using NPS forms and following NPS procedures. Agencies are not required to nominate properties in order to comply with Section 106, although Section 110(a)(2) of NHPA does require agencies to have programs in place for nominating federally owned or controlled historic properties.

An owner of private property that objects to including his or her eligible property in the National Register, may block it from being listed. Effects on such a property are not exempt from Section 106 review, however, since the property remains eligible for the Register. Private owners may do as they wish with their historic property, provided that they are not receiving Federal assistance or approvals. If they are, the Federal agency involved must comply with Section 106 before the project can be implemented.

Identifying historic properties

Agencies are required to make a "reasonable and good faith effort to carry out appropriate identification efforts. . . " [36 CFR § 800.4(b)(1)] This responsibility rests squarely with the Federal agency and cannot be delegated (with the exception of certain HUD programs). The agency can solicit the help of applicants, grantees, or others to carry out this work, but it is up to the agency to see that the work is carried out properly and to make appropriate use of the results.

In consultation with the SHPO/THPO, the agency determines the scope of needed identification efforts and takes action to identify potential historic properties. The agency then evaluates the significance of those properties and decides whether any could be affected by the undertaking.

Determining an undertaking's area of potential effects

The agency's first step in establishing the scope of needed identification efforts is to determine the undertaking's **area of**

potential effects. This is done in consultation with the SHPO/THPO. [36 CFR §800.4(a)(1)] The area of potential effects (APE) is defined as:

> *. . . the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. 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.* [36 CFR § 800.16(d)]

If there is disagreement concerning the extent of the APE, the consulting parties may seek guidance and assistance from the Council. Also, the Council can elect to issue an advisory comment to the agency on its APE determination. [36 CFR § 800.9(a)] If this occurs, the agency has to consider the views of the Council in reaching a final decision regarding the boundaries of the APE.

Points to remember. When defining an area of potential effects (APE), agencies need to remember that:

1. The APE is defined before identification begins, when it may not yet be known whether any historic properties actually **are** within the APE. To determine an APE, it is not necessary to know whether any historic properties exist in the area.

2. An APE is not determined on the basis of land ownership.

3. The APE should include:

- all alternative locations for all elements of the undertaking;
- all locations where the undertaking may result in disturbance of the ground;
- all locations from which elements of the undertaking (e.g., structures or land disturbance) 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.

4. An APE need not be a single area and need not always have hard and fast boundaries. There may be different APEs for different effects of an undertaking. Revising project plans may also lead to revising APE boundaries.

5. Determining an APE does not mean that any historic properties within its boundaries must be preserved. They will, however, have to be taken into account during the review process.

The agency is required to document its determination of the APE. [36 CFR §800.4(a)(1)] The general standard for documenting determinations, including the APE, is that the determination be "supported by sufficient documentation to enable any reviewing parties to understand its basis." [36 CFR §800.11(a)] The agency should use appropriate graphic materials to illustrate the APE, so that the Council, the SHPO/THPO, another consulting party or a member of the public could readily comprehend its scope.

Gathering existing information

The agency should next ascertain what information is already known about properties in the APE. This should include both reviewing known information and conferring with consulting parties and members of the public who might have knowledge of resources in the area and concerns regarding the undertaking's potential impacts on historic properties. [36 CFR §800.4(a)(2-3)]

The regulations specifically require that the agency seek information from Indian tribes and Native Hawaiian organizations about properties that may be of religious and cultural significance to them and may be eligible for the National Register. However, because of the nature of the properties in question, these groups may not wish to divulge information about such properties. Such properties may have spiritual or sacred values for those who ascribe significance to them, or may be used in ongoing cultural activities that may not be readily shared with outsiders. Thus, it may be strongly desired that both the nature and

the precise location of the property be kept secret. Agencies should work with Indian tribes and Native Hawaiian organizations to address such confidentiality concerns. [36 CFR §800.4(a)(4)]

Good questions for an agency to ask during this step are:

- What is already known about historic properties in the area?
- To whom should we talk in order to find out? What are their concerns about possible effects to historic properties?
- What further actions will we need to take to fill in gaps in our knowledge?

Taking steps to identify historic properties in the APE

Based on the information it has gathered, the agency should proceed to identify historic properties in the APE. This is done in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to properties. [36 CFR § 800.4(b)]

Appropriate identification efforts may require further background research, consultation, oral history interviews, sample field investigation, and/or field survey. The Council's regulations state that agencies have to consider a number of factors when deciding what constitutes a "reasonable and good faith effort" at identification. [36 CFR § 800.4(b)(1)] These are:

- past planning, research, and studies;
- the magnitude and nature of the undertaking;
- the degree of Federal involvement;
- the nature and extent of potential effects on historic properties;
- the likely nature and location of historic properties within the area of potential effects;

- applicable standards and guidelines; and
- confidentiality concerns.

While designed to give agencies flexibility, these factors also establish benchmarks against which other consulting parties can assess the adequacy of an agency's effort. These factors are to be considered together; one cannot be singled out to justify a lesser or greater obligation. The outcome of the equation should be a reasonable response that acknowledges all of the factors cited. If there is disagreement concerning proposed identification efforts, the consulting parties may seek guidance and assistance from the Council.

Determining the timing of identification

Ideally, identification of historic properties should be completed during the early stages of project planning and Section 106 compliance. In some cases, however, this is not practical. Phasing the identification effort is one way of addressing this problem. [36 CFR § 800.4(b)(2)]

Phasing can be used when the undertaking involves:

- corridors;
- large land areas; or
- areas where access to properties is restricted.

When phasing identification, the agency should first determine the likelihood of historic properties in each corridor or area through background research, consultation, and appropriate field investigation. This is done in consultation with the SHPO/THPO and other consulting parties. The requirement to take steps up front to determine the likelihood of historic properties is essential to effective phasing. Phasing does not just mean putting off identification. There must be solid initial efforts from which full identification can proceed after alternatives are refined or access gained.

Evaluating historic significance

As a result of its identification efforts, an agency may find properties in the APE that are already listed on the National Register or designated as National Historic Landmarks (NHLs). (If an NHL is present, the agency is required to notify the Secretary of Interior/National Park Service [36 CFR § 800.10(a)]) Frequently, however, the area contains properties whose significance has never been assessed. The agency is responsible for evaluating these against the National Register criteria. [36 CFR § 800.4(c)(1)] The purpose of evaluation is to determine which properties within the APE are eligible for the National Register and thus subject to Section 106 review.

Evaluation is carried out in consultation with the SHPO/ THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified properties. Consultation with these latter groups is required even if the properties of concern to them are not on tribal lands. Since they have special expertise in assessing the significance of properties to which they ascribe religious and cultural significance, obtaining their views is critical. [36 CFR § 800.4(c)(1)]

If any properties in the APE were previously determined eligible or ineligible for the National Register in connection with another project or planning study, it may be necessary to reevaluate them, as earlier evaluations may have been inadequate. [36 CFR § 800.4(c)(1)] The condition of the property may have changed over time, leading to loss of integrity, or the passage of time may have resulted in changing perceptions of significance.

Determining eligibility

After applying the National Register criteria to a property, the agency determines whether, in its opinion, the property is eligible or ineligible for the National Register. Then the agency will either be able to move forward in the process based on its determination or will have to take further steps to conclude the evaluation process, depending on the views of the SHPO/THPO and involved Indian tribes and Native Hawaiian organizations.

There may be **agreement** between the agency and the SHPO/THPO regarding eligibility. If the agency and

SHPO/THPO agree, the property will be treated as eligible or ineligible, as the case may be, for purposes of Section 106. This kind of agreement is often referred to as a consensus determination. [36 CFR § 800.4(c)(2)]

If there is **disagreement** regarding eligibility between the agency and the SHPO/THPO and that disagreement cannot be resolved, the agency will have to send documentation about the property to NPS and request a formal determination of eligibility from the Keeper of the National Register. The Keeper's decision is final. [36 CFR § 800.4(c)(2)]

There may be occasions when members of the public or other consulting parties may dispute a consensus determination, or the Council may independently believe that a final opinion from the Keeper of the National Register is necessary. If either the Council or the Secretary of the Interior so request, the agency must seek a formal determination. [36 CFR § 800.4(c)(2)] The Council does not make the determination; it simply serves as a conduit for seeking a final determination from the Keeper.

It is important to note that if an undertaking occurs on or may affect historic properties **on tribal lands**, disagreement from the THPO or other officially designated tribal representative regarding eligibility necessitates seeking a determination from the Keeper. **Off tribal lands**, although the agency has to consult with Indian tribes and Native Hawaiian organizations when applying the National Register criteria to properties to which they attach religious and cultural significance, their agreement on eligibility for these properties is not required. The check and balance in the process is that these groups can ask the Council to request that the agency get a formal determination of eligibility from the Keeper. [36 CFR § 800.4(c)(2)]

Concluding the identification and evaluation step

To bring the identification and evaluation process to closure, the agency makes and documents a formal finding as to whether historic properties may be affected by the undertaking. As noted earlier, effect means altering the characteristics of a historic property that qualify it for inclusion in or eligibility for the National Register. [36 CFR §800.16(i)]

Two findings are possible, "no historic properties affected" or "historic properties affected."

No historic properties affected

A finding of no historic properties affected is appropriate when:

$ the agency has determined during the identification and evaluation step that there are no historic properties in the area of potential effect, or

$ the agency has determined that there are historic properties present but the undertaking will have not have any effect on them. [36 CFR § 800.4(d)(1)]

In considering whether there will be an effect on any of the historic properties in the APE, it is important to remember that:

1. To have an effect, the undertaking must have the **potential to alter the qualifying characteristics** of the property. If the undertaking will alter the property in some other way, there may not be an effect for purposes of Section 106. Therefore, it is critical to understand **why** the property is significant and what elements of the property contribute to that significance.

2. An effect does not have to be negative to be an effect. If the undertaking will change the relevant characteristics of the property at all, it will have an effect. Therefore, even a beneficial effect is nevertheless an effect.

3. The potential alteration does not have to be a certainty; as long as the undertaking **may** alter the relevant characteristics, it must be found to have an effect. Only if an agency can definitely determine that qualifying characteristics will not be altered can it say that the undertaking will not affect the property.

4. Effects do not need to be direct and physical. For example, alterations that may affect the way an eligible place of traditional cultural importance is used can affect the characteristics that make the property eligible.

5. The agency should consider not only the changes that may occur at the time of the undertaking, but also those reasonably foreseeable effects that may occur later in time.

Review of the agency's finding

The agency provides its finding of no historic properties affected to the SHPO/THPO along with documentation specified in the regulations. In addition, the agency must notify other consulting parties and make the documentation available to the public. The SHPO/THPO can object to an agency's finding of no historic properties affected, but must do so within 30 days of receiving the documented finding. [36 CFR § 800.4(d)(1); 36 CFR § 800.11(d)]

There is no requirement for agencies to forward a finding of no historic properties affected to the Council for review absent a timely SHPO/THPO objection. However, if such a finding is brought to the Council's attention, it may review and object to the finding. This provides an avenue for other parties to seek Council intervention or for the Council to act on its own initiative. However, Council action under those circumstances must be within the 30-day time period during which the SHPO/THPO are reviewing the finding.

If there is no timely objection to the agency's finding of no historic properties affected, then the Section 106 process is complete.

Although the agency must give the Council and SHPO/ THPO 30 days to object to its finding, such objection does not force the agency into the next step of the process. When confronted with an SHPO/THPO objection, the agency shall either consult with the objecting party to resolve the disagreement or forward the documentation to the Council with a request that it review the finding and notify all consulting parties that suich a request has been made. Upon receipt of the finding, the Council has 30 days to review the finding and provide its views to the agency official. The Council may elect to provide its views to the head of the agency if it believes that circumstances warrant elevating the matter consistent with appendix A of the regulations. The agency official or the head of the agency, as appropriate, must

take into account the views of the Council in reaching a final decision on the finding, provide to the Council a rationale for its decision, and proceed in accordance with its ultimate finding. The agency must also copy the SHPO/THPO and consulting parties on this response. The head of an agency can delegate the duty to respond to the Council to the agency's Senior Policy Official. [36 CFR §800.16(z)] The agency is not required to abide by the Council's opinion.

Historic properties affected

A finding of historic properties affected occurs when the agency determines that historic properties may be affected by the undertaking.

When historic properties may be affected, the agency notifies the consulting parties and invites their views on the effects. These must be considered in the next step of the process, when the agency assesses whether the effects of the undertaking on historic properties will be adverse. [36 CFR § 800.4(d)(2)]

Summary of Step 2

If, after the agency identifies and evaluates historic properties, the agency determines and documents that no historic properties will be affected by an undertaking, the agency has completed the Section 106 process. When historic properties may be affected, the agency proceeds to the next step, assessing whether the effects will be adverse.

Unit IV:
ASSESSMENT OF ADVERSE EFFECTS

Step 3: Assessing adverse effects

Once the agency determines that historic properties may be affected by an undertaking, the agency proceeds with Step 3 of the Section 106 process, assessing adverse effects. The purpose of this step is to ascertain the nature of the project's impact on the historic properties, particularly whether the properties will be adversely affected. Agencies do this by applying criteria of adverse effect prior to making a formal finding of "no adverse effect" or "adverse effect."

Criteria of adverse effect

The Council's criteria of adverse effect are found at Section 800.5(a)(1) of the regulations. According to the criteria, an adverse effect occurs when the integrity of the historic property may be diminished by the undertaking through alteration of the characteristics that qualify the property for the National Register. Such alteration can be caused directly as a result of the undertaking or be an indirect consequence.

> ***Criteria of adverse effect****. An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. . . .* [36 CFR § 800.5(a)(1)]

It is important to note that negative impact to the integrity of a property does not have to be a certainty for a finding of adverse effect to be appropriate. If the project **may** diminish the integrity of the property, it is considered to have an adverse effect. Since Section 106 is initiated early in project planning, it may not be possible to say with precision the impact of a project, but the potential for adverse effect is usually clear if it exists.

In assessing whether there will be an adverse effect, it is important to consider **all** characteristics that qualify the property for the National Register, including any that may have been identified subsequent to an earlier eligibility determination. [36 CFR § 800.5(a)(1)] For example, a building may have been identified as eligible in the past due to obvious architectural merit, yet also be significant for its association with important persons or events. Therefore, giving consideration only to its architecture when assessing project impacts would not be sufficient.

When considering whether an undertaking will diminish a property's integrity, all reasonably foreseeable impacts must be considered. These include reasonably foreseeable cumulative effects and effects that may occur at a later date or at some distance as a result of the undertaking. [36 CFR § 800.5(a)(1)] For example, highway construction clearly has the potential to affect historic properties in the area or areas the highway traverses, as well as in the immediate right-of-way. 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 adverse effects of the undertaking.

Examples of adverse effects

The Council's regulations cite the following typical examples of adverse effects to historic properties.

Adverse effects on historic properties include, but are not limited to:

(i) ***Physical destruction of or damage*** *to all or part of the property;*

(ii) ***Alteration*** *of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation and provision of handicapped access, that is not consistent with the Secretary's Standards for the Treatment of Historic Properties (36 CFR part 68) and applicable guidelines*

(iii) ***Removal*** *of the property from its historic location;*

(iv) ***Change of the character of the property's use or*** *of physical features within the property's* ***setting*** *that contribute to its historic significance;*

(v) ***Introduction of visual, atmospheric or audible elements*** *that diminish the integrity of the property's significant historic features;*

(vi) ***Neglect*** *of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and*

(vii) ***Transfer, lease, or sale of property out of Federal ownership or control*** *without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.* [36 CFR Part 800.5(a)(2); emphasis added]

Applying the criteria of adverse effect

Agency application of the criteria of adverse effect must be done in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious or cultural significance to affected properties. Any views on effects that have been provided by the consulting parties or the public during previous steps in the process must also be considered by the agency. [36 CFR § 800.5(a)]

If the agency has phased its identification and evaluation efforts, it may also phase application of the criteria of adverse effect. Again, this is designed to give agencies flexibility when dealing with multiple corridors, large land areas, and areas with restricted access. [36 CFR § 800.5(a)(3)]

Finding of no adverse effect

A finding of no adverse effect is appropriate when:

- None of the undertaking's anticipated effects meet the

criteria of adverse effect; or

- The agency, after consultation with the SHPO/THPO, modifies the undertaking or agrees to conditions that will avoid all adverse effects. A typical condition requires later SHPO/THPO review of rehabilitation plans to ensure that they meet the Secretary of the Interior's *Standards for the Treatment of Historic Properties*. [36 CFR § 800.5(b)].

Review of a finding of no adverse effect

If the agency finds that its undertaking will not have an adverse effect on historic properties, it documents its finding to the consulting parties. [36 CFR § 800.5(c)] The required documentation includes:

- a description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, and drawings, as necessary
- a description of the steps taken to identify historic properties;

- a description of the affected historic properties, including information on the characteristics that qualify them for the National Register;

- a description of the undertaking's effects on historic properties;

- an explanation of why the criteria of adverse effect were found inapplicable, including any conditions or future actions agreed upon to avoid all adverse effects; and

- copies or summaries of any views provided by the consulting parties and the public. [36 CFR § 800.11(e)]

How the agency proceeds with the review process depends on the response of the consulting parties.

Agreement with the finding of no adverse effect

Generally, the agency may proceed with its undertaking

without further review if within the 30-day review period the SHPO/THPO agrees that the project will have no adverse effect on historic properties, or does not respond, and no other consulting party (including the Council) objects. [36 CFR § 800.5(c)(1)]

The agency is required to maintain a public record of the finding and carry out the undertaking in accordance with the finding. If the undertaking changes and cannot be conducted consistent with the finding of no adverse effect, then the agency will have to reopen the Section 106 process. [36 CFR § 800.5(d)(1)]

In most cases where the agency and the consulting parties are in agreement, the Council will not be notified about or review findings of no adverse effect. However, the Council can on its own initiative, submit its opinion on the finding of no adverse effect during the same 30-day period the SHPO/THPO and other consulting parties review the finding. The regulations intend this to be a rarely used check and balance, generally triggered by an appeal from a member of the public. In deciding whether to address its opinion to the head of the agency (as opposed to the agency official) the Council is guided by the criteria for Council involvement found in Appendix A of the regulations. When the Council timely submits its opinion to the agency, the person to whom the Council addresses the opinion must take that opinion into account and respond before proceeding in accordance with the agency's ultimate finding [36 CFR §800.5©(3)(ii)]. The agency must also copy the SHPO/THPO and consulting parties on this response. The head of the agency can delegate his/her duty to respond to the Council to the agency's Senior Policy Official [36 CFR §800.16(z)]. The agency is not required to abide by the Council's opinion.

Disagreement with the finding of no adverse effect

The SHPO/THPO or any other consulting party can disagree with the agency's finding of no adverse effect, but must do so and specify why within 30 days of receiving an adequately documented finding. [36 CFR § 800.5(c)(2)(i)] The agency then has a choice. It may either:

- consult further until the disagreement is resolved, or

- request that the Council review the finding of no adverse effect in order to resolve the disagreement and notify the consulting parties accordingly. [36 CFR § 800.5(c)(2)(i)]

If the agency decides to continue consultation, it may decide to change its finding, agree that the project will have an adverse effect, and proceed in the Section 106 process accordingly. However, if the agency stands by its finding of no adverse effect and cannot resolve the disagreement that has been raised, it must refer the matter to the Council.

The agency needs to provide the Council with the same documentation that the agency gave to the consulting parties. The Council has 15 days after receiving documentation on a finding of no adverse effect to decide if the criteria of adverse effect have been applied correctly and provide its opinion to the agency. The Council may elect to extend this time period for 15 days. The Council may choose to provide its views to the head of the agency if it believes this is warranted consistent with Appendix A of the regulations. The agency official, or the head of the agency if that is to whom the Council commented, shall take into account the Council's opinion in reaching a final decision on the finding and shall report to the Council on the rationale for its decision. The agency must also copy the SHPO/THPO and consulting parties on this response. The head of an agency can delegate his/her duty to respond to the Council to the agency's Senior Policy Official [36 CFR §800.16(z)]. When the Council reviews a finding of no adverse effect, its determination is not binding. The agency has discretion to (a) maintain its finding of no adverse effect, thereby completing the Section 106 process, or (b) change its finding to adverse effect and move to the next step in the process. [36 CFR § 800.5(d)]. If the Council fails to provide its opinion to the agency within the prescribed time period, the agency's responsibilities under Section 106 are fulfilled.

Finding of adverse effect

An undertaking is considered to have an adverse effect when:

- an agency finds that any aspect of an undertaking meets

the criteria of adverse effect;

- an agency agrees to change its finding of no adverse effect after a SHPO/THPO or consulting party indicates its disagreement; or

- an agency chooses to change its finding of no adverse effect after the Council reviews the agency's finding and determines that the effect of the undertaking is adverse.

When an agency determines that its undertaking will result in adverse effects to historic properties, the agency moves to Step 4 of the process, resolving adverse effects, which is aimed at consulting further to reach agreement on measures that will enable the agency to proceed with its undertaking without unacceptable harm to historic properties.

Summary of Step 3

When historic properties in the undertaking's area of potential effect will be affected, the agency assesses the effects by applying the criteria of adverse effect. If it ultimately determines and documents that the undertaking will result in no adverse effect to historic properties – after any necessary reviews of that finding – the agency has completed the process. If properties will be adversely affected, the agency proceeds to the next step, resolving the adverse effects.

Unit V:
RESOLUTION OF ADVERSE EFFECTS

Step 4: Resolving adverse effects

After a finding has been made that an undertaking may have an adverse effect on historic properties within the area of potential effects, the agency proceeds with Step 4 of the process, resolving adverse effects. In this step, the agency works with the consulting parties to seek a solution that accommodates the needs of all concerned, serves the public interest, and ideally promotes the protection and enhancement of our historic resources.

The usual result is a Memorandum of Agreement (MOA) that spells out the measures agreed upon by the agency and the consulting parties, identifies who is responsible for carrying them out, and provides documentary evidence that the agency has met the requirements of Section 106. If agreement cannot be reached, then the Council issues formal comments on the undertaking. The agency must take these comments under consideration before proceeding.

Alternatives and mitigation

Consultation to resolve adverse effects involves consideration of alternative ways to accomplish the purposes of an undertaking which could avoid unnecessary damage to historic properties or minimize or mitigate unavoidable damage. [36 CFR 800.6(a)] In theory, the consulting parties look first at alternatives that might avoid or minimize adverse effects altogether, and then at alternatives that might mitigate – that is, alleviate or compensate for – adverse effects. In fact, however, alternatives to avoid, minimize, and mitigate are usually considered together, and what typically comes out of the consultation process is an MOA that stipulates measures to avoid or minimize some adverse effects and mitigate others.

Consultation to resolve adverse effects will move more quickly and smoothly if an agency enters the process with the expectation that it will need to consider alternatives, and if it has already developed the information needed to make an effective analysis of alternatives possible. The earlier in the planning process that consultation to resolve adverse effects begins, the easier it is for all concerned to identify and consider alternatives.

Avoiding adverse effects

Alternatives that are usually considered to avoid adverse effects include:

- moving the undertaking to an alternative site;
- using an alternative design;
- pursuing an alternative to the undertaking; or
- no undertaking at all.

Minimizing or mitigating adverse effects

The range of actions that can be taken to minimize or mitigate adverse effects is considerably broader, although some of the measures are similar to those used to avoid adverse effects. Some examples include:

- alternative design;
- altering the location of the undertaking;
- limiting the magnitude of the undertaking;
- rehabilitating – instead of demolishing – some historic properties;
- adopting a planned program of preservation and maintenance;

- moving historic properties;
- marketing the historic property for donation, sale, or lease;
- documenting a historic property before destroying it (includes architectural, engineering, historical and archeological documentation); and
- recovering data from an archeological site through controlled excavation prior to destruction of all or part of the site.

Guidance on when data recovery is appropriate mitigation and how such work should be carried out can be found in the Council's *Recommended Approach for Consultation on Recovery of Significant Information from Archeological Sites,* located on our web site at www.achp.gov/archguide.html. This guidance also includes a model MOA format to assist in practical application of the guidance.

Documentation as mitigation under Section 106 also fulfills the agency's independent responsibility to document historic properties in accordance with Section 110(b) of NHPA. Section 110(b) requires that agencies document historic properties before they are substantially altered or demolished as a result of Federal action or assistance.

Accepting loss of historic property

There are instances in which no alternatives to avoid or minimize adverse effects are feasible. However, the benefits of the undertaking may justify accepting the loss of a historic property or some of its significant characteristics. The participants of the Section 106 process may agree that this is the case and develop an MOA accordingly. Usually some compensatory mitigation measures – such as marketing, data recovery, or documentation – are provided for when loss is accepted.

Consultation to resolve adverse effects

The agency is responsible for continuing consultation with the consulting parties in order to try to resolve adverse effects and develop an MOA. The available options for completing the resolution of adverse effects, including finalizing an MOA, vary depending on whether the Council participates in consultation and whether the participants in consultation can reach agreement.

No time limit applies to this portion of the process. As discussed later, however, there are opportunities for ensuring that the process moves forward toward closure should consultation become unproductive.

Notifying the Council

Whenever there is a finding of adverse effect, the agency is required to notify the Council and provide documentation on the project. [36 CFR § 800.6(a)(1)] This notification must include a request that the Council participate in consultation when:

- the agency wants the Council to participate;
- the undertaking has an adverse effect upon a National Historic Landmark; or
- a Programmatic Agreement under § 800.14(b) will be prepared. [36 CFR § 800.6(a)(1)(i)]

A Programmatic Agreement (PA) is a type of agreement document that can be used to address the adverse effects of complex project situations or of multiple undertakings. Rather than simply set forth avoidance or mitigation measures as in an MOA, a PA establishes a process for how affected historic properties will be addressed which differs from the standard Section 106 review process.

> Notice to the Council at this stage is extremely important, as it provides the basis for the Council to decide whether it wishes to enter the consultation process. Failure of an agency to notify the Council is a serious procedural flaw, as it denies the Council the opportunity to join at the outset the consultation to resolve adverse effects.

Documentation requirements

When notifying the Council of the finding of adverse effect, the agency must provide the following documentation: [36 CFR § 800.6(a)(1)]

- a description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, and drawings, as necessary;
- a description of the steps taken to identify historic properties;
- a description of the affected historic properties, including information on the characteristics that qualify them for the National Register;
- a description of the undertaking's effects on historic properties;
- an explanation of why the criteria of adverse effect were found applicable, including any conditions or future actions proposed to avoid, minimize or mitigate adverse effects; and
- copies or summaries of any views provided by the consulting parties and the public. [36 CFR § 800.11(e)]

Each consulting party needs to be provided with the above information, subject to the confidentiality provisions of § 800.11(c), as well as any documentation that may be developed as consultation proceeds. [36 CFR § 800.6(a)(3)]

> If an agency is also compiling documentation for its National Environmental Policy Act (NEPA) compliance, the NEPA documents can be used to provide some or all of the necessary documentation for consultation. However, when an agency uses an environmental assessment (EA) or environmental impact statement (EIS) as Section 106 documentation, it is very important that the cover letter states that intent and put the documents into context. Such use of NEPA documents should not be confused with the process whereby compliance with Section 106 is done through the preparation of an EA or EIS.

Council decision whether to participate

In addition to situations where the agency is required to ask the Council to participate in consultation, the SHPO/THPO, an Indian tribe or Native Hawaiian organization, or any other consulting party may also independently make such a request. [36 CFR § 800.6(a)(1)(ii)] Upon receiving an adequately documented adverse effect notification from the agency or a request from a consulting party, the Council has 15 days to decide whether it wishes to participate in consultation. [36 CFR § 800.6(a)(1)(iii)] If the Council fails to respond, the agency can assume that the Council has decided against participating.

> As consultation proceeds, it also is possible that changing circumstances might trigger the Council's entering consultation at a later time in order to ensure that the purposes of Section 106 and NHPA are met. [36 CFR § 800.2(b)] Public controversy, litigation, and questions of policy and interpretation that might necessitate Council involvement may not manifest themselves until consultation to resolve adverse effects is under way.

Whenever the Council decides to join consultation, it must notify the agency official coordinating the review, as well as the consulting parties. The Council must also advise the head of the Federal agency of its decision to participate. [36 CFR § 800.6(a)(1)(iii)] This will keep the agency head apprised of cases that present issues significant enough to merit Council involvement. The Council must indicate how its decision to participate in consultation meets the criteria for Council involvement set forth in Appendix A. To reiterate the criteria, the Council is likely to enter the process when the undertaking:

- has substantial impacts on important historic properties,
- presents important questions of policy or interpretation,
- has potential for procedural problems, or
- presents issues of concern to Indian tribes or Native Hawaiian organizations.

> It is important to note that the Council does not have to participate in consultation when asked. The Council must base its decision to participate on whether the

criteria for Council involvement are met. If they aren't, the Council will not participate, even if asked. Also, the Council will not always elect to participate even though one or more of the criteria may be met. [Appendix A]

In situations involving adverse effects to archeological sites, the Council will look to see if its guidance, *Recommended Approach for Consultation on Recovery of Significant Information from Archeological Sites*], is being applied. As noted in that guidance, it is highly unlikely that the Council will enter consultation if the agency follows this guidance, unless the Council is informed of serious problems by a consulting party or a member of the public.

Public involvement

Agencies are required to inform the public of the adverse effects of the undertaking and to provide the public an opportunity to express its views. The intent is for agency public involvement efforts to be adequate, yet commensurate with the scale of the project. [36 CFR § 800.6(a)(4)] The agency's efforts should take into account:

- the magnitude of the undertaking;
- the nature of likely effects;
- the relationship of the Federal involvement to the undertaking;
- the scope of public participation at earlier steps; and
- confidentiality concerns.

The confidentiality issues discussed in Unit II are particularly pertinent to the consultation to resolve adverse effects. Disclosure of information to the public and even to consulting parties may need to be limited. [36 CFR § 800.6(a)(5)] The provisions of Section 800.11(c) should be
followed to determine what information may be released when issues of confidentiality are raised.

If all relevant information was provided at earlier stages in the process in such a way that a wide audience was reached, and no new information is available at this stage in the process that would assist in the resolution of adverse

effects, then further public notice may not be warranted. However, this presumes that the public already had the opportunity to make its views known on ways to resolve the adverse effects.

The agency, the SHPO/THPO, and the Council (if participating) may agree that it would be beneficial to the resolution of adverse effects to invite individuals or organizations from the public to join the consultation. Indeed, the agency is **required** to invite to consultation those parties that will have a role in implementing any measure agreed upon through consultation. For example, if it becomes apparent during consultation that review of project plans by a local historical society could be one measure to minimize adverse effects, the society must be invited to be a consulting party. [36 CFR § 800.6(a)(2)]

Conflict resolution

It is important for the consulting parties to work together as amicably and constructively as possible to negotiate ways of resolving adverse effects that are satisfactory to all. To this end, there are some important guidelines to keep in mind.

1. Approach the consultation process in good faith, with an open mind.

2. Do not assume that other participants in the consultation are adversaries. Rather, they are people who represent other interests and needs.

3. Make your interests clear.

4. Acknowledge the interests of others as legitimate.

5. Seek to understand the interests of others.

6. Identify shared interests.

7. Develop, and consider fairly, a wide range of options.

8. Look for options that allow mutual gain.

9. Try to identify solutions that will leave all parties satisfied.

Consultation without Council participation

If the Council does **not** elect to participate in consultation, the agency consults with the SHPO/THPO and other consulting parties. If the agency and the SHPO/THPO reach agreement, they may develop and sign an MOA. Agreement by the other consulting parties is advisable, but is not required, although in some cases it may be a practical or political necessity.

Before approving the undertaking, the agency must submit the signed MOA to the Council, along with documentation. [36 CFR § 800.6(b)(1)(iv)] Required documentation includes:

- any substantive revisions to the documentation originally submitted to the Council with the agency's finding of adverse effect;

- an evaluation of measures considered to avoid or minimize the adverse effects; and

- a summary of the views of the consulting parties and the public. [36 CFR § 800.11(f)]

The MOA and documentation, coupled with the information previously provided with the agency's notification of adverse effect, should provide a comprehensive record of how the agency has taken the effects of the undertaking into account.

> If an MOA between the agency and the SHPO/THPO is submitted to the Council, and the agency has not previously provided the Council with the required notification of adverse effect, the Council could consider the MOA invalid because of this shortcoming. Since the agency did not provide the Council its required opportunity to join the consultation earlier, the process might have to be

reopened to ensure that the Council has the "reasonable opportunity to comment" required by Section 106.

There are no time limits on consultation. However, if the agency and the SHPO/THPO cannot reach agreement, the agency then asks the Council to join the consultation in order to move the process forward. [36 CFR § 800.6(b)(1)(v)] The request has to be accompanied by documentation that is similar to what is provided to the Council with an MOA, but with more detailed discussion of alternatives and mitigation measures. [36 CFR § 800.11(g)]

Consultation with Council participation

If the agency, SHPO/THPO, and the Council consult and reach agreement, they may develop and sign an MOA. Again, the agreement of other consulting parties is not a prerequisite to executing the MOA. [36 CFR § 800.6(b)(2)]

To recap, the Council can elect to participate in consultation:

- from the beginning, in response to the agency's notification of adverse effect [36 CFR § 800.6(a)(1)];
- at the request of a consulting party [36 CFR § 800.6(a)(1)];
- on its own initiative, when it determines that its participation is necessary to ensure that the purposes of Section 106 and NHPA are met [36 CFR § 800.2(b)(1)]; and
- when requested by the agency following unsuccessful efforts to conclude a Memorandum of Agreement with the SHPO/THPO. [36 CFR § 800.6(b)(1)(v)] When this occurs, the Council can choose to enter consultation to resolve the adverse effects or may opt instead to issue a formal comment on the undertaking to the head of the agency. Council comment is discussed later in this unit. [36 CFR § 800.6(b)(1)(v)]

Consultation to resolve adverse effects to National Historic Landmarks (NHLs)

Section 110(f) of NHPA requires that:

Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking.

This places a higher requirement on agencies than the standard set by Section 106 to "take into account" project effects on historic properties. Under Section 110(f), agencies have an affirmative responsibility to take actions "to the maximum extent possible" to minimize harm to NHLs. In response to this requirement, Section 800.10 of the Council's regulations sets forth special requirements for consultation to resolve adverse effects regarding NHLs under Section 106.

- As noted earlier, the agency must request that the Council participate in consultation. [36 CFR § 800.10(b); 36 CFR § 800.6(a)(1)(i)(B)]

- The agency must invite the Secretary of the Interior (represented by the National Park Service) to join the consultation. [36 CFR § 800.10(c)] This requirement recognizes the Department of the Interior's role in designating NHLs and promoting their protection.

- The Council may request that the Secretary of the Interior provide a report on the significance of the NHL, the effects of the undertaking, and recommendations on measures to avoid, minimize, or mitigate adverse effects. [36 CFR § 800.10(c)]

Developing a Memorandum of Agreement (MOA)

Once the means of resolving adverse effects are agreed upon by the consulting parties, they are formalized in an MOA. As discussed earlier, the consulting parties may develop a Programmatic Agreement (PA) in lieu of an MOA for complex projects or multiple undertakings. In such cases,

PAs are developed using the same process and requirements as discussed below for MOAs.

The MOA is a written agreement that serves three primary purposes:

- to specify the mitigation or alternatives agreed to by the consulting parties;
- to identify who is responsible for carrying out the specified measures;
- to serve – along with its implementation – as evidence that the agency has complied with Section 106.

> The agency provides each consulting party with a copy of the MOA. [36 CFR § 800.6(c)(9)] The MOA governs the undertaking and all of its parts, and the agency must ensure the undertaking is carried out in accordance with the terms of the MOA. [36 CFR § 800.6(c)]

Writing an MOA

The MOA is a legally binding document that commits an agency both by statute and by regulation to carry out the undertaking in accordance with the terms of the agreement. [16 U.S.C.470h-2(l); 36 CFR § 800.6(c)] Besides binding signatory parties to its stipulations, an MOA provides clear evidence that an agency has met its obligations under Section 106. Properly executing and carrying out the terms of an MOA allows an agency to withstand legal challenges over its compliance with Section 106. Therefore, the MOA has to be legally sufficient and should be drafted with care.

The following principles are important to good agreement document writing, and hence for writing good MOAs.

1. Be sure to identify the undertaking clearly.
2. Identify the responsible agency.
3. Assign duties only to signatories.
4. Avoid the use of the passive voice.
5. Include all agreed-upon provisions.

6. Make sure all provisions will be understood by a "cold" reader.

7. Identify shorthand references.

8. Structure the document logically.

9. Identify properties clearly and completely.

10. Cover the whole undertaking.

11. Provide complete citations.

12. Use consistent terminology.

13. Use terms that are consistent with statutory definitions where applicable.

14. Define terms specific to the undertaking that are not defined in NHPA or 36 CFR Part 800.

15. Think ahead to ensure that all foreseeable aspects of the undertaking are addressed.

16. Include all statutory authorities.

Parts of an MOA

An MOA should have three principal parts:

- **Preamble language** identifies the project, cites the legal authority of the MOA, and names the parties entering into the agreement.

- **Stipulations** state the agreed-upon mitigation and identify who is responsible for carrying out the measures. In accordance with the regulations, agreement stipulations must provide for termination and reconsideration of the terms of the MOA if the undertaking has not been implemented within a specified time [36 CFR § 800.6(c)(5)]. Also, they should provide for:

  — monitoring and reporting on implementation (when the signatories agree it is appropriate) [36

CFR § 800.6(c)(4)];

— addressing subsequent discovery or identification of additional historic properties affected by the undertaking (when the signatories agree it is appropriate) [36 CFR § 800.6(c)(6)]; and

— amending the agreement [36 CFR § 800.6(c)(7)]

- **Signatures** of the agency and other parties.

Parties to an MOA

The parties that sign an MOA will vary depending on who participated in consultation, the resources affected, and the proposed mitigation measures.

Signatories

The agency, SHPO/THPO, and the Council (when participating in consultation) are required signatories to an MOA and have authority to execute, amend or terminate the MOA. [36 CFR § 800.6(c)(1)] There are, however, the following exceptions:

The agency and the Council can execute an MOA without the SHPO if the SHPO terminates further consultation on an undertaking. [36 CFR § 800.7(a)(2)]

- If a tribe has not formally assumed SHPO responsibilities under Section 101(d)(2) of NHPA, it can elect to waive the requirement that the tribe be a signatory to an MOA when the project occurs on or affects tribal lands. [36 CFR § 800.2(c)(2)(ii)(F)] This gives those tribes the ability, short of terminating consultation, to allow an MOA involving tribal lands to go forward without condoning the agreement with their signature. Such a waiver must be provided to the agency in writing.

Invited signatories

The agency may also invite additional parties to be signatories to an MOA. Invited signatories that sign the MOA have the authority to execute, amend, or terminate the MOA. [36 CFR § 800.6(c)(2)(i)]

- When the undertaking affects a historic property of religious and cultural significance to an Indian tribe or Native Hawaiian organization, and such property is off tribal lands, the tribe or organization may be invited to sign the MOA. [36 CFR § 800.6(c)(2)(ii)] Their refusal to sign the MOA would not prevent the MOA from being finalized between the agency and SHPO/THPO, and Council (if participating). [36 CFR § 800.6(c)(2)(iv)]

- If the MOA stipulates that a party has a specific responsibility to fulfill, the agency should invite that party to sign the document. [36 CFR § 800.6(c)(2)(iii)] If they do not agree to sign, the MOA can still be finalized, but it would first need to be revised to reflect that the party is not assuming any responsibility. [36 CFR § 800.6(c)(2)(iv)]

Concurring parties

The agency can invite any consulting party to concur in the MOA. Sometimes it may be appropriate to ask others to
concur in the agreement, even if they did not participate in consultation. However, the refusal of any party asked to concur in the MOA cannot prevent the MOA from being finalized. [36 CFR § 800.6(c)(3)]

Concurring parties do not have the authority to execute, amend, or terminate an MOA. These rights are confined to the signatories (including invited signatories). [36 CFR § 800.6(c)(1)]

Council comment

Consultation to resolve adverse effects usually leads to agreement on how to balance the demands of a project and the presence of historic properties. But sometimes

this goal cannot be achieved. In such cases, the Council issues a formal comment on the undertaking to the head of the agency.

Termination of consultation and Council comment

The regulations provide a "safety valve" which prevents agencies from being caught in an endless cycle of unproductive consultation. The agency, the SHPO/THPO, or the Council can terminate consultation if it determines that further consultation will not be productive. [36 CFR § 800.7(a)]

If the **agency terminates consultation** and requests Council comment, the request must come from the head of the agency, an Assistant Secretary, or "other officer with major department-wide or agency-wide responsibilities." [36 CFR § 800.7(a)(1)] Since the Council comments to the head of the agency, only a policy-level agency official can trigger such a comment through termination.

As noted earlier, if the **SHPO terminates consultation**, the Council has the option of executing an MOA with the agency rather than commenting to the head of the agency. [36 CFR § 800.7(a)(2)]

However, this same option is not available when a **THPO terminates consultation** regarding an undertaking occurring on or affecting historic properties on tribal lands, due to the sovereign status of tribes with respect to their lands. Therefore, such termination of consultation results in Council comment. [36 CFR § 800.7(a)(3)]

Before the **Council terminates consultation**, it may consult with the agency's Federal Preservation Officer to try to resolve issues concerning the undertaking. [36 CFR § 800.7(a)(4)]

When an agency and SHPO/THPO are consulting without the Council, neither can simply terminate and request Council comment. As noted earlier, the agency must first ask the Council to join the consultation. [36 CFR § 800.6(b)(1)(v)] If consultation with the Council proves unproductive, then the Council, agency, or SHPO/THPO may terminate consultation as discussed above.

Unless the agency and the Council agree to a longer time period, the Council has 45 days to issue its written comments. During that time, the Council must give the agency, the consulting parties, and the public an opportunity to provide their views to the Council. An onsite inspection and public meeting may be necessary, depending on the nature of the case. [36 CFR § 800.7(c)(1) & (2)]

The Council comments to the head of the Federal agency, not the agency official who initiated Section 106 review. Because the comment is designed to influence decision making at the highest levels of the agency, the comment is developed by the Council membership – the 20 Federal agency heads, Presidential appointees, and other high-level officials – and not just the Council's professional staff. Copies of the Council's written comment to the head of the agency are provided to the agency official who initiates Section 106 review, the agency's FPO, and the consulting parties. [36 CFR § 800.7(c)(3)]

Response to Council comment

While the agency is not required to follow the Council's recommendations, the head of the agency is required to take the Council's comments into account in reaching a final decision on the undertaking. [36 CFR § 800.7(c)(4)] As is the case at all stages in the Section 106 process, it is ultimately up to the Federal agency to decide how to proceed.

The agency head may not delegate the responsibility for considering the Council's comments and responding to them prior to making the final decision on the undertaking. Section 110(l) of NHPA requires the decision be made by the head of the agency and documented by the agency head for review by the Council or others. For such programs as the Community Development Block Grant program, where legal responsibility for Section 106 compliance is delegated by statute to a non-Federal official, the head of the responsible unit of government (e.g., mayor or county executive) must conform to this provision.

When documenting his or her decision, the head of the agency is required to:

- provide a summary of the decision and its rationale to the Council prior to approving the undertaking;

- provide a copy of the decision summary to all consulting parties; and

- notify the public and make the record of the decision available for public inspection. [36 CFR §§ 800.7(c)(4)(i-iii)]

Council comment when an MOA is terminated

After an MOA is executed, if any of the signatories believe that its terms are not being carried out or cannot be carried out, they must consult to try to amend the MOA. [36 CFR § 800.6(c)(7) & (8)] If that fails, any signatory may terminate the MOA. When this occurs, the agency can either:

- seek to resolve the adverse effects with the SHPO/THPO and the Council (as appropriate) and execute a new MOA; or

- seek formal comment from the Council to the head of the agency. [36 CFR § 800.6(c)(8)] Council comment is rendered, considered, and responded to, in the same manner as discussed above.

A special type of Council comment

Sometimes when the Council participates in consultation leading to an MOA, it may feel that it is important to provide the agency with additional guidance. In these cases, it may elect to provide advisory comments in addition to signing the MOA. Such comments are not binding on the agency, as are the terms of the MOA, but may provide direction on implementing the MOA, address policy issues highlighted by the project, or provide recommendations for future undertakings. Such comments are issued to the agency official who negotiated the MOA. [36 CFR § 800.7(b)]

Summary of Step 4

When an undertaking may result in adverse effects to historic properties, the agency consults to resolve those adverse effects. This generally results in agreement on how to avoid, minimize, or mitigate adverse effects, and this consensus is embodied in an MOA which the agency is responsible for implementing. When there is failure to agree, the process concludes after the Council has issued formal comments to the head of the agency and the agency head has taken the comments into account and documented the agency's final decision.

Expediting consultation

For the sake of clarity, we have discussed the four steps of the Section 106 process sequentially, but it is important to note that the regulations authorize agencies to compress steps of the consultation. Agreement between the agency and the SHPO/THPO is needed to compress steps, and adequate opportunities for the participation of consulting parties and the public must be provided. This permits flexing and streamlining that can assist agencies in coordinating Section 106 review with other reviews while not compromising the basic requirements of the Section 106 process. [36 CFR § 800.3(g)] Opportunities for further streamlining the process through Program Alternatives are discussed in the next unit.

Unit VI:
SPECIAL SITUATIONS
& PROGRAM ALTERNATIVES

Council review of Section 106 compliance

Foreclosure of Council comment

Section 106 requires that agencies take into account the effects of their undertakings on historic properties and afford the Council an opportunity to comment **prior** to approving an undertaking. If an agency fails to complete the requirements of the Section 106 process prior to approving an undertaking, the Council's opportunity to comment may be foreclosed. If the Council believes an agency may have foreclosed its opportunity to comment, the Council will so notify the agency and give the agency 30 days to respond and provide its views on whether foreclosure has occurred. [36 CFR §800.9(b)]

A foreclosure finding means that, in the Council's opinion, the agency has failed to comply with Section 106, effectively precluding the Council from providing comments which the agency can meaningfully consider prior to the approval of the undertaking. [36 CFR § 800.16(j)] This leaves the agency vulnerable to citizen litigation. Because of the implications of such a finding, it is developed by the Council membership and sent to the head of the Federal agency, as well as to the agency official responsible for the project.

Avoiding foreclosure requires that agencies be aware of their statutory and regulatory responsibilities, that they initiate compliance with Section 106 early in project planning, and that they ensure Section 106 review is appropriately carried out and concluded.

Actions by applicants that compromise agency compliance

Sometimes applicants for Federal assistance or permits may take actions that adversely affect historic properties before the Federal agency has completed or begun Section 106. For example, the owner of a historic building may demolish it to

facilitate planned new development before the Federal funding agency has an opportunity to initiate or complete the Section 106 review process. This type of action may occur due to ignorance, or it may represent an attempt to circumvent the need for Section 106 review. To discourage such "anticipatory destruction," Section 110(k) of NHPA prohibits Federal assistance to applicants who try to avoid Section 106 by adversely affecting a property, unless the agency first consults the Council and determines that circumstances justify granting the assistance despite the adverse effect. Section 110(k) states:

> *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, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, allowed such 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.* [16 U.S.C. 470h-2 (k)]

The Council's regulations set forth the process for an agency to follow when it determines that Section 110(k) is applicable. [36 CFR §800.9(c)] The agency should notify the Council and provide documentation. The Council has thirty days to give the agency its opinion as to whether circumstances justify granting the assistance and what, if any, mitigation may be possible for the adverse effects. The agency must consider the Council's opinion in making its decision. If the agency decides to grant the assistance, it then notifies the Council, SHPO/THPO, and any parties interested in the undertaking. [36 CFR §800.9(c) (2)] The agency then proceeds with the Section 106 process to resolve the adverse effects that have occurred and any other adverse effects to historic properties.

Advisory opinions and evaluation of Section 106 operations

As has been mentioned throughout this course, the Council can provide an advisory opinion to an agency at any time regarding any finding, determination, or decision related to an undertaking. This can be done at the request of any party, or on the Council's own initiative. The agency must consider the Council's views in reaching a decision on the matter in question. [36 CFR § 800.9(a)]

The Council may also evaluate the operation of the Section 106 process by reviewing how participants fulfill their responsibilities and how effectively outcomes advance the purposes of NHPA. Agencies and other participants may be asked to provide information to assist the Council in these efforts. The Council may then make recommendations to improve the efficiency and effectiveness of the process, and may sometimes choose to participate in individual case reviews to improve compliance. [36 CFR § 800.9(d)]

Program alternatives

To give agencies and other parties in the process added flexibility, the regulations provide alternatives to case-by-case review whereby agencies may meet their Section 106 obligations.

Agency alternate procedures

Federal agencies can develop alternate procedures to substitute in whole or in part for the four-step Section 106 review process. [36 CFR §800.14(a)] This provides agencies with an opportunity to tailor the Section 106 process to the agency's programs and decisionmaking processes. Such alternate procedures have to be developed with full consultation with all pertinent parties and with public participation. Before the alternate procedures can substitute for the Council's regulations, however, the Council must determine that they are consistent with those regulations. As of July 2004, the Army is the only agency with authorized agency alternate procedures.

Approaches for addressing routine cases

The Council is authorized to cooperate with agencies in establishing several alternate approaches for handling routine cases.

- **Exemptions.** The Council can exempt a program or category of undertakings from review. [36 CFR §800.14(c)] This can only apply where the effects of undertakings on historic properties are foreseeable and likely to be minimal or not adverse.

- **Standard treatments**. The Council can establish standard methods of treating categories of undertakings, effects, or properties. [36 CFR §800.14(d)] Such standard treatments could simplify the steps or requirements of the process as long as the substantive treatment requirements are followed.

- **Program comments.** The Council can issue a comment on a whole category of undertakings with a program comment rather than on case-by-case basis. [36 CFR §800.14(e)] If an agency requests a program comment, the Council can decline to issue such a comment, and the agency then continues with its standard Section 106 compliance.

Programmatic Agreements

The Programmatic Agreement (PA) is a special type of agreement that records the terms agreed upon to implement a particular agency program or resolve adverse effects of a complex project or multiple undertakings. [36 CFR §800.14(b)] The PA is used to establish a process for addressing effects to historic properties which differs from the standard Section 106 review process.

The regulations state that a PA may be used:

- when effects on historic properties are similar and repetitive or are multi-State or regional in scope;

- when effects on historic properties cannot be fully determined prior to approval of the undertaking;

- when non-Federal parties will be delegated major decisionmaking responsibilities;

- where routine management activities are undertaken at Federal installations, facilities, or other land-management units; or

- where other circumstances warrant a departure from the normal Section 106 process. [36 CFR §800.14(b)(1)]

Development of a PA

As mentioned in Unit V, PAs for resolving the adverse effects of complex projects or multiple undertakings are developed using the same process set forth in Section 800.6 for the development of MOAs. [36 CFR §800.14(b)(3)] For PAs involving regional or national agency programs, consultation takes place between (as appropriate) the Council, the National Conference of State Historic Preservation Officers (NCSHPO), SHPOs/THPOs, Indian tribes and Native Hawaiian organizations, and the public. [36 CFR §800.14(b)(2)(i-ii)]

PAs for agency programs are signed by the agency and the Council, by NCSHPO if national in scope, and by the pertinent SHPOs/THPOs if regional. [36 CFR §800.14(b)(2)(iii)] PAs for agency programs are not applicable on tribal lands unless the tribe signs the agreement. Tribes can either sign individually or designate a representative to sign on their behalf. Thus, one tribe could sign for several others, or a regional or national tribal organization could sign on behalf of tribes when authorized by them to do so. [36 CFR §800.14(b)(2)(iii)]

Also, the Council may designate an agreement document as a prototype PA that may be used for the same type of program or undertaking in more than one case or area. When a Federal agency uses such a prototype PA, it may develop and execute the PA with the appropriate SHPO/THPO without Council participation in consultation or signature. [36 CFR § 800.14(b)(4)]

> If the Council determines that the terms of a PA for an agency program are not being carried out, or if the PA is terminated, the agency returns to complying with the standard Section 106 process on a case-by-case basis under the standard process.

Emergency situations

Section 800.12 of the Council's regulations sets forth special provisions for how agencies should take historic properties into account for undertakings that are conducted in response to emergency situations. Such provisions, which allow for streamlining the review process, can be used when there is:

- a disaster or emergency declared by the President, a tribal government, or the governor of a State [36 CFR §800.12(a)-(b)];
- an imminent threat to public health or safety due to a natural disaster or an emergency declared by a local government that is functioning as a Federal agency for Section 106 purposes (for implementation of HUD programs) [36 CFR §800.12(c)]; or
- another immediate threat to life or property. These would include localized emergencies not covered above. [36 CFR §800.12(a)-(b)]

Immediate rescue and salvage operations to preserve life or property are exempt from review. For all other undertakings, the emergency review provisions can only be used for actions that will be implemented within 30 days of the emergency. However, the agency may request an extension of this time limit from the Council prior to the expiration of the 30 days. [36 CFR §800.12(d)]

Advance planning for emergencies

The Council's regulations emphasize proactive planning by authorizing and encouraging agencies to establish their own emergency procedures for addressing historic properties. This course of action allows an agency to plan ahead for possible emergencies, identify acceptable courses of action that have been thought through without the pressure of an emergency situation, and obtain agreement ahead of time, which eliminates the need to seek comment once an emergency has arisen. Such procedures must be developed in consultation with the SHPO/THPO, affected Indian tribes and Native Hawaiian organizations, and the Council.

The procedures must be approved by the Council in order to substitute for the normal process for dealing with emergencies. [36 CFR §800.12(a)]

Review without agency emergency procedures

Absent approved agency emergency procedures, the agency ensures adequate review of emergency undertakings by either following the terms of any previously agreed upon PA or by following an expedited review process. Under that process, the agency notifies the Council, the SHPO/THPO, and any Indian tribes or Native Hawaiian organizations that may attach religious and cultural significance to affected properties. If possible, these parties must be given seven days to comment before the undertaking is implemented. [36 CFR §800.12(b)]

If a local government that is functioning as a Federal agency for HUD-funded programs requests review of an emergency undertaking under the emergency provisions, either the SHPO/THPO or the Council can object within the seven day review period. If this occurs, the project must be reviewed under the standard Section 106 review process. [36 CFR §800.12(c)]

Post-review discoveries

Another special situation provided for in the Council's regulations is the unexpected late discovery of effects to historic properties after work on a project has begun. Sometimes, previously unidentified properties are encountered. This most frequently involves unanticipated discovery of archeological properties during excavation or other ground-disturbing activity. In other cases, unforeseen effects on a known historic property may only become apparent after a project is underway.

The provisions in Section 800.13 of the Council's regulations addressing "post-review" discoveries can only be used when a project has already gone through the Section 106 review process. They are not a substitute for the regular compliance process.

Advance planning for discoveries

Up-front planning is the preferred way for agencies to address the potential for post-review discoveries. This enables the agency to establish how unanticipated discoveries will be handled before workers and contractors have started, so that new discoveries cause the least possible disruption to work schedules.

The process of identifying historic properties may lead the agency to conclude that later discovery of historic properties is likely. When this is the case, a process for addressing impacts to any such properties has to be developed in advance and included in any PA, MOA, or finding of no adverse effect. [36 CFR §800.13(a)(1)&(2)]

Addressing discoveries without prior planning

When no plan for discoveries is in place, agencies have several options for addressing post-review discoveries. Which options are available depends upon the nature of the historic property in question and the status of the project.

- **AHPA compliance**. If the property involved has value **only** because of its archeological data – as opposed to religious, cultural, or interpretive values – the agency may choose to comply with the Archeological and Historic Preservation Act (AHPA) instead of Section 106. [36 CFR §800.13(b)(2)] Under AHPA, the agency notifies the Secretary of the Interior and undertakes data recovery, or the Secretary may do so on the agency's behalf. The agency is required to report afterwards on its actions under AHPA to the Council, SHPO/THPO, and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the property.

  In order for an agency to utilize this option, its determination that a property has value only for data must be concurred in by the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the property. This is a check and balance to ensure that other values are not overlooked.

- **Review under the standard Section 106 process.** If a project is not yet approved or underway when the discovery is made, then the agency would consult in accordance with the standard Section 106 process to resolve adverse effects. The presumption is that there is still time to do so. [36 CFR §800.13(b)(1)]

- **Expedited review.** If the project is approved and construction underway at the time of the discovery, the agency follows an expedited review process. [36 CFR §800.13(b)(3)] The agency notifies the Council, the SHPO/THPO, and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the property within 48 hours of the discovery and describes the agency's views on the property's National Register eligibility and the actions the agency proposes to take.

  The reviewers have 48 hours to comment, and the agency should consider their recommendations. If the property is on tribal lands, tribal concurrence is needed, and the agency must comply with any pertinent tribal regulations and procedures. [36 CFR §800.13(d)] Finally, the agency is required to report back to the reviewers when its actions are complete.

In conclusion

As this unit highlights, the Section 106 review process is flexible enough to accommodate a wide range of situations, but always within the basic framework of the statutory requirements: that Federal agencies take into account the effects of their undertakings on historic properties and provide the Council a reasonable opportunity to comment. The four steps of the standard review process and the provisions for special situations provide Federal agencies the process to follow in assuming responsibility for the effects of their actions and being publicly accountable for their decisions. The process ensures that consideration of preservation values is integral to agency planning and decision making, thus permitting Federal actions to proceed while minimizing the cost to important historic resources.