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COUNCIL ON ENVIRONMENTAL QUALITY
EXECUTIVE OFFICE OF THE PRESIDENT
AND
ADVISORY COUNCIL ON HISTORIC PRESERVATION

NEPA and NHPA

A Handbook for Integrating NEPA and Section 106

MARCH 2013

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1. INTRODUCTION

The environmental review process initiated with the passage of the 1966 National Historic Preservation Act (NHPA) (P.L. 89-665; 80 Stat. 915; 16 U.S.C. 470) by Congress ushered in a new approach to Federal project planning. The passage of the National Environmental Policy Act of 1969 (NEPA) (P.L. 91-190; 83 Stat. 852; 42 U.S.C. 4321) in December 1969 and its subsequent signing into law on January 1, 1970, expanded environmental reviews and formally established environmental protection as a Federal policy. NEPA and NHPA require Federal officials to "stop, look, and listen" before making decisions that impact historic properties and the human environment.

NEPA and NHPA each created agencies to implement major environmental programs that shape Federal project planning. The Advisory Council on Historic Preservation (ACHP) and the Council on Environmental Quality (CEQ) administer regulations viewed as the cornerstones of the Federal environmental review procedures. The CEQ *Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act,* (40 C.F.R. Parts 1500-1508) (CEQ regulations) encourage integration of the NEPA process (NEPA review) with other planning and environmental reviews, such as Section 106 of NHPA (Section 106). The regulations that implement Section 106, *Protection of Historic Properties* (36 C.F.R. Part 800), encourage agencies to plan Section 106 consultations coordinated with other requirements of other statutes, as applicable, such as NEPA. The concepts of "coordination" and "integration" are found in both the CEQ regulations and Section 106 regulations, because they provide efficiencies, improve public understanding, and lead to more informed decisions.

This handbook provides advice on implementing provisions added to the Section 106 regulations in 1999 that address both "coordination" of the Section 106 and NEPA reviews and the "substitution" of the NEPA reviews for the Section 106 process. Coordination, addressed in 36 C.F.R. § 800.8(a), *"Coordination With the National Environmental Policy Act,"* encourages agencies to coordinate compliance with Section 106 with any steps taken to meet NEPA review requirements. Substitution,

WHAT IS A "HISTORIC PROPERTY?"

"Historic property" means any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places maintained by the Secretary of the Interior (National Park Service). This term includes artifacts, records, and material remains that are related to and located within such properties. Properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined eligible for inclusion in the National Register.
[36 C.F.R. § 800.16(l)(1)]

For more information on the National Register of Historic Places and its eligibility requirements, see: http://www.nps.gov/history/nr

WHAT IS A "CULTURAL RESOURCE?"

Effects considered under NEPA include cultural and historic. [40 C.F.R. § 1508.8]
The term "cultural resources" covers a wider range of resources than "historic properties," such as sacred sites, archaeological sites not eligible for the National Register of Historic Places, and archaeological collections.

See the DEFINITIONS AND TRANSLATIONS in Attachment A.

addressed in 36 C.F.R. § 800.8(c), "*Use of the NEPA process for section 106 purposes,*" authorizes agencies to use the procedures and documentation required for the preparation of an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) or an Environmental Impact Statement (EIS) and Record of Decision (ROD) to comply with Section 106 in lieu of the procedures in 36 C.F.R. § 800.3 through 36 C.F.R. § 800.6 of the Section 106 regulations.

This handbook also provides advice on implementing CEQ regulations that require agencies to "integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays in the process, and to head off potential conflicts."[1] A 2003 report from the NEPA Task Force, Modernizing NEPA Implementation, recommended that CEQ develop a handbook to integrate the NEPA environmental review with Section 106 and other environmental review laws.[2] CEQ has issued a suite of guidances and memoranda to agencies on topics such as improving the efficiency of the NEPA process, establishing categorical exclusions, and mitigation and monitoring to reaffirm the NEPA principles of early integration of statutes and interagency cooperation.

This handbook is a joint effort between CEQ and the ACHP and has benefitted from broad agency review. It is intended to help practitioners take advantage of opportunities to coordinate NEPA and Section 106 compliance procedures to improve environmental reviews. The handbook will also help Federal agencies, project sponsors, and applicants identify early in project planning when they might benefit from the NEPA-Section 106 substitution process. A checklist of information needed to complete a legally sufficient substitution process is included at the end of the handbook to help agencies make an informed decision about which approach is most practical in a specific situation.

The ACHP and CEQ understand that agencies will apply concepts in this handbook consistent with their own mission, policies, and regulations, as well as the CEQ and Section 106 regulations to meet the increasingly complex challenges of project planning in the 21st century.

Accordingly, NEPA practitioners, preservationists, project sponsors, applicants, and the general public are encouraged to become familiar with and apply the key concepts for integrating NEPA and Section 106 compliance procedures:

- Begin integration of NEPA and Section 106 processes early—the earlier it begins, the better it works.
- Educate stakeholders on the benefits of integrating, through coordination or substitution, the NEPA and Section 106 processes.
- Develop comprehensive planning schedules and tracking mechanisms for the NEPA and Section 106 processes to keep them synchronized.
- Develop comprehensive communication plans that meet agency outreach and consultation requirements to maximize opportunities for public and consulting party involvement and minimize duplication of effort by agency staff. Plans should specify whether the agency will use coordination or substitution.
- Use NEPA documents to facilitate Section 106 consultation, and use Section 106 to inform the development and selection of alternatives in NEPA documents.
- Develop an integrated strategy to accomplish specialized studies to provide information and analysis needed under NEPA and Section 106.
- Complete Section 106 and the appropriate NEPA review (Categorical Exclusion, EA, or EIS) before issuing a final agency decision.

THE ADVISORY COUNCIL ON HISTORIC PRESERVATION (ACHP)

The ACHP provides guidance and advice and generally oversees the operation of the Section 106 process. The ACHP also consults with and comments to agency officials on individual undertakings and programs that affect historic properties.

THE PRESIDENT'S COUNCIL ON ENVIRONMENTAL QUALITY (CEQ)

CEQ coordinates Federal environmental efforts and works closely with agencies and other White House offices in the development of environmental policies and initiatives.

Federal agencies are encouraged to coordinate compliance with Section 106 with any steps taken to meet the requirements of NEPA. Agencies should consider their Section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner.
36 C.F.R. § 800.8(a)(1)

Federal agencies are encouraged to integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.
40 C.F.R. § 1501.2

II. BACKGROUND

Federal agencies have independent statutory obligations under NEPA and NHPA. Section 106 and the NEPA reviews help ensure that our natural, cultural, and historic environment is given consideration in Federal project planning. Federal courts have characterized both laws as requiring the Federal Government to "stop, look, and listen" before making decisions that might affect historic properties as one component of the human environment. The ACHP and CEQ present this handbook to address a long-standing need to improve the abilities of Federal agencies, applicants, project sponsors, and consultants to conduct these environmental reviews in the most efficient and effective way possible. It provides advice on implementing a 1999 provision in the Section 106 regulations, "Coordination with the National Environmental Policy Act," 36 C.F.R. § 800.8. It also provides advice on implementing CEQ regulations, requiring agencies to "integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts."[3]

This handbook uses the term "integrate" to encompass the terms used in both Section 106 and the CEQ regulations. "Integrate" as used in 40 C.F.R. §§ 1500.2(c) and 1502.25 encompasses "coordinate" as used in 36 C.F.R. § 800.8(a), and "substitution" of a NEPA process for Section 106 as used in 36 C.F.R. § 800.8(c). This handbook is intended to assist Federal planners, cultural resource managers, and other responsible parties in improving the integration of the NEPA analysis and documentation process and Section 106 compliance. The benefits of integrating compliance have long been recognized for maximizing staff resources, facilitating coordinated public participation in decision making, and leading to more informed decisions. The CEQ recently issued guidance on the topic of making NEPA reviews more efficient and timely,[4] and this handbook furthers many of the principles presented therein.

This handbook will illustrate that integrating the two procedures:

- Supports broad discussion of effects to the human environment and integrates the consideration of historic properties with other environmental factors.
- Facilitates the development of a comprehensive environmental review schedule that helps agencies reduce litigation risk by ensuring that requirements under both statutes and their implementing regulations are met in a timely manner.
- Provides agencies with opportunities to save time and expense by gathering information and developing public engagement strategies and documents that meet the statutory requirements of NEPA and NHPA with less duplication of agency effort.
- Enhances public engagement by providing State Historic Preservation Officer (SHPO); Tribal Historic Preservation Officer (THPO); applicants; tribal, state, and local governments; and other interested parties with opportunities to engage under both statutes at the same time.
- Helps ease potential duplication and time consuming processes for potential applicants.
- Promotes transparency and accountability in Federal decision making, and more informed, better decisions.

As agencies pursue project planning for more complex and expansive activities that have the potential to affect a myriad of resources, collaboration of NEPA and Section 106 practitioners and involvement of appropriate stakeholders early in project planning can inform the development and analysis of alternatives and the assessment and resolution of effects that meet the purpose and intent of Section 106 and the NEPA reviews. When the NEPA review and Section 106 are integrated, whether through coordination or substitution, an agency assesses ways to avoid, minimize, or mitigate adverse effects while identifying alternatives and preparing NEPA documentation. It is important for agencies to consider ways to avoid affecting historic properties before assessing potential mitigation measures to resolve adverse effects. If the proposed undertaking would have an adverse effect on a historic property and that effect cannot be avoided, then the agency can focus its consultation on the development of specific mitigation measures for that historic property.

WHAT IS CONSULTATION IN SECTION 106?

Consultation means 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.

For more information, see: http://www.achp.gov and http://www.nps.gov/hps/fapa_110.htm

STATE HISTORIC PRESERVATION OFFICER (SHPO) AND TRIBAL HISTORIC PRESERVATION OFFICER (THPO)

Pursuant to the NHPA, the SHPO and the THPO advise and assist, as appropriate, Federal agencies in carrying out their historic preservation responsibilities.
16 U.S.C. 470a(b)(3)(E) and (d)(2).

WHAT IS A SIGNIFICANT IMPACT IN NEPA?

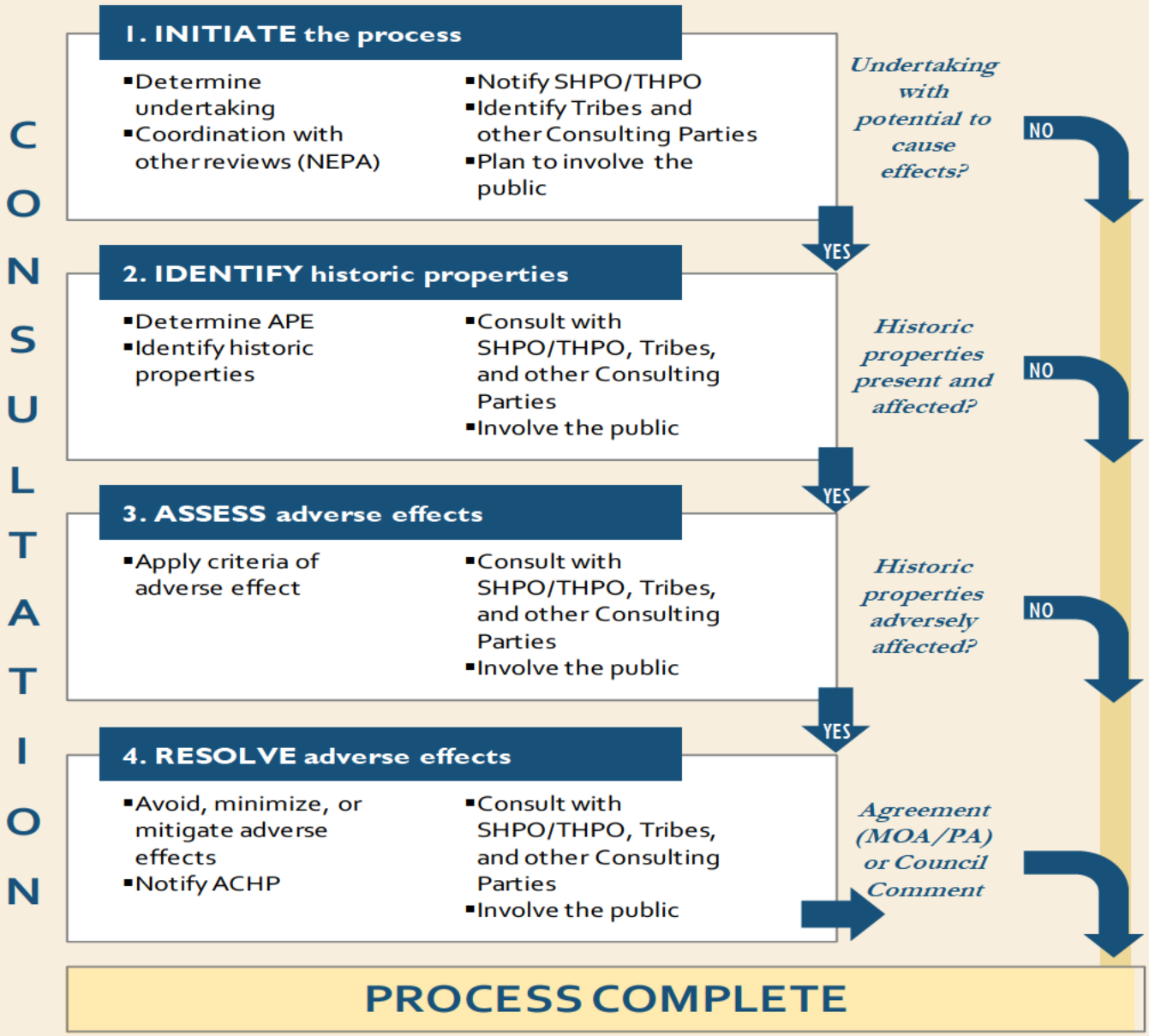
Under NEPA, significance is determined based on context and intensity. Impacts are analyzed in several contexts such as society as a whole, the affected region, the affected interests, and the locality. Intensity refers to the severity of effect, which includes factors such as the magnitude, geographic extent, duration, and frequency of the effect.
[40 C.F.R. § 1508.27]

WHAT IS AN ADVERSE EFFECT IN 106?

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 property's integrity. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance, or be cumulative.
[36 C.F.R. § 800.5(a)(1)]

See the DEFINITIONS AND TRANSLATIONS in Attachment A.

THE SECTION 106 PROCESS



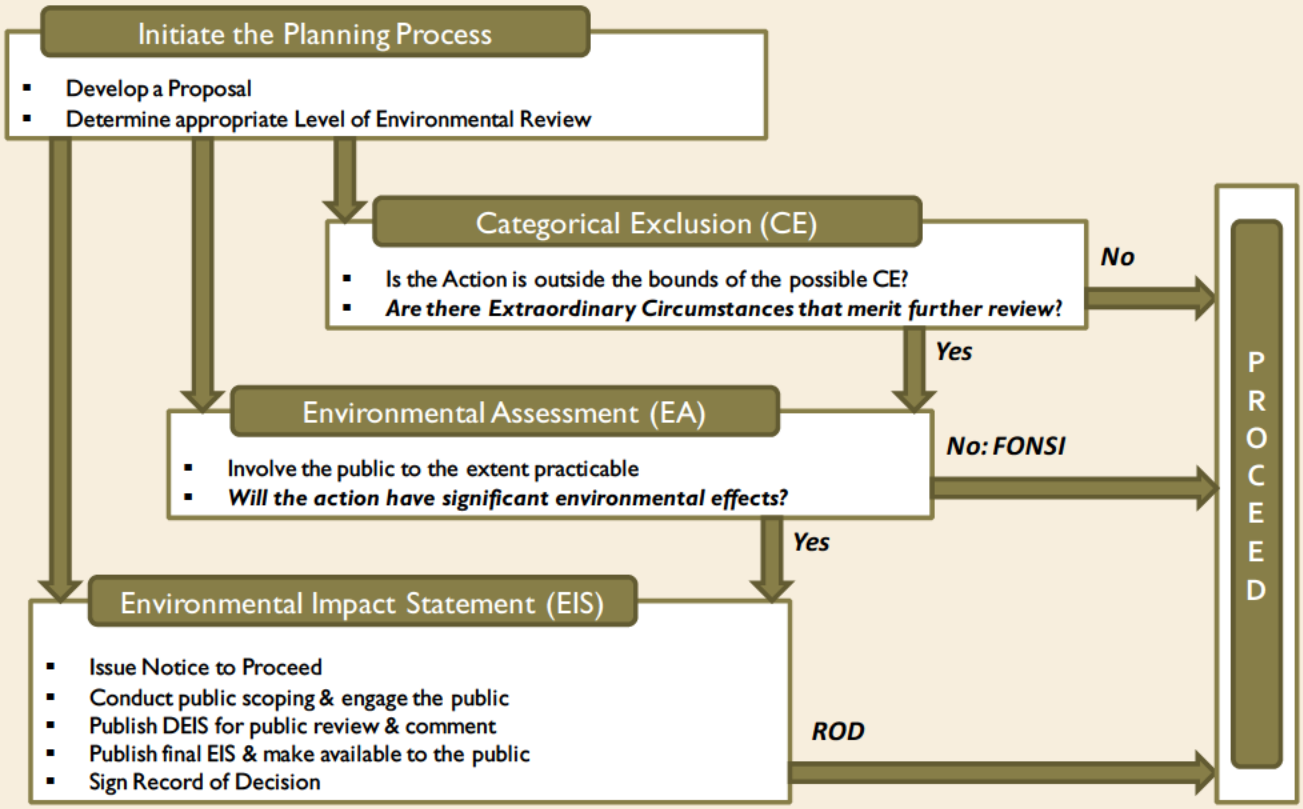
SECTION 106 OF THE NHPA

Congress enacted the National Historic Preservation Act in 1966, mandating that Federal decision makers consider historic properties during project planning. Section 106 of the NHPA requires Federal agencies to take into account the effects of undertakings they carry out, assist, fund, or permit on historic properties and to provide the ACHP a reasonable opportunity to comment on such undertakings.

Federal agencies meet this requirement by completing the Section 106 process set forth in the implementing regulations, "Protection of Historic Properties," 36 C.F.R. Part 800. The goal of the Section 106 process is to identify and to consider historic properties that might be affected by an undertaking and to attempt to resolve any adverse effects through consultation. The process provides for participation by SHPO, THPO, tribal, state, and local governments, Indian tribes and Native Hawaiian organizations, applicants for Federal assistance, permits, or licenses, representatives from interested organizations, private citizens, and the public. Federal agencies and consulting parties strive to reach agreement on measures to avoid, minimize, and mitigate adverse effects on historic properties and to find a balance between project goals and preservation objectives.

For more information, see: http://www.achp.gov

THE NEPA PROCESS



NEPA

The National Environmental Policy Act was signed into law on January 1, 1970. NEPA mandates that Federal agencies assess proposed Federal actions' environmental impacts, including impacts on historic and cultural resources. Federal agencies meet their NEPA review responsibilities by completing the NEPA processes set forth in their NEPA implementing procedures and CEQ's regulations, 40 C.F.R. Parts 1500-1508. There are three forms of NEPA review: Categorical Exclusion, Environmental Assessments, and Environmental Impact Statements.

CATEGORICAL EXCLUSION (CE)

A CE describes a category of actions that are expected not to have individually or cumulatively significant environmental impacts. Each agency's procedures for implementing NEPA sets out the agency's CEs, which are established after CEQ and public review. A proposed action within such a category does not require further review in an Environmental Assessment or an Environmental Impact Statement when there are no "extraordinary circumstances" associated with the site- or project-specific proposal that indicate further environmental review is warranted.

ENVIRONMENTAL ASSESSMENT (EA)

When a CE is not appropriate and the agency has not determined or is uncertain whether the proposed action will cause significant environmental effects, then an EA is prepared. If, as a result of the EA, a finding of no significant impact (FONSI) is made, then the NEPA review process is completed with the FONSI; otherwise an EIS is prepared.

ENVIRONMENTAL IMPACT STATEMENT (EIS)

NEPA and CEQ's regulations require the preparation of an EIS when a proposed Federal action may significantly affect the human environment. When an EIS is prepared, the NEPA review process is concluded when a record of decision (ROD) is issued. Historic properties, as a subset of cultural resources, are one aspect of the "human environment" defined by the NEPA regulations. Consequently, impacts on historic properties and cultural resources must be considered in determining whether to prepare an EIS.

For more information, see: http://www.nepa.gov

Most Federal agencies have their own implementing regulations or administrative protocols for implementing NEPA or approved program alternatives for Section 106. The advice provided in this handbook should serve as a foundation from which Federal agencies may develop or revise their own procedures or protocols to best suit their agencies' missions, their agencies' frameworks for implementing their programs, and their agencies' approaches to specific undertakings to satisfy the requirements of both Section 106 and NEPA.

Recently enacted legislation and administrative policies encourage agencies to seek new efficiencies in the environmental review process. Implementing the advice and recommendations made in this handbook can help agencies achieve these goals. It is important to recognize, however, that special circumstances may impact how an agency proceeds through NEPA and Section 106 compliance. For example, new legislation can change what an agency is required to do, litigation may inform agency procedures and policies, an agency may need to revisit determinations or decisions, or circumstances may dictate expedited timelines. These special situations can challenge agency decision makers in determining the best way forward. As such, CEQ and the ACHP are available to provide advice to agencies on a case by case basis as these situations arise.

III. RELATIONSHIP OF NEPA AND SECTION 106 REVIEWS

NEPA and Section 106 reviews may be triggered by a Federal or Federally funded, licensed, or permitted action and apply whether that action is on Federal, private, state, or tribal land. They share the goal of more informed agency decisions with respect to environmental consequences, including the effects on historic and cultural properties. Both encourage coordination with other environmental reviews.

NEPA and Section 106 implementation are overseen by Federal agencies that have promulgated regulations implementing the statutory procedures. The CEQ oversees 40 C.F.R. Parts 1500-1508, Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act. The ACHP oversees 36 C.F.R. Part 800, Protection of Historic Properties. These regulations are similar in several respects. Both regulatory procedures:

- Authorize development of agency-specific alternative procedures provided those procedures meet certain standards and approval requirements.
- Require agencies to gather information on the potential effects of the proposed action on historic properties and consider alternatives that may avoid or minimize the potential for adverse effects.
- Vary depending on the scope of the proposed action and its potential to have environmental effects.
- Emphasize the importance of initiating the environmental review process early in project planning.
- Emphasize notifying the public about the proposed Federal actions and involving the public in the decision making process.
- Require the process to be completed prior to a Federal decision.

Distinctions exist between the NEPA and Section 106 reviews in terms of the types, scope, and geographical area of environmental review procedures, the nature of public engagement and tribal consultation, information requirements, procedures for developing alternatives,

documentation, and timing. These distinctions are important for understanding opportunities for coordination and for following the substitution process.

A. Action and Undertaking

An environmental review under NEPA is required for all "Federal actions" which include projects, plans, policies, and programs financed, assisted, conducted, regulated, or approved by Federal agencies. Federal agencies must comply with Section 106 for all "undertakings," defined 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 financial assistance; and those requiring a Federal permit, license or approval."[5] Under Section 106, if the agency determines that the undertaking is a type of activity that does not have the potential to cause effects on historic properties, then there is no further Section 106 responsibility.

TIP:
When a Federal agency makes its initial determination under Section 106, it considers whether the project is the type of activity that could affect historic properties, assuming such properties were present. This evaluation must be independent of the real context (e.g., actual location) for the activity. The Federal agency should never proceed on the assumption that the potential to affect historic properties is absent based on location, previous disturbance, or because no historic properties are believed to be present in the area. Such findings should be subject to the Section 106 notification and consultation provisions.
36 C.F.R. § 800.3(a)(1)

B. Type of Review

Compliance procedures for NEPA and Section 106 vary depending on the potential of the proposed action to cause environmental effects. Federal agencies determine the type of NEPA review they will undertake for a proposed action based on the context and intensity of its impacts.[6] Context is defined as the geographic and social context in which the effect will occur, while intensity refers to the severity of the impact. Agencies may meet their responsibilities with a Categorical Exclusion (CE), Environmental Assessment that results in a Finding of No Significant Impact, or Environmental Impact Statement and Record of Decision. CEs are agency-specific and require consideration of whether there are "extraordinary circumstances" in which a normally excluded action may have a significant environmental effect that will then require further analysis in an EA or an EIS.

If a project, activity, or program is categorically excluded from NEPA review under an agency's NEPA procedures, the agency official shall determine if it still qualifies as an undertaking requiring review under Section 106.
36 C.F.R. § 800.8(b)

Under Section 106, a Federal agency considers the potential effects of its undertaking on historic properties. When a Federal agency has found that an undertaking may adversely affect historic properties, it must develop and consider alternatives or measures to avoid, minimize, or mitigate such effects.[7] The Section 106 process

TIP:
NEPA and NHPA are statutory requirements that can be waived only by specific provision in an Act of Congress. Unless a waiver has been authorized in legislation, the administrative record for each Federal project or program should document compliance with NEPA and NHPA.

NEPA REVIEW AND TIERING

The NEPA regulations at 40 C.F.R. §§ 1502.4(c), 1502.20, and 1508.28, and CEQ guidance ("Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act") encourage agencies to tier their EAs and EISs to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review. Whenever a broad EA or EIS has been prepared, such as a program or policy statement, and a subsequent EIS or EA is then prepared on an action included within the entire program or policy, such as a site specific action, the subsequent EIS or EA need only summarize the issues discussed in the broader EIS or EA by incorporation by reference and shall concentrate on the issues specific to the subsequent action. Materials incorporated by reference must be briefly described and appropriately cited, and available for review by interested parties.

For more information, see CEQ's Memorandum for Heads of Federal Departments and Agencies, "Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act" (March 6, 2012), *available at* http://ceq.hss.doe.gov/current_developments/docs/Improving_NEPA_Efficiencies_06Mar2012.pdf.

SECTION 106 AGREEMENTS

A Memorandum of Agreement is used to resolve adverse effects to historic properties and conclude the Section 106 process when implementing a discrete project with identified adverse effects. A Programmatic Agreement is a program alternative that may be used to implement the Section 106 process for a complex project situation. Programmatic Agreements can be developed on a national, statewide, or regional scope for similar or repetitive undertakings, for undertakings with repetitive effects on historic properties, or for situations where the effects to historic properties cannot be fully determined prior to the approval of an undertaking.

normally concludes with an agency finding of "no historic properties affected," "no adverse effect," or "adverse effects" resolved through avoidance, minimization, or mitigation. For undertakings with adverse effects, the Federal agency usually executes a legally binding document, a Memorandum of Agreement (MOA) or Programmatic Agreement (PA), that stipulates the resolution of adverse effects agreed to by the signatories. In those rare circumstances where there is a failure to reach an agreed-upon solution, the ACHP issues formal advisory comments to the head of the agency. The head of the agency must then take into account and respond to those comments.[8]

C. Scope of Review

Environmental review under NEPA includes a description of the affected human environment and the environmental consequences of the proposed action on that environment. NEPA regulations require NEPA documents to list all Federal permits, licenses, and other entitlements and to integrate to the fullest extent possible its information gathering and analyses with other Federal environmental review laws and executive orders—such as the Endangered Species Act (ESA), Clean Air Act General Conformity Rule, and the Marine Mammal Protection Act. As a result, NEPA is sometimes referred to as "an umbrella law." Nevertheless, agencies must still fulfill the requirements under those independent statutes, including the NHPA. Both NEPA and Section 106 require agencies to consider historic properties and effects to them. The affected human environment reviewed under NEPA includes aesthetic, historic, and cultural resources as these terms are commonly understood, including such resources as sacred sites. Section 106 is concerned exclusively with impacts to historic properties, defined in NHPA[9] as properties that are listed, or may be eligible for listing, in the National Register of Historic Places (National Register).[10] These may include prehistoric or historic districts, sites, buildings, structures, objects, or properties of traditional religious and cultural importance to an Indian tribe or a Native Hawaiian organization, that meet the National Register criteria.[11] Cultural resources that are not eligible

for or listed in the National Register may be considered as part of the NEPA review.

D. Study Area and Area of Potential Effects

The NEPA review's study area will vary depending on the extent of the potential impacts associated with the alternative courses of action. If reasonable alternatives exist, NEPA requires agencies to rigorously explore and objectively evaluate them.[12] Agencies should give a similar level of attention to historic properties as that given to other resources for all alternatives to establish a baseline of information to consider during consultation and review. Section 106 requires agencies to identify historic properties within the area of potential effects[13] for the proposed undertaking. In practice, the preferred alternative in a NEPA review may be considered equivalent to the proposed undertaking under Section 106. Early in the Section 106 review process, the Federal agency determines the area of potential effects for its undertaking. The area of potential effects is 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 Section 106 process does not require agencies to identify and evaluate historic properties in the area of potential effects for all NEPA alternatives; however, the preferred alternative may not be selected until late in the NEPA review, or may change during that review. In addition, Section 106 may require additional identification of historic resources as part of an effort to develop and evaluate alternatives to the proposed undertaking to avoid or mitigate adverse effects. Agencies should therefore establish the schedule, geographic area, and specifications for specialized studies, including historic property surveys, for more than the preferred alternative when there are adverse effects, to have the information they need in each step of the NEPA and Section 106 processes.

Section 106 allows the identification and evaluation of historic properties and assessment of effects to be phased for large land areas or in cases of restricted access. In some circumstances, the agency may defer identification, evaluation, and assessment of effects through a formal agreement, such as a PA. As specific aspects or locations

The Department of Veterans Affairs (VA) lost its Veterans Medical Center in New Orleans as a result of Hurricanes Katrina and Rita in 2005. It proposed to replace the facility with a new facility, adjacent to the proposed replacement for the public Charity Hospital, which would be partially funded by the Federal Emergency Management Agency (FEMA). VA, FEMA, and the City of New Orleans (as the responsible entity for NEPA under HUD delegation) cooperated to conduct a programmatic (or tier 1) Environmental Assessment (PEA) for siting the two hospitals together in the Mid-City Historic District. Since the agencies did not wish to identify a preferred alternative prior to issuing the PEA, the Section 106 Programmatic Agreement was developed to address the potential adverse effects of each of the alternatives under study.

Since the approval of the programmatic Finding of No Significant Impact (FONSI) in 2007, each of the agencies have completed their own site-specific (or tier 2) Environmental Assessments.

VA issued a mitigated FONSI in November 2008, and reports that its effort to satisfy the Programmatic Agreement is roughly 90 percent complete as of February 2013.

For more information and updates, go to:

http://www.neworleans.va.gov/Project_Legacy.asp

http://www.fema.gov/environmental-planning-and-historic-preservation-program/environmental-documents-public-notices-2

TIP:
An "effect" under Section 106 means an alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register of Historic Places. A Federal agency must assess the effects of the proposed undertaking on historic properties prior to applying the criteria of adverse effect.

PARTICIPANTS IN THE SECTION 106 REVIEW PROCESS

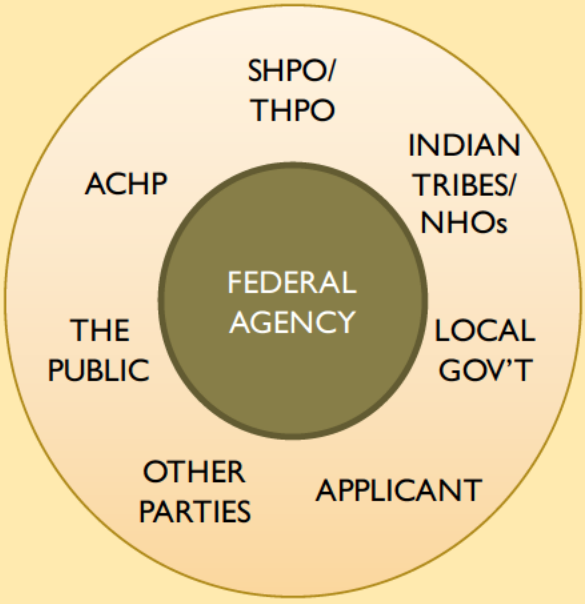
The regulations implementing Section 106, "Protection of Historic Properties" (36 C.F.R. Part 800), require Federal agencies to consult–seek, discuss, and consider the views and seek agreement with–the following stakeholders:

- State and Tribal Historic Preservation Officers (SHPOs/ THPOs)
- Federally recognized Indian tribes, including Native villages, Regional Corporations or Village Corporations, as those terms are defined in Section 3 of the Alaska Native Claims Settlement Act, and Native Hawaiian organizations (NHOs)
- Local governments
- Applicants for Federal permits, licenses, or assistance
- The National Park Service, if a National Historic Landmark may be affected by the undertaking
- The ACHP, if historic properties may be adversely affected or other circumstances warrant its participation

Federal agencies may also invite other consulting parties with a legal or economic relation to the undertaking or affected properties or concern with the undertaking's effects on historic properties.

The views of the public are also essential to informed Federal decision making in the Section 106 process.

For more information, go to: http://www.achp.gov



of an alternative are refined or access is gained, the agency should complete its efforts to identify and evaluate the potential effects to historic properties.

E. Stakeholder and Public Involvement

CEQ's NEPA regulations require agencies to "make diligent efforts to involve the public in preparing and implementing their NEPA procedures" and "to provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents."[14] The extent will vary with the level of review. CEs provide limited opportunities for public and tribal involvement. Where an EA is prepared, the type and extent of public involvement is at the discretion of the authorized officer. For an EIS, scoping involves notification and opportunities for comments on a proposed action by other agencies, organizations, tribes, local governments, and the public for the purpose of determining the scope of issues and identifying significant issues related to the proposed action. Agencies are required to make the draft EIS available for public review, invite comments, and respond to any comments submitted. In addition, a Federal, state, local, and tribal government with jurisdiction or special expertise may be offered a special role as a "cooperating agency."

Section 106 requires that agencies "provide the public with information about an undertaking and its effects and seek public comment."[15] The manner in which the agency official is to seek and consider the views of the general public should reflect "the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement in the undertaking."[16]

Agencies should plan public involvement appropriate to the scale of the undertaking and scope of Federal involvement.[17] Section 106 encourages agencies to use their own procedures implementing NEPA or other programs to satisfy the Section 106 general public outreach requirements, provided they include adequate opportunities for public involvement.[18]

In addition to requiring public involvement, Section 106 is a consultative process that "seeks to accommodate historic preservation concerns with the needs of the Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties."[19] Consulting parties include other Federal, state, and local agencies, Indian tribes, Native Hawaiian organizations, applicants, and the interested public. Consultation is defined in the Section 106 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."[20] The consultation process is used to identify and evaluate historic properties potentially affected by an undertaking, assess effects, and seek ways to avoid, minimize, or mitigate any adverse effects on those properties. Consulting parties are provided a more active role in these steps than the general public.

An agency should consider the implications for their communications strategy when determining whether to use coordination or substitution. When agencies plan to fulfill NEPA requirements for a proposed action through the preparation of CEs or EAs, Section 106 may require more public involvement than that afforded by the NEPA review. More public involvement may also be required when preparing an EIS, particularly when using the substitution process. Effective communications plans for engaging stakeholders and the public should satisfy all the NEPA review and Section 106 public involvement and consultation requirements.

F. Tribal Consultation

Under NEPA, Federal agencies are encouraged to consult with Indian tribes early in the planning process, and to invite Indian tribes to be cooperating agencies in preparation of an EIS, when potential effects are on a reservation or affect tribal interests.[21] Tribal consultation under NEPA can include effects to treaty, trust, and other natural resource issues, as well as to cultural resources in general, whether or not they meet the specific definition of historic property under the NHPA. The NEPA review may also include the government's responsibilities under Executive Order (EO) 12898,

FEDERALLY RECOGNIZED INDIAN TRIBES
The Federal Government has a unique relationship with Indian tribes derived from the Constitution of the United States, treaties, Supreme Court decisions, and Federal statutes. Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes, and should be conducted in a sensitive manner respectful of tribal sovereignty.
[36 C.F.R. § 800.2(c)(2)(ii)(B) and (C)]

NATIVE HAWAIIAN ORGANIZATION
An Native Hawaiian organization is 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 culturally significant to Native Hawaiians. The term includes, but is not limited to, the Office of Hawaiian Affairs of the State of Hawaii and Hui Malama I Na Kupuna O Hawai'i Nei, an organization incorporated under the laws of the State of Hawaii. The NHPA requires the agency official to consult with any Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking.
[36 C.F.R. § 800.2(c)(2)(ii) and § 800.16(s)(1)]

TIP:
The development of consultation protocols or communication agreements between a Federal agency and an Indian tribe or Native Hawaiian organization may help focus consultation and create common expectations.

INVOLVING CONSULTING PARTIES IN NEPA

A Section 106 review should begin prior to a Federal agency's identification of a preferred alternative under NEPA. While many SHPOs, THPOS, Indian tribes, and NHOs may find early involvement in the NEPA process challenging, it is important that agencies engage these Section 106 consulting parties early in project planning. Their involvement in the development of alternatives and consideration of historic preservation issues will benefit both the NEPA and the Section 106 processes. The development of alternatives which resolve adverse effects and prevent the need to review or revisit previously eliminated alternatives advances environmental reviews.

ENVIRONMENTAL JUSTICE

Environmental justice issues encompass a broad range of impacts covered by NEPA, including impacts on the natural or physical environment and interrelated social, cultural, and economic effects. In Section 106 consultations, representatives of affected communities may also raise environmental justice issues. Such issues which can be addressed through historic preservation considerations may contribute to the agency's overall environmental justice compliance.

Section 304 of the NHPA provides that the head of a Federal agency or other public official receiving grant assistance pursuant to the act, after consultation with the Secretary of the Interior, shall withhold from public disclosure information about the location, character, or ownership of a historic property when disclosure may cause a significant invasion of privacy, risk harm to the historic property, or impede the use of a traditional religious site by practitioners.

36 C.F.R. § 800.11(c)(1)

Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations; EO 13175, Consultation and Coordination with Indian Tribal Governments; the American Indian Religious Freedom Act; and related statutes and policies that have a consultation component.

Under the NHPA, consultation with Indian tribes and Native Hawaiian organizations is mandatory. It focuses on identifying and evaluating historic properties, assessing effects, and, where appropriate, resolving adverse effects to those properties. Consultation is required with any Indian tribe or Native Hawaiian organization that may attach religious and cultural significance to historic properties that may be affected by a proposed undertaking, regardless of whether the property is located on or off tribal lands.[22]

G. Information Requirements

The CEQ regulations require agencies to describe the environment, including cultural resources, likely to be affected by the proposed action and alternatives, and to discuss and consider the environmental effects of the proposed action and alternatives, so decision makers and the public may compare the consequences associated with alternate courses of action. Data and analysis vary depending on the importance of the impact, and the description should be no longer than necessary to understand the effects of the alternatives, with less important material summarized, consolidated, or referenced.[23]

Section 106 requires agencies to make a reasonable and good faith effort to identify historic properties. The level of effort is determined in consultation with the SHPO or the THPO. Agencies take into account information provided by consulting parties, individuals, organizations, tribes, and Native Hawaiian organizations about the location, character, and ownership of historic properties. They also consider past planning efforts and research, the magnitude and nature of the undertaking, the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects. Information about the location, character, or

ownership of historic properties, may be subject to the confidentiality provisions of Section 304 of the NHPA. Further, it may be necessary to withhold protected business analysis where the project sponsor or applicant wants to keep competitive information confidential. The request for confidentiality is often made early in the consultation process. It is important for an agency to carefully review solicitations and information that would be released or made available to the general public to ensure confidential information is protected as appropriate.

H. Documentation

At the end of the NEPA and Section 106 reviews, Federal agencies select an alternative to implement. The NEPA review may conclude with documentation of a CE, a FONSI for EAs, or a ROD for EISs, or a No Action decision. Only the ROD is a decision document under the CEQ regulations.[25] The Section 106 process normally concludes with documentation of one of three findings: "no historic properties affected;" "no adverse effect;" or "adverse effect" to historic properties that the Federal agency has resolved through the measures they have agreed to in an MOA or PA.[26] In rare circumstances, an agency is unable to resolve adverse effects, terminates consultation, and requests the ACHP to issue formal advisory comments.[27] The agency head then concludes the process by providing the ACHP with a summary of its decision and evidence of consideration of the ACHP's comments prior to reaching a final decision on the undertaking.[28] Copies of the agency's response and summary are provided to consulting parties and made available to the public. By statute, Federal agencies must conclude the Section 106 process before approving the expenditure of funds on an undertaking or before the issuance of any license, permit, or approval for an undertaking to proceed.[29] This requirement does not apply to the use of funds for non-destructive planning, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize, or mitigate the undertaking's adverse effects on historic properties.[30]

Applicants are likely to carry out a significant amount of the work including the following: gathering and providing baseline information on resources that may be impacted by the proposed action; administrative and technical facilitation of public engagement and tribal consultation; and helping to prepare or review draft documentation. Officials may authorize an applicant to initiate consultation with the SHPO/THPO and other consulting parties with the exception of Indian tribes by notifying the SHPO/THPO.[31] This delegation authority does not extend to an agency's government-to-government relationship with Indian tribes. The Federal agency alone is responsible for all findings and determinations under Section 106, and for government-to-government consultation with Indian tribes.

PROGRAM ALTERNATIVES FOR SECTION 106

Federal agencies may develop other "Program Alternatives" to fulfill their Section 106 compliance responsibilities. The Section 106 regulations outline options including the following: nationwide, regional, or complex project Programmatic Agreements; prototype Programmatic Agreements; exemptions; standard treatments; and program comments. Program Alternatives can be used to tailor the Section 106 review process to meet the needs of a particular Federal project or program.

For more information, see: http://www.achp.gov

PROGRAMMATIC AGREEMENTS

A Programmatic Agreement is a flexible tool that allows agencies to tailor the Section 106 process to their program or series of undertakings. A Programmatic Agreement may be helpful when an agency is developing a programmatic EA or EIS to establish a process for concluding future consultation and considering effects to historic properties. Consulting party involvement in the development of a Programmatic Agreement enables the Federal agency to identify major policy and historic preservation issues and focus consultation in relevant areas.

For example, a Programmatic EA and related Section 106 Programmatic Agreement were successfully developed to address environmental issues in recovery activities related to Hurricanes Rita and Katrina in Louisiana. For more information about FEMA's historic preservation program, see http://www.achp.gov/fema.html.

For more information about Section 106 Programmatic Agreements, see http://www.achp.gov

IV. ROAD MAP FOR COORDINATION

Coordinating the Section 106 and NEPA reviews is most effective when the responsible parties begin them simultaneously so that each process will fully inform the other. The general principles in 36 C.F.R. § 800.8(a) provide a framework for this coordination. The following section provides advice for putting those principles into practice for each level of NEPA review.

The initiation of the environmental review process is a critical part of planning a proposed action. The objectives and goals of the proposed action are usually outlined at this stage, and the agency begins to identify the potentially impacted resources and those entities and individuals that have an interest in the action or its potential effects. Agencies may be able to identify whether the proposed action meets the regulatory definition of undertaking and has the potential to cause effects on historic properties. If the action is not an undertaking with such potential, the agency has no further Section 106 responsibilities and should include this determination in the NEPA documentation.

Opportunities for Coordination:

- Begin both NEPA and Section 106 reviews early in project planning so each process can inform the other.
- Plan public involvement to satisfy both NEPA and Section 106 requirements.

A. Categorical Exclusions

The majority of Federal actions reviewed under NEPA qualify for a CE. A CE is established administratively as part of an agency's NEPA implementation procedures. It is specific to an agency's programs and is based on an agency's determination that the activities described in the CE typically do not have any potential for significant effects. A CE can be used to satisfy NEPA requirements for a proposed action when that action is described by the CE and the agency determines that there are no "extraordinary circumstances" that would warrant further analysis in an EA or EIS.[32] Because Section 106 is an independent statutory requirement, compliance with

NEPA through a CE does *not* satisfy an agency's obligations under Section 106 of the NHPA.[33]

If the proposed action is a type of undertaking with the potential to affect historic properties, the agency initiates the Section 106 consultation process by identifying the appropriate SHPO/THPO and other parties with an interest in the effects of the undertaking on historic properties, and consults to determine the area of potential effects, and the scope of identification efforts, consistent with 36 C.F.R. Part 800. The Section 106 consultation can assist an agency in determining whether "extraordinary circumstances" related to historic properties are present. "Extraordinary circumstances," in which a normally excluded action may have a significant environmental effect, typically consider the "degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources." [34]

When the Section 106 process concludes there are no historic properties present in the area of potential effects for the proposed action or that the proposed action will have no effect or no adverse effect to historic properties, the agency may proceed with the CE, if there are no other extraordinary circumstances, after documenting completion of its Section 106 requirement. However, if an agency determines there may be adverse effects to historic properties, it must consider whether the adverse effects constitute "extraordinary circumstances" that merit further analysis in an EA or EIS, either alone or in combination with other environmental effects. When the agency resolves the adverse effects to historic properties through the Section 106 process by avoiding, minimizing, or mitigating them such that the potential adverse effects no longer constitute "extraordinary circumstances," it may still meet its NEPA responsibilities through a CE. The agency documents the Section 106 analysis to support the application of the CE, and the Section 106 analysis should be completed before or concurrent with the use of a CE. If an agency uses CE documentation as its decision document and the proposed action constitutes a type of undertaking with the potential to

Congress has delegated the responsibility to comply with NEPA and Section 106 for certain programs of the Department of Housing and Urban Development (HUD) to the state and local governments which receive HUD funds, such as Community Development Block Grants (CDBG). In order to use CDBG funds to demolish a derelict structure or to design infill redevelopment in a blighted neighborhood, local governments must comply with Section 106 and NEPA. Many state and local governments have executed Programmatic Agreements which tailor the Section 106 review process to their HUD-delegated programs.

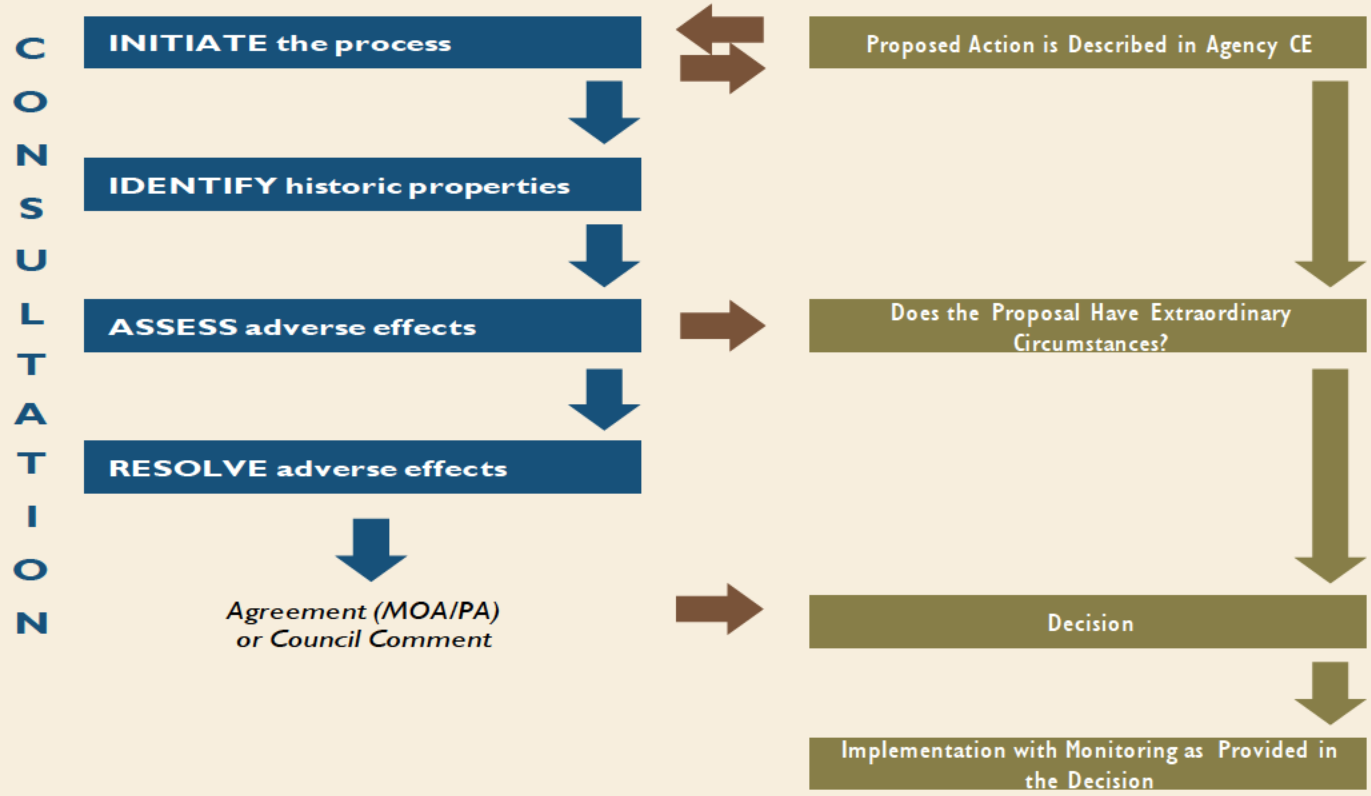
To review examples of these Section 106 Programmatic Agreements, go to:

http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/environment/section106

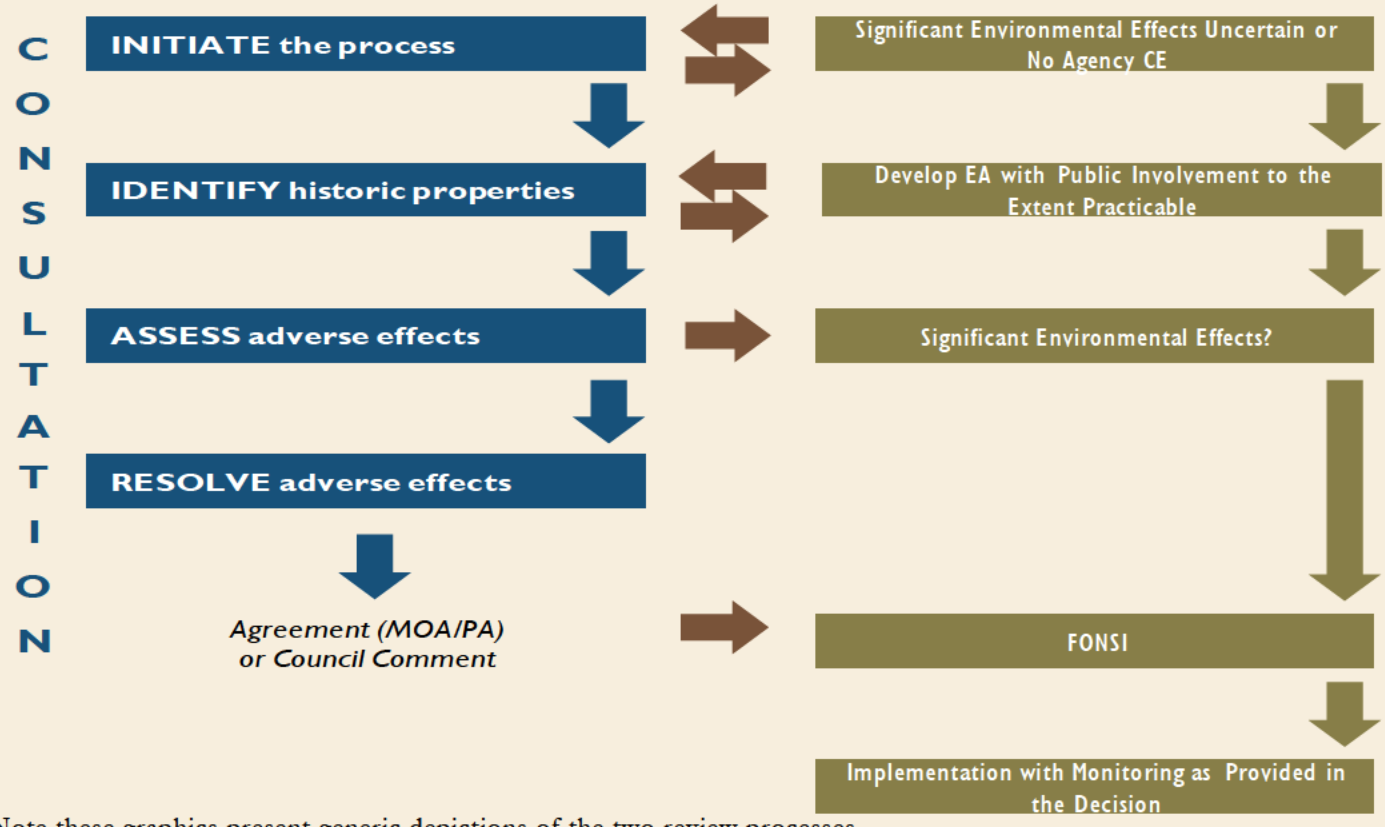
TIP:
Federal agencies can facilitate the early involvement of consulting parties by highlighting the relevant parts of the NEPA document that address the Section 106 process and historic preservation concerns.

TIMING AND COMMUNICATION

SECTION 106 AND CE



SECTION 106 AND EA



Note these graphics present generic depictions of the two review processes.

affect historic properties, then it would have to wait until the Section 106 process was concluded to issue such a CE document.

Opportunities for Coordination:

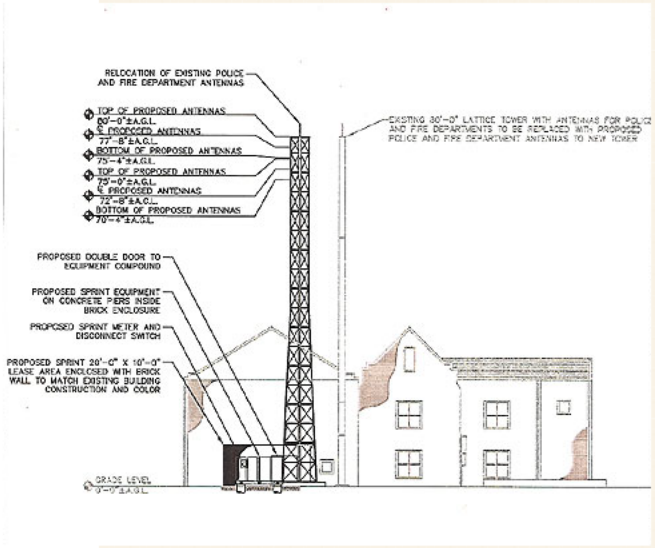
- Synchronizing NEPA and Section 106 reviews can allow potential adverse effects to be avoided, minimized, or mitigated and documented so that a CE can be applied.
- The Section 106 process can identify those circumstances in which the adverse effects to historic properties, individually or in combination with other potential effects, constitute "extraordinary circumstances" such that application of a CE is not appropriate, and additional NEPA analysis is required.

B. Environmental Assessments

When a CE is not appropriate and the agency has not determined that a proposed action has the potential to cause "significant environmental effects" requiring an EIS, the agency prepares an EA. An EA is typically a concise public document that provides sufficient evidence and analysis for determining whether to prepare an EIS or FONSI.[35] The EA includes brief discussions of the need for the proposed action, the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted. It includes the development and description of appropriate reasonable alternatives for proposals that involve unresolved conflicts concerning alternative uses of available resources. If the result of the EA is a FONSI, then the NEPA review process is complete; otherwise, an EIS is prepared or the proposal is not advanced.

1. Preliminary Analysis

During initial project formulation, the agency identifies the SHPO/THPO, Indian tribes and Native Hawaiian organizations, and other parties who may be concerned with the effects of the proposed action and its potential to affect historic properties.[36] Initiation of Section 106 consultation on an undertaking's area of potential effects and the identification of any historic properties that might be located within this geographically designated area can assist the agency in refining the issues for analysis and the



In 2001 and 2004, the Federal Communications Commission (FCC) executed nationwide Programmatic Agreements (NPAs) to streamline the Section 106 review of the proposed collocation of wireless antennae on existing tower facilities and the proposed construction and modification of certain wireless communications tower facilities. Concurrently, the FCC amended its regulations at 47 C.F.R. § 1.1307(a)(4) to state that new facilities that may affect historic properties, as determined through the Section106 review process, are "actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared." New facilities and collocations that do not affect historic properties may be categorically excluded from NEPA.

To learn more about the NPAs and the FCC regulations, go to:

http://wireless.fcc.gov/siting/npa.html

RESPONSIBLE PARTIES AND APPLICANTS

Federal agencies are responsible for complying with NEPA and Section 106. Other "responsible parties"- such as state or local governments, tribal governments, or applicants for Federal licenses, permits, or approvals– may be delegated the authority to complete certain agency obligations. Even where a delegation is not authorized, a Federal agency may use information, analyses, and recommendations prepared by these parties in the NEPA and Section 106 processes. The Federal agency remains responsible for NEPA and Section 106 findings, determinations, and government-to-government consultation with Federally recognized Indian tribes.
[36 C.F.R. § 800.2(a)(3)]

TIP:

When working with applicants, project sponsors, and consultants, Federal agencies should communicate with them early and clearly define the scope of the project, roles and responsibilities for both NEPA and Section 106 review, timelines, and information sharing. Early involvement means before major decisions are made about the planning process and preferred alternatives are selected.

scope of NEPA review. This includes the assessment of how alternatives to avoid, minimize, or mitigate potential adverse effects to historic properties will be considered in the NEPA review.

2. Plan to Involve the Public

Some form of public involvement is required for an EA; however, the type and extent of outreach is up to the discretion of the authorized agency official. Examples of public involvement include external scoping, public notification before or during preparation of the EA, public meetings, or public review and comment on the draft EA. Section 106 requires both public involvement and consultation with the SHPO and/or THPO and other consulting parties. A comprehensive communications plan that includes NEPA public involvement, any additional public involvement requirements under Section 106, Section 106 consultation requirements, and additional tribal consultation requirements will help meet the public engagement responsibilities with less duplication of effort. A good plan will include information on the background and context for the project, the agency points of contact, stakeholders, and scheduling milestones. Having a clear communications plan for all public outreach in the beginning of the project review will make the overall decision making process more transparent and provide a better opportunity for interested members of the public to contribute to the body of information assessed.

3. Preparing the EA

The Federal agency may assess the environmental impacts of the proposed action and alternatives in the EA concurrent with the potential effects of the action on historic properties. The assessment of effects to resources under an EA includes the Section 106 focus on which part of the proposed action could specifically affect a historic property and describes how the resource might be affected.

When considering effects on historic properties in the Section 106 process, the assessment should similarly focus on what aspect of the proposed undertaking would affect the historic property and what character-defining features of the historic property would be affected. Adverse effects are found when an undertaking might

alter, directly or indirectly, any of the characteristics of a historic property that qualify it 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.[37]

To coordinate Section 106 and an EA, an agency would use the Section 106 adverse effect criteria in evaluating and describing effects on historic properties. Agencies may also find it helpful to relate adverse effects under Section 106 to the criteria for determining the significance of impacts under NEPA. One approach to assessing the impacts to historic properties, as relative to the scope of the EA, is to consider the importance of the resource as its "context" and the severity of the proposed impacts as the action's "intensity."[38] Historic preservation professionals generally recognize that adverse effects are often complex and varied. Federal agencies should clearly define the specific characteristics that make an individual property or district eligible for the National Register to determine whether an action might alter, directly or indirectly, those qualifying characteristics in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association, and thus, to determine the severity of impacts to that historic property.

Agencies should take particular care when the proposed undertaking will affect types of historic properties whose boundaries might not be well defined or include natural features. The intensity of the action's effect on a property such as a cultural landscape or historic property of religious and cultural significance to Indian tribes or Native Hawaiian organizations might not be as immediately apparent as it would be when considering effects on a discrete structure or archaeological site. The intensity of the proposed action in these situations is likely to affect the more intangible aspects of the property, such as "feeling" as this term is used in the criteria for evaluating properties for the National Register. Consultation with Indian tribes and Native Hawaiian organizations to identify the character-defining features of such a cultural landscape is vital.

Traditional cultural landscapes describe an area considered to be culturally significant. They can and often do embrace one or more of the property types defined in the NHPA: districts, buildings, structures, sites, and objects. It is important to note that the challenges associated with the management of such sites, and their potential size, do not excuse the consideration of their significance. (Image: Sacred Sand Dunes in Monument Valley, © Sergey Yasny - Fotolia.com)

TIP:
When a project for which an agency has completed NEPA and Section 106 processes is delayed a long time or requires changes, the agency should re-engage consulting parties and provide them with new or updated information. An agency may need to reinitiate Section 106 consultation if the nature of the effects to historic properties have changed during this period. This information will also inform the agency's determination whether to supplement the NEPA review.

WHAT IS MITIGATION?
In the Section 106 process, the term "mitigate" is distinct from the terms "avoid" and "minimize," and means to compensate for the adverse effects to historic properties. In the NEPA environmental review process, the term "mitigate" includes avoiding, minimizing, reducing, as well as compensating for the impact to the human environment.

Understanding the similarities and differences between the terminology in Section 106 and NEPA is crucial to coordinate the two processes.

See Attachment A for a comprehensive comparison of terms and definitions.

TIP:
When the Section 106 process results in a finding of adverse effects to historic properties and mitigation measures are proposed through the development of a Section 106 agreement document, the NEPA review process may conclude with an EA and FONSI, or may require the development of an EIS and ROD.

The Section 106 documentation should have the length, detail, and technical information necessary to provide sufficient information to consulting parties about the nature of the historic properties involved and the reasoning behind the effect findings.[39] To communicate Section 106 information in the EA and FONSI, agencies may list consulting parties, outline findings and determinations, and briefly describe consulting party meetings. Tables and charts might be helpful to identify historic properties within the area of potential effects and organize descriptions of National Register eligibility, potential effects, and proposed treatment or mitigation measures. Because this information is generally presented in a summary format in the EA, agencies and applicants are encouraged to append or incorporate by reference those documents, findings, analyses, and letters developed or produced for the Section 106 process, particularly correspondence from the SHPOs and THPOs. In the EA, the agency should identify where the Section 106 findings and determinations are located to allow for easier reference and review, and consider using joint mailings that meet Section 106 consultation requirements.

The EA provides opportunities for considering mitigation measures that will avoid, minimize, rectify, reduce, eliminate over time, or compensate for adverse effects.[40] In the NEPA context, the term "mitigation" can refer to changes in the project that would lessen the overall impact to the human environment. A FONSI can be based on mitigation that would reduce the impacts of an action below the threshold of NEPA significance.[41] The term "mitigation" in Section 106 refers to measures to resolve the adverse effects to identified historic properties. If adverse effects cannot be avoided or minimized, then the Federal agency seeks other ways to mitigate those effects to historic properties.[42] Such measures might include redesign of new buildings, modification of site plans, realignment of corridors or rights of way, documentation, or preservation-in-place of certain historic properties. Any treatment and mitigation measures developed through the Section 106 process should be referenced in the EA and documented in an MOA or PA developed in consultation with consulting parties. For example, drafts of agreement documents

may be included as appendices to a draft EA and attached to a final EA or FONSI to document how the agency intends to fulfill its Section 106 responsibilities. Agencies that use a FONSI as a decision document for an undertaking must conclude the Section 106 process prior to issuing the FONSI.

4. FONSI or EIS?

The resolution of adverse effects to historic properties through the Section 106 process is a factor to consider in determining whether, for NEPA purposes, there are any potentially significant effects that require the preparation of an EIS. An adverse effect in the Section 106 process does not necessarily mean an agency will be unable to reach a FONSI. The Section 106 regulations state that the NEPA determination of whether an undertaking is a "major Federal action significantly affecting the quality of the human environment" that requires preparation of an EIS should include consideration of the likely effects on historic properties.[43] However, neither NEPA nor Section 106 requires the preparation of an EIS solely because the proposed undertaking has the potential to adversely affect a historic property.[44] Consequently, the agency will still need to determine whether the environmental effects of the action on historic properties are "significant" (or are still "significant") within the meaning of 40 C.F.R. § 1508.27.

Opportunities for Coordination:

- Incorporate Section 106 and the EA process, including tribal consultation, into an overall project schedule that includes milestones and a tracking system.
- Develop a comprehensive communication plan for the EA, Section 106, and consultation requirements.
- Include current project descriptions in all staff level and government-to-government consultation meetings.
- Include a statement in any public notice about the project that the agency intends to comply with Section 106 as well as EA public notification requirements.
- Ensure all public communications and the EA include Section 106 information.
- Where adverse effects to historic properties are avoided, minimized, or mitigated, a FONSI may be appropriate to conclude the EA process.

The General Services Administration (GSA) received authorization and an appropriation to acquire a site and design a new $100 million, 262,970 square foot Federal courthouse in Harrisburg, Pennsylvania. GSA published its Environmental Assessment (EA) that identified three site alternatives, all of which would adversely affect historic properties. The Bethesda Mission, pictured here, was one historic property that would have been adversely affected. Due to historic preservation and other community concerns, GSA determined that none of the three sites would be selected. GSA then released a revised site selection study, considering three new sites and published a new EA that selected a site at North 6th and Reily Streets, which is adequate for the courts, serves the needs of the community, and avoids adverse effects to historic properties. The Finding of No Significant Impact was approved. (Image: Bethesda Mission)

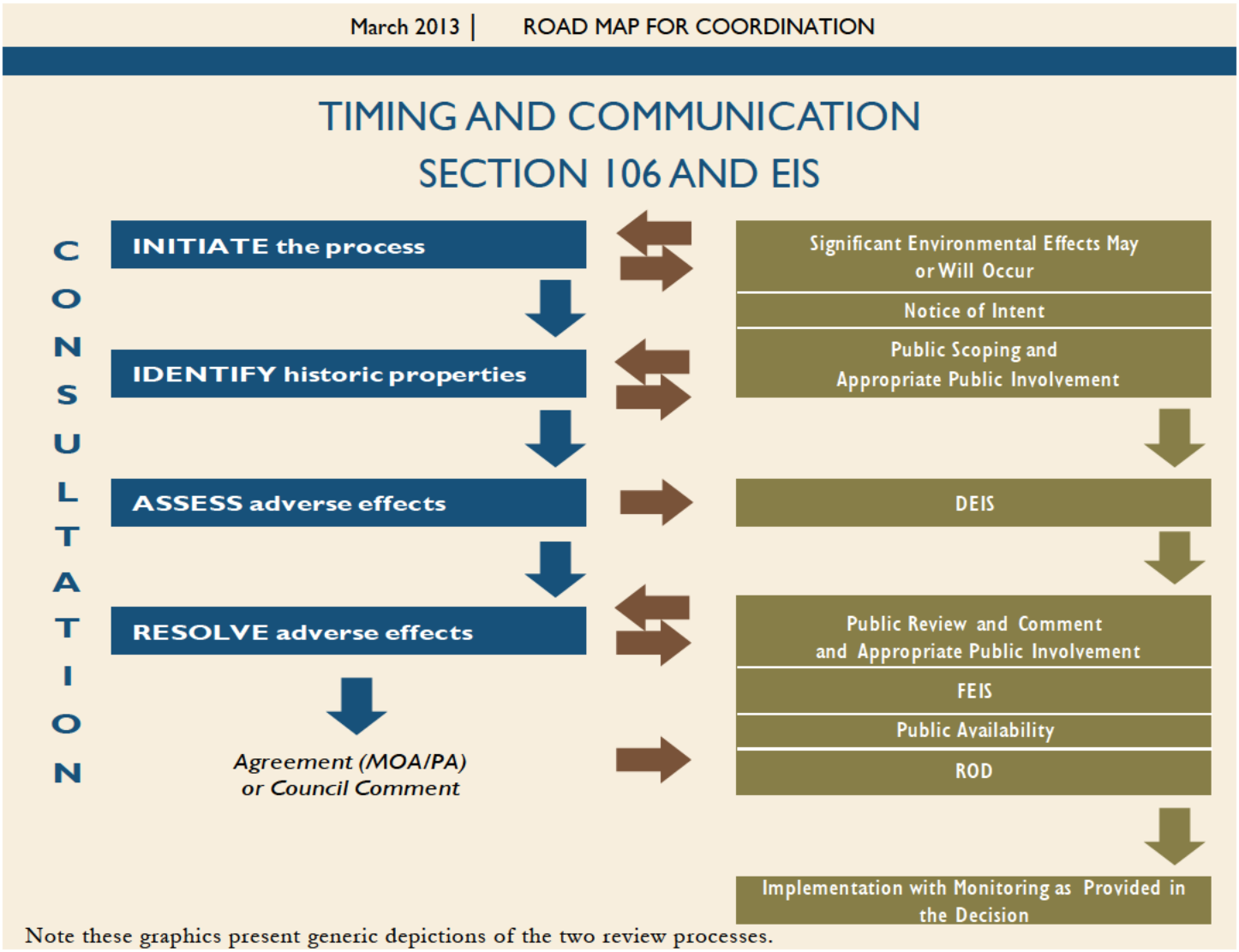
For more information, go to:

http://harrisburgcourthouse.com/

The determination of whether an undertaking...requires preparation of an EIS under NEPA, should include consideration of the undertaking's likely effects on historic properties.

A finding of adverse effect on a historic property does not necessarily require an EIS under NEPA.

36 C.F.R. § 800.8(a)(1)



Note these graphics present generic depictions of the two review processes.

C. Environmental Impact Statements

When an agency determines at the outset of the review process or through preparation of an EA that a proposed action is a major Federal action that may significantly affect the quality of the human environment, it prepares an EIS. When an EIS is prepared, the NEPA review process is concluded when a ROD is issued.[45] When coordinating preparation of an EIS with the Section 106 process, agencies are encouraged to incorporate and build upon the discussion and recommendations for EAs as outlined above.

1. Preliminary Analysis

The Federal agency should begin coordinating the EIS and Section 106 processes when developing the statement of Purpose and Need and identifying interested parties including potential cooperating agencies and consulting parties. This early effort will facilitate the development of a comprehensive schedule and tracking system that incorporates EIS, Section 106, as well as other environmental review requirements and milestones. The agency should also include tribal consultation requirements under EO 13175 and related authorities into a comprehensive communication plan to ensure the public, tribes, and consulting parties receive clear and complete information on when and how to provide their input. This will enable these parties to engage the agency in a manner that makes the best use of their time and expertise.

2. Scoping

The agency should include language in the Notice of Intent (NOI) and any notices of scoping, stating the agency's intent to discuss Section 106 and utilize scoping to partially fulfill the Section 106 public notification and consultation requirements. Scoping may be an opportunity to identify consulting parties and initiate consultation. Agencies should ensure all public communications and scoping meetings include Section

106 information. The agency should clearly describe the form and format of public meetings, hearings, or listening sessions,[46] and clarify that Section 106 will be coordinated with the EIS process; including how and when that coordination will take place. The agency should present this information in plain language so that diverse members of the public and potential consulting parties can understand what will be discussed. In addition, the public should be given enough information so that it can determine whether, or how, comments might be provided and considered by the agency.

When an EIS is being prepared, agencies consider alternatives that address the purpose and need for the action[47] and the affected environment, meaning the environment of the area to be potentially affected or created by the alternatives under consideration.[48] As stated earlier, the "cultural resources" that are to be identified and assessed as part of the affected environment include a broader array of properties than the "historic properties" defined in Section 106. For example, the identification of cultural resources when preparing an EIS might include resources such as cultural institutions, resources that embody cultural practices, and sacred sites that do not otherwise meet the definition of a historic property.

By initiating consultation with the SHPO, THPO, tribes, Native Hawaiian organizations, and other consulting parties early in the process, the agency can begin to identify historic properties and effects to historic properties before the early drafting stages of the cultural resources section of the EIS. An agency may plan the timing of Section 106 consultation and the extent and timing of sharing EIS related information with consulting parties, to maximize the opportunity for Section 106 consultation to assist in describing the affected environment and in the development of alternatives for the EIS. Consulting parties can contribute information that is relevant and timely to both procedures. Consulting parties can provide the agency with new information, suggestions, and creative options that might help it to better understand the impacts associated with its potential and proposed alternatives or in developing new alternatives. Agencies should be aware that initial alternatives might need to be reevaluated, revised, or modified as additional information about historic properties and potential effects come to light. The administrative record should document all relevant discussions and reviews.

3. Preparing the EIS

An EIS includes the analysis of the environmental impacts of each reasonable alternative. The relative scope of this analysis depends upon the level of probable effects and the complexity of the proposed alternative, and should be informed by consultation with the SHPO/THPO, affected Indian tribes, and Native Hawaiian organizations under Section 106, particularly with regard to the potential for large scale properties of religious or cultural significance. The agency should include any information obtained from the Section 106 consultation in the draft EIS sections on affected environment and impacts, subject to the confidentiality provisions of Section 304 of the NHPA. This ensures that determinations regarding which alternatives to advance for detailed analysis and which alternative is selected as the preferred alternative are made with an appropriate awareness of historic preservation concerns.

In addition to consultation, the EIS and Section 106 processes typically require specialized studies, including historic resource surveys, to fill data gaps. The EIS may need to include such studies for all alternatives, and Section 106 may require more detailed studies, particularly in the area of potential effects, for the preferred alternative. Agencies will want to establish the timing and specifications for specialized studies so that sufficient information is available to meet the requirements for both the EIS and Section 106 at each step in the compliance process, particularly with regard to the alternative that may likely be selected. Early consideration and coordination of the EIS and Section 106 processes will help achieve this, avoid duplication of effort, and lessen the risk that issues raised late in the process will require development of additional alternatives specifically to address historic property concerns.

4. Public Comment

By including Section 106 information in the Notices of Availability (NOA) and other public notices, agencies may meet the Section 106 requirements for public notification together with the EIS public review and comment requirements. The draft EIS or preliminary draft EIS can also be used to facilitate consultation efforts, including the development of draft MOAs and PAs. Public comments received by the agency should be considered in the identification of historic properties, the assessment of effects, and in the resolution of adverse effects.

5. Record of Decision

When there is a need to resolve adverse effects to historic properties, the agency develops mitigation measures that are typically memorialized in the signed MOA or PA. These documents should be included in the final EIS or ROD. Agencies and applicants should ensure there is an adequate mechanism for monitoring compliance with those measures, and that any commitments made in the final EIS and MOA or PA are supported by the appropriate authority, resources, and funding.

Opportunities for Coordination:

- Include language in any notification of scoping (including NOI) stating how it meets Section 106 public notification requirements.
- Ensure all public communications and scoping meetings include relevant Section 106 information.
- Use scoping and Section 106 consultation to identify historic resources and key issues, especially landscape level concerns.
- Develop an integrated strategy for completing studies to fill data gaps that meet information standards and timing requirements for both the EIS and Section 106 processes.
- Include information obtained from the Section 106 consultation in the draft EIS or preliminary draft EIS sections on affected environment, impacts, and potential mitigation for public review and comment to help meet Section 106 documentation requirements (remember to keep in mind confidentiality concerns).
- Include any draft MOA and PA in the Appendices of the Draft EIS. Include the draft final or final MOA or PA in an Appendix to the final EIS.
- Update the public on the status of the EIS and Section 106 reviews on agency Web sites, if available.
- Keep tribes and Native Hawaiian organizations informed by including project information and the proposed schedule at all regular meetings.
- Review comments received through the EIS process to identify any unresolved cultural, historic, and/or tribal issues.
- Where appropriate to resolve adverse effects, describe the mitigation commitments in the decision record.

V. ROAD MAP FOR SUBSTITUTION

A. Choosing Substitution

Substitution under 36 C.F.R. § 800.8(c) permits agencies to use the NEPA review to comply with Section 106 as an alternative to the process set out in 36 C.F.R. §§ 800.3-800.6. The use of a substitution approach allows agencies to use the procedures and documentation required for the preparation of an EA/FONSI or EIS/ROD to comply with the Section 106 procedures. To do so, the agency must notify the ACHP and SHPO/THPO in advance that it intends to do so and meet certain specified standards and documentation requirements as set forth in 36 C.F.R. § 800.8(c)(1). Substitution is appropriate for a proposed action for which an EA or EIS will be prepared, but not for a categorically excluded action. Those projects using a CE must follow the normal Section 106 procedures at 36 C.F.R. §§ 800.3-800.6 or an applicable program alternative.[49]

There are instances where the substitution approach might not work as well as the coordinated approach. For instance, where a project involves multiple, complicated impacts on many different types of resources, but Section 106 issues appear to be minor and straightforward, it may be more efficient to fulfill the requirements of Section 106 in a concurrent but parallel manner to avoid complicating a single review process. In addition, where a high level of public controversy or complex procedural issues have emerged over the potential impacts to historic properties, an agency might recognize the benefit of keeping the review processes separate so that attention can be focused on managing and resolving discrete controversies. The decision to substitute NEPA for Section 106 purposes may also be influenced by factors stemming from an agency's compliance with other environmental laws, such as the ESA and the Clean Water Act. The ACHP, CEQ, and other agency decision makers, as appropriate, can assist with the decision to use substitution. Prior agency experience with similar actions or projects within the same geographic area can also help to guide the decision.

The National Park Service (NPS) proposed a General Management Plan (GMP) that will provide a comprehensive direction for resource preservation and visitor use, direction for management of the Site, and a basic foundation for decision making for Abraham Lincoln Home National Historic Site for the next 15 to 20 years. The selected alternative focuses on providing visitors the opportunity to experience the historic Lincoln neighborhood as Lincoln knew it during his residence in Springfield, Illinois. This goal would be accomplished in part through rehabilitation and restoration of historic buildings and new construction within the National Historic Site. The implementation of all projects and programs stemming from the GMP is contingent upon congressional funding.

The NPS used the NEPA process to fulfill its Section 106 responsibilities in accordance with 36 C.F.R. § 800.8(c). Through Section 106 consultation, the NPS found that the GMP, as a plan without appropriated funding to implement the projects, would not affect historic properties. Consulting parties, however, anticipate the infrastructure projects stemming from the GMP to have the potential to adversely affect historic properties. Accordingly, NPS committed in its Record of Decision to meet the requirements of Section 106 when planning any of the individual projects or programs that might stem from the GMP. (Image: NPS)

To learn more about the General Management Plan and review the combined NEPA/106 documentation, go to:

http://parkplanning.nps.gov/projectHome.cfm?projectID=13436

The Federal Transit Administration (FTA) proposed a grant to the Regional Transportation District (RTD) of Denver, Colorado, for the construction of the Gold Line, an 11.2-mile electric commuter rail transit line. FTA notified the ACHP and the Colorado State Historic Preservation Office (SHPO) of its intent to use the NEPA process for Section 106 purposes in accordance with 36 C.F.R. § 800.8(c). Through Section 106 consultation, the FTA found that the preferred alternative would adversely affect several historic properties. FTA also found it was necessary to phase the identification, evaluation, and assessment of effects to archaeological sites on properties inaccessible prior to the approval of the grant. FTA documented its commitment to phased identification and mitigation measures in a Section 106 Memorandum of Agreement (MOA). The Record of Decision was approved in 2009, and the project is currently under construction. (Image: RTD)

For more information, go to:

http://www.rtd-fastracks.com/gl_3

An agency official may use the process and documentation required for the preparation of an EA/FONSI or an EIS/ROD to comply with Section 106 in lieu of the procedures in §§ 800.3—800.6 if the agency official has notified in advance the SHPO/THPO and the ACHP that it intends to do so and the...standards are met [as provided in 36 C.F.R. §800.8(c)(1)]. 36 C.F.R. § 800.8(c)

Early in the project planning stage, an agency should consider the following questions when determining whether substitution under 36 C.F.R. § 800.8(c) is appropriate:

- Will the Federal agency be actively involved in the development of the NEPA document (as opposed to an applicant, project sponsor, or contractor) and therefore be able to ensure its consultation responsibilities are being met?
- Are the agency delegations of authority and staff and other resources well positioned to support the substitution process?
- Will a single participation process enhance public engagement?
- Will substitution enhance the opportunity to resolve adverse effects because resource conflicts are related, or will it complicate other analyses?

Agencies will generally be able to answer "yes" to the majority of these questions for projects that make good candidates to the substitution approach.

The substitution approach requires advance planning to ensure that the NEPA review will meet the standards set forth in 36 C.F.R. § 800.8(c)(1). The substitution approach can clearly save time and documentation where an agency's undertaking would have adverse effects on multiple historic properties and cultural resources and the agency is preparing an EIS. The agency may document the final resolution of adverse effects in the ROD and if the ROD is used in this way, then the agency is not required to develop a separate Section 106 agreement document to conclude the Section 106 process.[50]

B. Meeting the Substitution Procedural Requirements and Standards

The substitution process requires that during the preparation of an EA or EIS, agencies must meet certain procedural requirements set out in 36 C.F.R. § 800.8(c) (1), (2), (3), and (4) and the four "standards," set out in 36 C.F.R.§ 800.8(c)(i)-(iv). The requirements and standards of the substitution process and advice on how to meet them during a NEPA review are outlined below. Attachment C to this handbook provides a checklist for

practitioners to use in preparing or reviewing a draft EIS or EA used for Section 106 purposes. This checklist should be particularly helpful for those practitioners working through the substitution approach for the first time.

1. Notification (36 C.F.R. § 800.8(c))

An agency must provide advance notice to the ACHP and SHPO/THPO that it intends to use the process and documentation for preparing an EA/FONSI or EIS/ROD to comply with Section 106 in lieu of 36 C.F.R. § 800.3 through § 800.8. Agencies may prepare a comprehensive project schedule and communication plan at this time to assist with internal coordination and timely completion of all substitution requirements. Roles and responsibilities should be clearly specified. This is also a good opportunity to ensure that agency decision making authority and staff and other resources are aligned to support successful execution of the plan.

2. Identifying Consulting Parties (36 C.F.R. § 800.8(c)(1)(i))

Section 106 is predicated on the active involvement of consulting parties. Agencies must keep them informed and engaged. An agency intending to use 36 C.F.R. §800.8(c) must identify consulting parties (standard 36 C.F.R. § 800.8(c)(1)(i)) during NEPA scoping consistent with the comprehensive project schedule and communication plan. Identifying and engaging diverse consulting parties (as defined in 36 C.F.R. § 800.2(c)) at this time is vital to explain the structure and context of the substitution process and to avoid potential confusion about the forthcoming NEPA process and documentation. Stakeholders may be unfamiliar with the substitution process, and agencies should explain the opportunities for enhancing stakeholder participation, as well as the efficiencies for the agency, and be prepared to respond to questions. The agency must ensure all consulting parties are included in any notification and distribution lists for NEPA documents, and that the ACHP is included in the notification and distribution when the agency is preparing a draft EIS and EIS.[51]

3. Identifying Historic Properties (36 C.F.R. § 800.8(c)(1)(ii)) & Involving the Public (36 C.F.R. § 800.8(c)(1)(iv))

As an agency develops its alternatives for an EA or EIS, it must determine its area of potential effects and make a reasonable and good faith effort to identify historic properties in the area of potential effects.[52] This effort must include consultation with consulting parties. Agencies may phase the scope and timing of their identification efforts to synchronize with their consideration of alternatives in the NEPA process, provided consideration of historic properties is commensurate with the assessment of other environmental factors. Where large land areas or large corridors are involved, final identification and evaluation of properties may be deferred through execution of a PA or in the ROD. When an agency defers completion of final identification of historic properties, it should establish the likely presence of historic properties for each alternative through background research, consultation, and the appropriate level of field identification, taking into account the number of alternatives, the magnitude of the undertaking and its likely effects, and the views of the SHPO/THPO and any other consulting party.[53]

The results of the agency's identification and evaluation efforts must be clearly identified in the NEPA documents so that agencies may effectively use draft NEPA documents as a way to share information with the public[54] and consulting parties during public comment periods. If draft documents are not normally made available for public review and comment (such as preliminary draft EISs or draft EAs), agencies will need to consider how they will provide that information to the public and consulting parties. Providing the public the opportunity to review NEPA documents without an opportunity to provide comments will typically not be sufficient to satisfy Section 106 public involvement requirements.

4. Consulting on Effects (36 C.F.R. § 800.8(c)(1)(iii))

The NEPA documentation must clearly state the agency's determination of effect, and this information must be provided to the SHPO/THPO and other consulting parties for their review and comment. To focus and help expedite the consulting party's review, the agency can send a draft or final NEPA document to the consulting parties and inform them where the relevant Section 106 information is located and how the NEPA document does or will address Section 106 findings and determinations. Where the Section 106 process can be concluded with a finding that no historic properties are affected or that there are no adverse effects, the agency must clearly state that finding in the final NEPA document (EA or EIS).

5. Resolving Adverse Effects (36 C.F.R. § 800.8(c)(1)(v))

Where the assessment of effects finds that there are potential adverse effects to historic properties, the agency consults to develop alternatives and proposed measures that might avoid, minimize, or mitigate those adverse effects. Substitution does not relieve an agency of its Section 106 responsibility to resolve adverse effects to historic properties through consultation. Alternatives and proposed measures that are developed through that consultation must be described in the EA, draft EIS (DEIS), or EIS. The description in the NEPA document should not be the first time the consulting parties see the measures proposed for resolving adverse effects.

6. Providing Opportunity for Review and Objection (36 C.F.R. §§ 800.8(c)(2-3))

Agencies must submit the EA, DEIS, or EIS to the SHPO/THPO and other consulting parties for review. A DEIS or final EIS must also go to the ACHP for review.[55] During or prior to the time allowed for public review and comment during the EA or EIS process or the review required by Section 800.8(c)(2)(i) (if these do not coincide), a consulting party may report an objection to the agency that the process has not met the standards of Section 800.8(c)(1) or that the resolution of adverse effects is inadequate.[56] Consequently, the comprehensive project schedule must include sufficient time for the opportunity for review and the possibility of an objection. Agencies planning to publish a Record of Decision 30 days after the publication of the final EIS should note that the opportunity for review and objection must occur prior to publication of the final EIS.

If there is an objection, the agency shall refer the objection to the ACHP for its opinion, which the ACHP has 30 days to provide.[57] If the ACHP does not agree with the objection or does not respond within 30 days, the agency may proceed to conclude its NEPA and Section 106 reviews. When the ACHP agrees with the objection, the agency takes the ACHP opinion into account in reaching a final decision regarding the issue following the process set out at 36 C.F.R. § 800.8(c)(3)(i).

7. Terminating the Substitution Process

If, as the result of an objection under 36 C.F.R. § 800.8(c)(2)(ii) or during consultation to resolve adverse effects, disagreement reaches a point where the substitution process is no longer prudent, then agencies may return to the appropriate step in the standard Section 106 process with notification to consulting parties. This notification must be in writing and state how previous steps met the standard procedural requirements and how the agency intends to meet the remaining Section 106 procedural requirements. If such a situation arises, the agency should consider meeting with all consulting parties to explain the specifics of complying with Section 106 and how it will continue to engage consulting parties. It is also helpful for the agency to develop a comprehensive project schedule to avoid unnecessary delays. The agency can still make use of opportunities to coordinate the remaining steps in the Section 106 process with the remaining NEPA review process, as outlined earlier in this handbook.

8. Concluding the Substitution Process (36 C.F.R. § 800.8(c)(4))

Following review of the EA, DEIS, or EIS and resolution of any objections under 36 C.F.R. § 800.8(c)(3) and before approving the undertaking, the agency must conclude the Section 106 substitution process. If, during preparation of the EA or EIS, an agency found there were no adverse effects to historic properties from the

proposed undertaking, it documents this in the EA or EIS.

When the agency is preparing an EA and there are adverse effects to historic properties, then the agency will have to develop an MOA (or a PA under 36 C.F.R. § 800.14(b)) or consider formal ACHP comments to conclude the Section 106 process before making the decision whether to proceed with the proposed action. A FONSI should make it clear that adverse effects have been resolved and an MOA, PA, or formal ACHP comment process was concluded. Use of a mitigated FONSI does not replace the requirement and procedures in the regulations implementing Section 106 to conclude the process with an MOA, PA, or ACHP comment.

If during preparation of an EIS, an agency finds there would be adverse effects from the proposed undertaking, it must document the resolution of those effects in one of the following ways: (1) incorporating a description of the agency's binding commitment to measures to avoid, minimize, or mitigate such effects in the ROD, if such measures were proposed in the DEIS or EIS and available for the consulting parties' review and opportunity to object; (2) executing an MOA in compliance with 36 C.F.R. § 800.6(c); or (3) receiving ACHP formal comments under 36 C.F.R. § 800.7 and responding to them. When an agency makes a binding commitment to mitigation measures in the ROD, the ROD should be specific regarding who will do what. The ROD should also include such administrative provisions as a process for any continued consultation during implementation, timelines for implementation, procedures for post-review discoveries, a dispute resolution process, and a provision addressing future changes to the undertaking as described in 36 C.F.R. § 800.8(c)(5).

A final point to consider is whether the proposed action is a program or complex action occurring in stages. For example, when a programmatic EA or EIS is being completed and there will be subsequent project specific NEPA documents, a PA may be used to conclude the Section 106 process for the programmatic EA or EIS. A PA will document the agreement of signatories on a process for ongoing or future Section 106 responsibilities. In instances where an agency believes that future flexibility may be needed, a PA can include amendment and dispute resolution procedures.

C. Challenges of the Substitution Process

The timing of the decision to pursue a substitution approach is extremely important. This decision must be made very early in the planning process and before either the Section 106 or NEPA review is substantively underway.[58]

At that early stage, agencies should devise a strategy for involving the SHPO, THPO, and consulting parties and for meeting the requirements of 36 C.F.R. § 800.8(c)(1)-(2). A good working relationship with the relevant SHPO or THPO will help the substitution approach move forward more smoothly. Consider any agency-specific policies or practices that might complicate the process, such as delegation to local governments or applicants to act in the Federal agency's stead. In addition, take into consideration those responsibilities, including government-to-government consultation with Indian tribes that cannot be delegated. Finally, consider whether the SHPO is involved in a state environmental review, in which case the scope of their state role and authority needs to be taken into consideration. This could include a state environmental review with overlapping requirements that have distinct provisions.

VI. EMERGENCY PROCEDURES

The NEPA and Section 106 regulations both include provisions for emergency situations, which would include natural disasters and security threats. Under NEPA, agencies must consult with CEQ to receive alternative arrangements for actions with potentially significant environmental impacts that must be taken in a time frame that does not allow for the normal EIS process.[59] Under Section 106, when an emergency represents an immediate threat to life or property, or is officially declared by the President, a tribal government, or a state governor, an agency may expedite consultation through notification to the ACHP and SHPO/THPO and provide an abbreviated opportunity to comment, instead of following the standard process in 36 C.F.R. §§ 800.3-800.6. This provision only applies to undertakings that will be implemented within 30 days after the emergency declaration.

The National Disaster Recovery Framework[60] provides a structure for disaster recovery efforts that encourages coordination among state and Federal agencies, nongovernmental partners, and other stakeholders. Agencies are encouraged to use the NEPA and Section 106 coordination and substitution advice provided in this handbook to expedite their support to communities for recovery actions.

In addition, agencies are encouraged by the ACHP to collaborate with consulting parties in advance of a disaster to develop procedures that respond to the effects of disasters on historic properties and are responsive to agency programs. Once these procedures are approved by the ACHP, such procedures will govern the agency's compliance with Section 106.[61]

TIP:
Over the years, FEMA has developed template language that it proposes to consulting parties when drafting a Statewide PA. A Statewide PA is an umbrella agreement that sets forth compliance procedures for pre- and post-disaster recovery programs authorized by FEMA. This template language is meant to provide FEMA a consistent approach for their Statewide PAs to help expedite the Section 106 process for their assistance and grant programs. Statewide PAs can help states prepare for emergency situations and improve coordination when emergencies occur. FEMA may include in a Statewide PA provisions that authorize other agencies to operate under its terms. They may also allow FEMA to comply with its own Section 106 responsibilities with regard to an undertaking by adopting the findings of another agency that has already completed its Section 106 review of the same undertaking.

VII. TIMING OF DECISIONS AND CONTINUING COLLABORATION

The goal of the Section 106 process is for agencies to identify historic properties potentially affected by a proposed undertaking, assess the effects of the undertaking, and seek ways to avoid, minimize, or mitigate any adverse effects. The initiation of Section 106 should occur early in project planning and in advance of an agency making binding decisions regarding the location, design, and siting of a project. By statute, the Section 106 requirements must be met prior to an agency approving the expenditure of funds on an undertaking (other than funds for non-destructive planning) or prior to issuance of a license, permit, or approval needed by the undertaking. Further, an agency must complete the NEPA and Section 106 reviews before signing a decision document.

The NEPA review may conclude with a CE, a FONSI, or a ROD. Under CEQ regulations, CEs, EAs, FONSIs, and EISs are not decision documents. Agencies should avoid issuing NEPA documents that present a final agency decision before they have completed their Section 106 process because the Section 106 process may result in a finding that requires the NEPA document to be revised or supplemented.

If the undertaking is modified after approval of the FONSI or the ROD in a manner that changes the undertaking or alters its effects on historic properties, or if the agency official fails to ensure that the measures to avoid, minimize, or mitigate adverse effects (as specified in either the FONSI or the ROD, or in the binding commitment in the MOA) are carried out , then the agency must notify the ACHP and all consulting parties that supplemental NEPA documentation will be completed or that the agency will revert to the standard Section 106 process by completing the procedures in 36 C.F.R. §§ 800.3-800.6, as necessary.[62] The supplemental process must be coordinated with consulting parties and meet the same requirements under 36 C.F.R. § 800.8(c) as the original NEPA documentation in those cases where the agency is continuing the substitution approach and not reverting to the standard Section 106 process.

Although CEQ's regulations allow an agency to adopt another agency's EA or EIS to fulfill its NEPA requirements,[63] such an adoption on its own may not fulfill the adopting agency's Section 106 responsibilities unless specifically written into a Section 106 compliance agreement. Such a stipulation in an MOA or PA should be explicit regarding how another Federal agency may join the process and sign the agreement at a later date should its role in the program or undertaking be defined after the agreement has been executed. In the event that such a stipulation is not included in an MOA or PA, an agency should consult with the appropriate SHPO/THPO, ACHP, and other consulting parties to determine the necessity and extent of any further Section 106 review.

When mitigation is used to resolve adverse effects, agencies should incorporate the monitoring of Section 106 mitigation measures with mitigation monitoring under NEPA, ESA, or other environmental review laws and track them concurrently. In 2011, CEQ issued guidance about the importance of monitoring mitigation measures that agencies commit to making when they finalize their NEPA documents and issue their decision, both for ensuring that the mitigation commitments are implemented and for assessing their efficacy in mitigating the action's impacts to the environment.[64] Consistent with the basic NEPA tenets of public participation, as well as recent executive directives on openness and transparency in government, the guidance encourages agencies to make information about mitigation monitoring available to the public. Similarly, agencies resolving adverse effects to historic properties under 36 C.F.R. § 800.8(c), particularly when formalizing the mitigation through a ROD rather than MOA or PA, should ensure that the monitoring and reporting on the status of agreed-upon mitigation is available to consulting parties and the general public as the action proceeds. An example of how the agency can meet this obligation is to post regular status reports on the implementation of the project's mitigation measures on its Web site.

VIII. LESSONS LEARNED AND BEST PRACTICES

Finally, whether using coordination or substitution, it is important to keep track of any lessons learned to share within the agency or with other agencies to assist in making the process more efficient and manageable in the future. Best management practices should also be shared with CEQ and the ACHP and made available on agency Web sites. If agencies that have mastered the use of substitution share their successes, then other agencies may be more amenable to applying this process to their actions and take the opportunity to garner similar benefits. By sharing information, CEQ and the ACHP can also determine the type of training that will be most helpful to diverse practitioners and stakeholders. Sharing information also enables CEQ and the ACHP to stay abreast of trends that inform our policies and procedures.

IX. CONCLUSION

This handbook is intended to help NEPA and Section 106 practitioners administer or participate in NEPA and Section 106 processes in an effective and efficient manner in the 21st century. Going forward, the NEPA and Section 106 review processes should never be considered in isolation or as sequential environmental reviews that never intersect and operate under different schedules and requirements. The current paradigm for environmental reviews advanced by CEQ and the ACHP envision these reviews occurring simultaneously, continually exchanging information, and allowing determinations and recommendations in one to inform the other. Coordination or substitution not only improves the efficiency of the review procedures, but ultimately allows for the fullest consideration of effects to historic properties. Rather than allowing the lag in initiating Section 106 reviews to result in delays in NEPA review, the Section 106 process should be integrated with the NEPA review process–either through coordination or substitution.

The ultimate goal for both NEPA environmental reviews and Section 106 is to ensure the Federal Government considers the effects of its actions upon the environment, acts in the public interest, works efficiently, and makes decisions in an open, efficient, and transparent manner. Integrating the NEPA and Section 106 review processes fulfills the goals set forth in NEPA and the CEQ regulations, and by the ACHP in its Section 106 regulations. These significant environmental reviews have been in existence for almost five decades and are still relevant. By applying this handbook to future reviews, environmental and historic review processes will be synchronized to improve the overall decision making for proposed projects.

X. ENDNOTES

1. 40 C.F.R. § 1501.2.
2. "Modernizing NEPA Implementation," Section 7.2.1, *available at* http://ceq.hss.doe.gov/ntf/report/index.html.
3. 40 C.F.R. § 1501.2.
4. Memorandum for Heads of Federal Departments and Agencies, Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act, March 6, 2012, *available at* http://ceq.hss.doe.gov/current_developments/docs/Improving_NEPA_Efficiencies_06Mar2012.pdf.
5. 36 C.F.R. § 800.16(y).
6. See 40 C.F.R. § 1508.27 (defining significantly).
7. 36 C.F.R. § 800.6.
8. 36 C.F.R. § 800.7(c).
9. 16 USC § 470w(5).
10. See 36 C.F.R. § 60.4 (listing the eligibility criteria for the National Register).
11. 36 C.F.R. § 800.16(l)(1).
12. See 40 C.F.R. § 1502.14 (requiring an agency to rigorously explore and objectively evaluate all reasonable alternatives, and to devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits); CEQ NEPA's Forty Most Asked Questions, Question 5.b., *available at* http://ceq.hss.doe.gov/nepa/regs/40/40p3.htm.
13. 36 C.F.R. § 800.16(d).
14. 40 C.F.R. § 1506.6
15. 36 C.F.R. § 800.2(d)(2)
16. 36 C.F.R. § 800.2(d)(1)
17. 36 C.F.R. § 800.2(a)(4)
18. 36 C.F.R. § 800.2(a)(4)
19. 36 C.F.R. § 800.1(a).
20. 36 C.F.R. § 800.16(f)
21. 40 C.F.R. §§ 1501.6,1508.5; Memorandum for the Heads of Federal Agencies, Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act, January 30, 2002, *available at* http://ceq.hss.doe.gov/nepa/regs/cooperating/cooperatingagenciesmemorandum.html; Memorandum for the Heads of Federal Agencies, Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act, July 28, 1999, *available at* http://ceq.hss.doe.gov/nepa/regs/ceqcoop.pdf.
22. 16 U.S.C. 470a(d). See also Consultation with Native Hawaiian Organizations in the Section 106 Review Process: A Handbook, June 2011, *available at* http://www.achp.gov/Native%20Hawaiian%20Consultation%20Handbook.pdf; Consultation with Indians Tribes in the Section 106 Review Process: A Handbook, June 2012, *available at* http://www.achp.gov/pdfs/consultation-with-indian-tribes-handbook-june-2012.pdf. See also U.S Department of Housing and Urban Development, Tribal Directory Assessment Tool (TDAT) v2.0, *available at* http://egis.hud.gov/tdat/Tribal.aspx.
23. 40 C.F.R. § 1502.15.
24. 16 U.S.C. 470w-3.
25. 40 C.F.R. § 1505.2
26. 16 U.S.C. 470h-2(l).
27. 36 C.F.R. § 800.7.
28. 36 C.F.R. § 800.7 (c)(4)
29. 16 U.S.C. 470f.
30. 36 C.F.R. § 800.1(c)
31. 36 C.F.R. § 800.2(c)(4).
32. 40 C.F.R. § 1508.4.
33. 36 C.F.R. § 800.8(b).

34. 40 C.F.R. § 1508.27(b)(8).
35. 40 C.F.R. § 1508.9.
36. 36 C.F.R. § 800.3(c), (f); 40 C.F.R. § 1501.7.
37. 36 C.F.R. § 800.5(a)(1).
38. See 40 C.F.R. § 1508.27 (defining significantly).
39. See 36 C.F.R. § 800.11(a) (providing for adequacy of Section 106 documentation).
40. 40 C.F.R. § 1508.20.
41. Memorandum for the Heads of Federal Agencies, Appropriate Use of Mitigation and Monitoring and Appropriate Use of Mitigated Findings of No Significant Impact, January 14, 2011, *available at* http://ceq.hss.doe.gov/current_developments/docs/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf.
42. See 36 C.F.R. § 800.6(b) (instructing the Federal agency official to consult with the SHPO/THPO and other consulting parties to seek ways to avoid, minimize, or mitigate the adverse effects to historic properties).
43. 36 C.F.R. § 800.8(a)(1).
44. 16 U.S.C. 470h-2(i); 36 C.F.R. § 800.8(a)(1).
45. 40 C.F.R. § 1505.2.
46. 40 C.F.R. § 1501.7; See 40 C.F.R. § 1506.6.
47. 40 C.F.R. § 1502.14.
48. 40 C.F.R. § 1502.15.
49. 36 C.F.R. § 800.8(b).
50. 36 C.F.R. § 800.8(c)(4)(i)(A).
51. 36 C.F.R. § 800.8(c)(2)(i).
52. 36 C.F.R. 800.8(c)(1)(ii).
53. 36 C.F.R. § 800.4(b)(2)
54. 36 C.F.R. 800.8(c)(1)(iv).
55. 36 C.F.R. § 800.8(c)(2)(i).
56. 36 C.F.R. § 800.8(c)(2)(ii).
57. 36 C.F.R. § 800.8(c)(2)(ii), (c)(3).
58. See 36 C.F.R. § 800.8(c) ("an agency official may use the [substitution process] … if the agency official has notified in advance the SHPO/THPO and the Council that it intends to do so …").
59. 40 C.F.R. § 1506.11.
60. National Response Framework, January 2008, *available at* http://www.fema.gov/pdf/emergency/nrf/nrf-core.pdf.
61. 36 C.F.R. § 800.12.
62. 36 C.F.R. § 800.8(c)(5).
63. 40 C.F.R. § 1506.3; Memorandum for Heads of Federal Departments and Agencies, Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act, March 6, 2012, *available at* http://ceq.hss.doe.gov/current_developments/docs/Improving_NEPA_Efficiencies_06Mar2012.pdf.
64. Memorandum for Heads of Federal Departments and Agencies, Appropriate Use of Mitigation and Monitoring and Appropriate Use of Mitigated Findings of No Significant Impact, January 14, 2011, *available at* http://ceq.hss.doe.gov/current_developments/docs/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf.

ATTACHMENT A
DEFINITIONS AND TRANSLATIONS

The Advisory Council on Historic Preservation (ACHP) advises Federal agencies to coordinate compliance with Section 106 of the National Historic Preservation Act (NHPA) and the procedures in the regulations implementing Section 106, "Protection of Historic Properties" (36 C.F.R. Part 800), with steps taken to meet the requirements of the National Environmental Policy Act (NEPA). The ACHP recommends that participants in the Section 106 process and NEPA practitioners familiarize themselves with the vocabulary of the two processes in order to better understand the relationship between the requirements and to realize opportunities to avoid unnecessary duplication of effort. The following is a selection of defined terms with highlighted comparisons and contrasts regarding their use in the NEPA and NHPA contexts.

TERM/PHRASE	NEPA	NHPA
Cultural Resources (NEPA)/ Historic Properties (Section 106)	Effects considered under NEPA include cultural and historic. [40 C.F.R. § 1508.8]	Any prehistoric or historic district, site, building structure, or object included in or eligible for inclusion in the National Register of Historic Places. [36 C.F.R. § 800.16.(l)(1)] Properties of religious and cultural significance to Indian tribes and Native Hawaiian organizations may be determined to be eligible for inclusion in the National Register. [16 U.S.C. 470a(d)(6)(A)]
Federal Action (NEPA)/ Undertaking (Section 106)	Federal actions includes activities entirely or partially financed, assisted, conducted, regulated, or approved by Federal agencies. Federal actions include adopting policies such as, rules or regulations; adopting plans; adopting programs; or approving projects; ongoing activities; issuing permits; or financing projects completed by another entity. [40 C.F.R. § 1508.18]	A project, activities, 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 financial assistance; and those requiring a Federal permit, license, or approval. [36 C.F.R. § 800.16(y)]
Affected Environment (NEPA)/ Area of Potential Effects (Section 106)	The environment of the area(s) to be affected or created by the alternatives under consideration. [40 C.F.R. § 1502.15]	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 C.F.R. § 800.16(d)]
Significance (NEPA)/ Significant (Section 106)	Used to describe the level of impact a proposed action may have. Context and intensity have to be evaluated when assessing significance. Context is described below; intensity refers to the severity of the impact, in whatever context(s) it occurs.	Use to describe the historic resource that has certain character defining features that make it historically significant and therefore eligible for listing in the National Register with the requisite integrity. See National Register of Historic Places eligibility criteria. [40 C.F.R. § 60.4]
Significant Impact (NEPA)/ Adverse effect (Section 106)	See Significance (NEPA) above.	Alteration to the characteristics of a historic property that qualify it for inclusion in the National Register of Historic Places in a manner that would diminish its integrity. [36 C.F.R. § 800.5(a)(1)]

TERM/PHRASE	NEPA	NHPA
Public Involvement (NEPA)/ Consultation (Section 106)	Agencies shall provide notice of NEPA-related public hearings or meetings and the availability of environmental documents. They shall solicit information and comments from the public, and make EISs and their supporting documentation available subject to the Freedom of Information Act. [40 C.F.R. § 1506.6]	The process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them. [36 C.F.R. § 800.16(f)] Agencies are required to consult with certain parties (see below) and give the public an opportunity to comment.
Stakeholders (NEPA)/ Consulting Parties (Section 106)	The term "stakeholder" is used throughout this handbook to refer to potentially impacted entities, including members of the public, who participate in some part of the NEPA process.	Parties that have consultative roles in the Section 106 process, including SHPOs; THPOs; Indian tribes; Native Hawaiian organizations; representatives of local governments; applicants for Federal assistance, permits, licenses, and other approvals; the ACHP; and other individuals and organizations with a demonstrated interest in the undertaking or the affected historic properties. [36 C.F.R. § 800.2(c)]
Cooperating Agency (NEPA)/ Consulting Party (Section 106)	Any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposed (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. A state or local agency of similar qualifications or, when the effects are on a reservation, an Indian tribe, may by agreement with the lead agency become a cooperating agency. [40 C.F.R. § 1508.5]	See Consulting Party (Section 106) above.
Context	"Context" is the geographic biophysical, and social context in which the effects will occur. The CEQ regulations [40 C.F.R. § 1508.27] mention society as a whole, the region, and affected interests as examples of context. Considering contexts does not mean giving greater attention to, for example, effects on society as a whole than to effects on a local area. The importance of a small-scale impact must be considered in the context of the local area and not dismissed because it lacks impacts on larger areas.	"Historic context" or "context" is background information gathered to evaluate the historic significance of a historic property.
Mitigation	Mitigation includes avoiding the impact altogether by not taking a certain action or parts of an action; minimizing impacts by limiting the degree or magnitude of the action and its implementation; rectifying the impact by repairing, rehabilitating, or restoring the affected environment; reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and compensating for the impact by replacing or providing substitute resources or environments. [40 C.F.R. § 1508.20]	A measure to resolve specific adverse effects to identified historic property or properties by offsetting such effects. A nexus is required between the mitigation measure(s) and the adverse effects to historic properties.

TERM/PHRASE	NEPA	NHPA
Type of Effects/ Impacts	Effects and impacts are synonymous terms under NEPA. The magnitude, duration, and timing of the effect to different aspects of the human environment are evaluated in the impact section of an EA or an EIS for their significance. Effects can be beneficial or adverse, and direct, indirect, or cumulative. [40 C.F.R. § 1508.8]	An "effect" means alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register of Historic Places. [36 C.F.R. § 800.16(i)] Adverse effects are described above and may include direct, indirect, or cumulative effects.
Cumulative Effects	The impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertaking such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. [40 C.F.R. § 1508.7] An individual action may not have much effect, but it may be part of a pattern of actions whose combined effects on a resource are significant.	Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance, or be cumulative. [36 C.F.R. § 800.5(a)(1)] While the Section 106 regulations do not define "cumulative effects," the CEQ regulation definition of "cumulative impact" is analogous and instructive.
Indirect Effects	Reasonably foreseeable impacts that occur later in time or are further removed in distance from the proposed action. [40 C.F.R. § 1508.8] These are often referred to as "downstream" impacts, or future impacts.	Indirect effects may change the character of the property's use or physical features within the property's setting that contribute to its historic significance; are often audible, atmospheric, and visual effects; and may relate to viewshed issues.
Direct Effects	An impact that occurs as a result of the proposal or alternative in the same place and at the same time as the action. Direct effects include actual changes to cultural or historic resources. [40 C.F.R. § 1508.8]	A direct effect to a historic property would include demolition of a historic building, major disturbance of an archaeological site, or any other actions that occur to the property itself.

ATTACHMENT B
TEXT OF 36 C.F.R. § 800.8(c)

Use of the NEPA process for Section 106 purposes. An agency official may use the process and documentation required for the preparation of an EA/FONSI or an EIS/ROD to comply with section 106 in lieu of the procedures set forth in §§ 800.3 through 800.6 if the agency official has notified in advance the SHPO/THPO and the Council that it intends to do so and the following standards are met.

(1) *Standards for developing environmental documents to comply with Section 106*. During preparation of the EA or draft EIS (DEIS) the agency official shall:

(i) Identify consulting parties either pursuant to § 800.3(f) or through the NEPA scoping process with results consistent with § 800.3(f);

(ii) Identify historic properties and assess the effects of the undertaking on such properties in a manner consistent with the standards and criteria of §§ 800.4 through 800.5, provided that the scope and timing of these steps may be phased to reflect the agency official's consideration of project alternatives in the NEPA process and the effort is commensurate with the assessment of other environmental factors;

(iii) Consult regarding the effects of the undertaking on historic properties with the SHPO/THPO, Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, other consulting parties, and the Council, where appropriate, during NEPA scoping, environmental analysis, and the preparation of NEPA documents;

(iv) Involve the public in accordance with the agency's published NEPA procedures; and

(v) Develop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA or DEIS.

(2) *Review of environmental documents*.

(i) The agency official shall submit the EA, DEIS or EIS to the SHPO/THPO, Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, and other consulting parties prior to or when making the document available for public comment. If the document being prepared is a DEIS or EIS, the agency official shall also submit it to the Council.

(ii) Prior to or within the time allowed for public comment on the document, a SHPO/THPO, an Indian tribe or Native Hawaiian organization, another consulting party or the Council may object to the agency official that preparation of the EA, DEIS or EIS has not met the standards set forth in paragraph (c)(1) of this section or that the substantive resolution of the effects on historic properties proposed in an EA, DEIS or EIS is inadequate. If the agency official receives such an objection, the agency official shall refer the matter to the Council.

(3) *Resolution of objections*. Within 30 days of the agency official's referral of an objection under paragraph (c)(2)(ii) of this section, the Council shall review the objection and notify the agency as to its opinion on the objection.

(i) If the Council agrees with the objection:

(A) The Council shall provide the agency official and, if the Council determines the issue warrants it, the head of the agency with the Council's opinion regarding the objection. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The person to whom the Council addresses its opinion (the agency official or the

head of the agency) shall take into account the Council's opinion in reaching a final decision on the issue of the objection.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council. The head of the agency may delegate his or her duties under this paragraph to the agency's senior Policy Official. If the agency official's initial decision regarding the matter that is the subject of the objection will be revised, the agency official shall proceed in accordance with the revised decision. If the final decision of the agency is to affirm the initial agency decision, once the summary of the final decision has been sent to the Council, the agency official shall continue its compliance with this section.

(ii) If the Council disagrees with the objection, the Council shall so notify the agency official, in which case the agency official shall continue its compliance with this section.

(iii) If the Council fails to respond to the objection within the 30 day period, the agency official shall continue its compliance with this section.

(4) *Approval of the undertaking.* If the agency official has found, during the preparation of an EA or EIS that the effects of an undertaking on historic properties are adverse, the agency official shall develop measures in the EA, DEIS, or EIS to avoid, minimize, or mitigate such effects in accordance with paragraph (c)(1)(v) of this section. The agency official's responsibilities under Section 106 and the procedures in this subpart shall then be satisfied when either:

(i) a binding commitment to such proposed measures is incorporated in

(A) the ROD, if such measures were proposed in a DEIS or EIS; or

(B) an MOA drafted in compliance with § 800.6(c); or

(ii) the Council has commented under § 800.7 and received the agency's response to such comments.

(5) *Modification of the undertaking.* If the undertaking is modified after approval of the FONSI or the ROD in a manner that changes the undertaking or alters its effects on historic properties, or if the agency official fails to ensure that the measures to avoid, minimize or mitigate adverse effects (as specified in either the FONSI or the ROD, or in the binding commitment adopted pursuant to paragraph (c)(4) of this section) are carried out, the agency official shall notify the Council and all consulting parties that supplemental environmental documents will be prepared in compliance with NEPA or that the procedures in §§ 800.3 through 800.6 will be followed as necessary.

ATTACHMENT C
CHECKLIST FOR SUBSTITUTION

This checklist was developed by the Advisory Council on Historic Preservation (ACHP) as a guide for those preparing or reviewing a NEPA document – Environmental Impact Statement (EIS) or Environmental Assessment (EA) – used for Section 106 purposes in accordance with Section 800.8(c) of the Section 106 implementing regulations, "Protection of Historic Properties" (36 C.F.R. Part 800). The checklist is based on the standards for developing environmental documents to comply with Section 106 at 36 C.F.R. § 800.8(c)(1). Ideally, the preparer or reviewer will be able to answer "yes" to all items.

NOTIFICATION	YES	NO	COMMENTS
Did the agency notify *in advance* the SHPO/THPO and the ACHP of its intent to use the NEPA process for Section 106 purposes?			
Is the notification correspondence included in the EA/DEIS or appendices?			
IDENTIFICATION OF CONSULTING PARTIES	**YES**	**NO**	**COMMENTS**
Is the effort to identify consulting parties described in the EA/DEIS?			
Is a list of the consulting parties provided in the EA/DEIS?			
Are all consulting parties included? (Indian tribes, Native Hawaiian organizations, local governments, applicants, and/or other consulting parties)			
Has the agency reviewed and responded to all requests to be consulting parties? Has the agency documented the exchange in its administrative record?			
IDENTIFICATION OF HISTORIC PROPERTIES	**YES**	**NO**	**COMMENTS**
Is the effort to identify historic properties of all types (buildings, structures, objects, districts, and sites) described, including the Area of Potential Effects and the methodology for investigation? If no, has the agency disclosed its intent to phase the identification and assessments?			
Is the effort to identify historic properties commensurate with the assessment of other environmental factors?			
Are determinations of eligibility for the National Register of Historic Places (NRHP) clearly stated?			
Can a layman understand the characteristics of each historic property and why it is significant (eligible for the NRHP) and retains integrity?			

ASSESSMENT OF EFFECTS	YES	NO	COMMENTS
Has one of the following Section 106 effect findings for the undertaking been clearly stated? ▸ No historic properties affected ▸ No historic properties adversely affected ▸ Historic properties adversely affected			
If adverse effects may result, is the application of the criteria of adverse effect described?			
Was all of the above information presented during scoping meetings and/or other public and stakeholder outreach?			
CONSULTATION AND PUBLIC INVOLVEMENT	**YES**	**NO**	**COMMENTS**
Is the SHPO/THPO concurrence with eligibility determinations documented? Is the documentation included in the document and appendices?			
Is the SHPO/THPO concurrence with the Section 106 effect finding documented? Is the correspondence included?			
Has an adequate opportunity for consulting with the SHPO/THPO, Indian tribes, Native Hawaiian organizations, local governments, applicants, and/or other consulting parties been provided prior to the release of the DEIS/EA? Is all relevant documentation (subject to confidentiality) included?			
Do any of the consulting parties substantively disagree with the agency's determinations of eligibility or findings of effect? If so; is the process for seeking agreement on those issues disclosed?			
If a National Historic Landmark (NHL) may be affected by the undertaking, has the agency notified the National Park Service (pursuant to 36 C.F.R. § 800.10(c)) and invited its participation where there may be an adverse effect? Is all relevant correspondence included?			
Does the document cover sheet or distribution letter clearly indicate that the DEIS/EA also documents the Section 106 process?			
Have historic preservation concerns expressed by members of the public been addressed? If appropriate, have such commenters been invited to be consulting parties in the Section 106 review?			
Have the scoping notices and other public meeting notices included information about Section 106?			

DEVELOPMENT OF ALTERNATIVES OR MEASURES TO AVOID, MINIMIZE, OR MITIGATE ADVERSE EFFECTS	YES	NO	COMMENTS
Is the development and evaluation of alternatives or modifications that could avoid or minimize adverse effects to historic properties documented?			
Where appropriate have mitigation measures been proposed?			
Is the consultation with SHPO/THPO, Indian tribes, Native Hawaiian organizations, local governments, applicants, and/or other consulting parties about avoidance, minimization, or mitigation measures documented? Is all relevant documentation (subject to confidentiality) included in the EA/DEIS or appendices?			
STEPS TO CONCLUSION	**YES**	**NO**	**COMMENTS**
Is there a potential for the preferred alternative to adversely affect at least one historic property? If no, Section 106 is complete if no objections are raised by the SHPO/THPO, Indian tribes, Native Hawaiian organizations, local governments, applicants, other consulting parties, or the ACHP. Is the final Section 106 finding documented?			
If the preferred alternative could adversely affect historic properties, is one of the following strategies for completing the Section 106 process identified? ▸ Execution of a Memorandum of Agreement or a Programmatic Agreement ▸ Incorporation of the binding commitment to mitigation measures in the Record of Decision ▸ Termination, formal ACHP comments pursuant to 36 C.F.R. § 800.7, and response by head of the agency			

If incorporating binding commitment to mitigation measures in the ROD, does the ROD include the following:
▸ Commitments clearly identifying who will do what by when
▸ Administrative provisions including:
  ▸ Process for continued consultation during implementation (for example, regarding design review, data recovery, development of mitigation products)
  ▸ Deadlines/timelines for implementation
  ▸ Post-review discoveries
  ▸ Dispute resolution process
  ▸ Contingency for changes to the undertaking referencing 36 C.F.R. § 800.8(c)(5)			

IMPLEMENTATION	**YES**	**NO**	**COMMENTS**
Is the agency prepared to carry out the commitments made in: ▸ Memorandum of Agreement or a Programmatic Agreement, ▸ Record of Decision, or ▸ Response by head of the agency to formal ACHP comments following termination?			

ATTACHMENT D
LINKS TO MORE INFORMATION

National Historic Preservation Act:

http://www.achp.gov/docs/nhpa%202008-final.pdf

National Environmental Policy Act:

http://ceq.hss.doe.gov/laws_and_executive_orders/the_nepa_statute.html

Protection of Historic Properties, 36 C.F.R. Part 800:

http://www.achp.gov/regs-rev04.pdf

Regulations for Implementing NEPA, 40 C.F.R. Parts 1500-1508:

http://ceq.hss.doe.gov/ceq_regulations/regulations.html

ACHP's Guidance on Section 106:

http://www.achp.gov/work106.html

ACHP's Guidance on Section 106 Program Alternatives:

http://www.achp.gov/progalt/

Section 106 Archaeology Guidance:

http://www.achp.gov/docs/ACHP%20ARCHAEOLOGY%20GUIDANCE.pdf

ACHP's Office of Native American Affairs:

http://www.achp.gov/nap.html

Collaboration in NEPA: A Handbook for Practitioners:

http://ceq.hss.doe.gov/nepa/nepapubs/Collaboration_in_NEPA_Oct2007.pdf.

Modernizing NEPA Implementation:

http://ceq.hss.doe.gov/publications/modernizing_nepa_implementation.html

CEQ Guidance on the "Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact:"

http://ceq.hss.doe.gov/current_developments/docs/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf

CEQ Guidance on Categorical Exclusions:

http://ceq.hss.doe.gov/ceq_regulations/NEPA_CE_Guidance_Nov232010.pdf.

FOR MORE INFORMATION ON THE CEQ, PLEASE VISIT:

ceq.hss.doe.gov

The Council on Environmental Quality coordinates Federal environmental efforts and works closely with agencies and other White House offices in the development of environmental policies and initiatives.

CEQ was established within the Executive Office of the President by Congress as part of the National Environmental Policy Act of 1969, and additional responsibilities were provided by the Environmental Quality Improvement Act of 1970.

Executive Office of the President
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FOR MORE INFORMATION ON THE ACHP, PLEASE VISIT:

www.achp.gov

The Advisory Council on Historic Preservation, an independent Federal agency, promotes the preservation, enhancement, and sustainable use of our nation's diverse historic resources, and advises the President and the Congress on national historic preservation policy.

ADVISORY COUNCIL ON HISTORIC PRESERVATION
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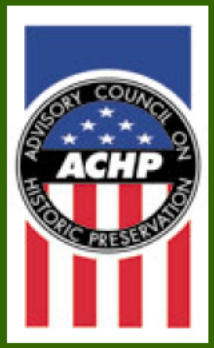
EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES
COUNCIL ON ENVIRONMENTAL QUALITY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