

Section 106 Handbook:

How to Assess the Effects of FAA Actions on Historic Properties under Section 106 of the National Historic Preservation Act



Federal Aviation Administration

June 2015

Cover photographs:

Top left: Huffman Prairie Flying Field was designated a National Historic Landmark (NHL) for its role in the development and testing of the world's first practical airplane, the *Wright Flyer III*, and is part of the Dayton Aviation Heritage National Historic Park. *(Photo from National Historic Landmarks collection)*

Top right: College Park Airport, listed in the National Register of Historic Places, is the world's oldest continually operating airport (est. 1908). *(Photo courtesy of College Park Aviation Museum)*

Bottom left: This DC-3 N34, shown over Oklahoma City in 1987, was built at the Douglas Aircraft plant at Tinker Air Force Base in Oklahoma City and was delivered to the Navy as an R4D-7 in May, 1945. The FAA's predecessor, the Civil Aeronautics Administration (CAA), acquired this 1945 Douglas DC-3 Airplane in 1957 for use in its flight inspection program to check the accuracy of navigational aids. The aircraft, known by its registration number N34, was listed as a structure in the National Register of Historic Places. *(Photo courtesy of Oklahoma Historical Society)*

Bottom right: Dulles International Airport Terminal, built in 1962, was determined eligible for the National Register in 1978 based on its exceptional significance as the first airport in the United States to be designed specifically for jet planes and as the greatest achievement of architect Eero Saarinen. *(Photo by Joe Ravi, CC-BY-SA 3.0)*

For more information on historic properties associated with aviation, see the National Register of Historic Places Travel Itinerary, *Aviation: From Sand Dunes to Sonic Booms*, available at <http://www.nps.gov/nr/travel/aviation/> and the National Register Bulletin *Guidelines for Evaluating and Documenting Historic Aviation Properties*, available at <http://www.nps.gov/nr/publications/bulletins/aviation/>.

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Introduction

A. How to Use this Handbook

This Handbook is intended to help FAA staff and contractors meet the requirement of Section 106 of the National Historic Preservation Act (NHPA) that federal agencies give consideration to the effects of their actions on historic properties in the most meaningful and efficient way possible. The Handbook is designed to serve as an introduction to Section 106 as well as a reference on particular issues encountered during the Section 106 process. ***The Handbook is not a substitute for legal advice and should not be cited as the source of legal requirements.*** Requirements established by statute and regulations are described in the main text with references to the relevant legal authorities in end notes. Practical tips and commentary are offered in margin notes.

The FAA most often conducts Section 106 review concurrently with the National Environmental Policy Act (NEPA) process. Consequently, the Handbook should be used in conjunction with FAA Order 1050.1, which serves as the FAA's policy and procedures for compliance with NEPA, and the 1050.1 Desk Reference, as well as the Office of Airports' Order 5050.4 and accompanying Desk Reference or other guidance specific to individual lines of business and agency programs. Coordinating Section 106 with NEPA is addressed in Part I.D. below, and throughout Part II of the Handbook in green text boxes. Section 106 review also can assist in compliance with Section 4(f) of the Department of Transportation Act as it relates to historic sites. Findings made under Section 106 and the accompanying documentation can support DOT Section 4(f) determinations regarding the use of a historic property for an FAA program or project. Coordination between Section 106 and Section 4(f) is discussed in Chapters 5 and 8 of the 1050.1F Desk Reference.

The information in the Handbook is tailored to the FAA and the types of actions that are most likely to be the subject of the FAA's Section 106 review. The Handbook may be supplemented with guidance from the Advisory Council on Historic Preservation (ACHP) as well as more particularized guidelines developed by FAA lines of business for their projects and actions.

The Handbook was revised in June 2015 to reflect recodification of the National Historic Preservation Act in Title 54 of the U.S. Code. It is subject to further revision based on changes in laws and programs, policy developments and lessons learned in carrying out Section 106 review. Suggestions for improvements, additions and corrections can be submitted to the FAA's Federal Preservation Officer in the Office of Environment and Energy's Environmental Policy and Operations Division (AEE-400) and are welcome at any time.

B. The National Historic Preservation Act

The National Historic Preservation Act (NHPA)¹ grew out of public reaction to controversial federal projects in the 1950s and early 1960s in which historic buildings and even entire neighborhoods were demolished to make way for urban renewal or new highways. The 1966 law created the Advisory Council on Historic Preservation (ACHP), an independent federal agency that promotes the preservation, enhancement and sustainable use of historic resources.² The NHPA also authorized establishment of state programs led by a State Historic Preservation Office (SHPO) and expanded the National Register of Historic Places to embrace a more diverse concept of what is “historic.”³

“[H]istoric properties significant to the Nation’s heritage are being lost or substantially altered, often inadvertently, with increasing frequency . . .”

National Historic Preservation Act of 1966

Section 106 of the NHPA instructs federal agencies to consider the effect of any proposed federal “undertaking” (i.e., an activity, program or project), on historic properties.⁴ This provision has specific implementing regulations, found at 36 CFR Part 800, which detail how to carry out the review process. Section 106 review is designed to make federal agencies aware of how their actions might affect historic properties by integrating preservation into project planning in much the same way that the National Environmental Policy Act (NEPA), enacted in 1969, requires federal agencies to consider impacts to the environment.

In 1992, Congress amended the NHPA to give Indian tribes and Native Hawaiian organizations an express role in the preservation of properties of historic or cultural significance to them.⁵ The Section 106 regulations were amended to reflect those changes,⁶ and a program developed to assist Indian tribes in preserving their historic properties and cultural traditions through the designation of Tribal Historic Preservation Offices (THPO).⁷

The NHPA calls on the head of each federal agency to assume responsibility for the preservation of historic properties under the agency’s jurisdiction or control and to have procedures for complying with Section 106.⁸ To carry out this mandate, each federal agency must designate a preservation officer and establish a preservation program for the identification and protection of historic properties. The FAA has assigned this function to the Office of Environment and Energy’s Environmental Policy and Operations Division (AEE-400).

C. An Overview of Section 106

Section 106 does not dictate a particular outcome: The FAA’s legal obligation is to ensure that full consideration is given to the effect of the undertaking on historic properties by consulting with other parties in good faith and completing the Section 106 process before making a final decision.⁹ To ensure that occurs, the Section 106 regulations outline detailed procedural requirements; however, there is flexibility in how these requirements are met. The FAA is given authority under Section 106 to determine a reasonable level of effort for review and make most of the key decisions.¹⁰

Section 106 applies to agency “undertakings” – projects, programs or other activities carried out by or on behalf of the agency; carried out with federal financial assistance; or requiring a federal permit, license or approval. An undertaking is only subject to Section 106 review if it is the type of activity that could affect buildings, structures, objects, or sites (including landscapes and archeological sites) whether or not they have been identified as historic.

The Section 106 process is usually described in four steps, as detailed in the next section of this Handbook. Figure 1 shows this sequence and the possible outcomes at each step.

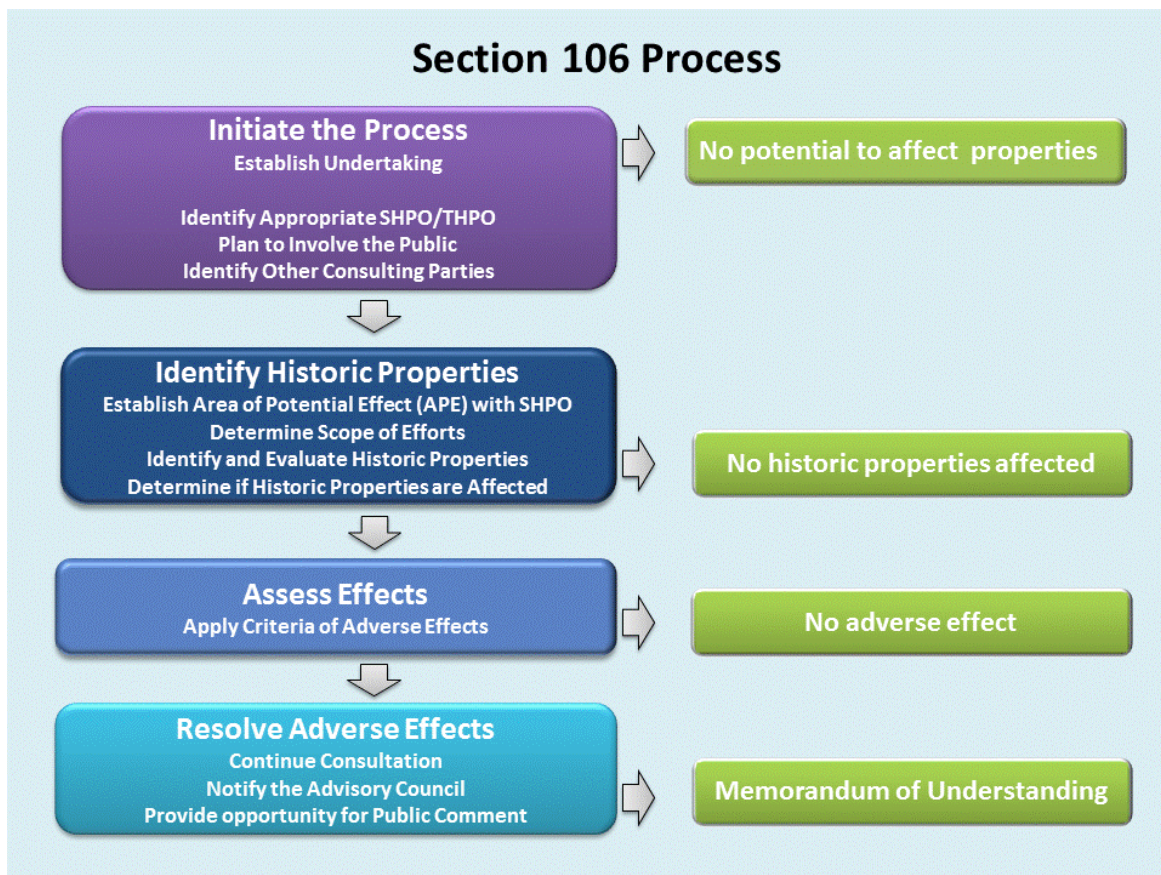


Figure 1: Section 106 Process

D. Integrating Section 106 and NEPA

Section 106 usually is triggered by the same actions that trigger NEPA. Although it often is integrated into the NEPA process, Section 106 imposes an independent legal requirement on the FAA. The two statutes and their regulations also use different terminology:

Section 106	NEPA
<ul style="list-style-type: none">• Undertaking• Area of Potential Effect• Historic Property• Adverse Effect	<ul style="list-style-type: none">• Federal Action• Affected Environment• Cultural Resources• Significant Impacts

Figure 2: Section 106 and NEPA Terminology

The Section 106 regulations encourage agencies to coordinate NEPA and Section 106 compliance.¹¹ (The Section 106 regulations also allow an agency to substitute the NEPA process for Section 106 review;¹² however notice must be provided to the ACHP and the SHPO/THPO in advance.) NEPA regulations likewise encourage integration with other planning and environmental reviews,¹³ such as Section 106. In 2013, the Council on Environmental Quality (CEQ) and the ACHP issued joint guidance on integrating NEPA and Section 106.¹⁴ Coordinating efforts under NEPA and Section 106 can make both reviews more efficient. This Handbook identifies ways to integrate the two reviews at specific points in the Section 106 process to reduce duplication, leverage resources and streamline both processes. Chapter 8 of the 1050.1 Desk Reference also discusses the relationship between the Section 106 process and the FAA’s NEPA procedures.

The Section 106 process is an effective way to gather the information needed to assess impacts on historic properties for NEPA review. FAA NEPA documents typically report applicable Section 106 consultation and findings and apply those findings to the NEPA significance determination. Early coordination is essential: the Section 106 regulations emphasize the importance of considering historic properties as early as possible in the NEPA planning process, and urge agencies to plan their public participation, analysis and review so that they can meet the purposes and requirements of both statutes in a timely and efficient way.¹⁵

Note: Section 106 should be satisfied prior to making a Categorical Exclusion determination, signing a Finding of No Significant Impact (FONSI), or issuing a Record of Decision (ROD).

Section 106 may require procedures beyond what is necessary for NEPA compliance. For example, actions that are categorically excluded under NEPA may still be subject to Section 106 review,¹⁶ as discussed below. The two processes do not always align perfectly, and the points at which they intersect depend on the level of NEPA review. For an environmental impact statement (EIS), initiating Section 106 review at the Notice of Intent stage allows the processes to run in parallel and results in the most efficient coordination. Figure 3, which also appears as Exhibit 8-2 of the 1050.1 Desk Reference, illustrates how the Section 106 consultation process can be coordinated with the NEPA process for an EIS.

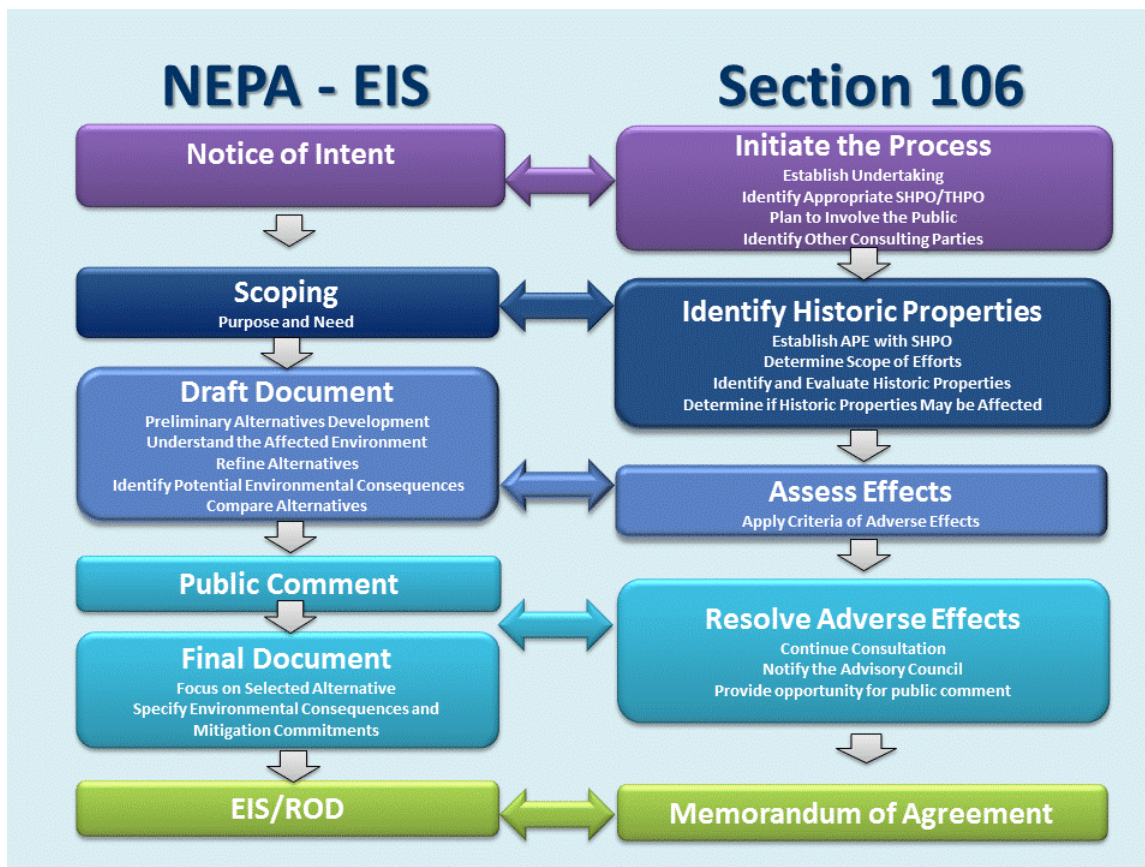


Figure 3: NEPA EIS process and Section 106

Similarly, beginning the Section 106 process at the earliest stage of an environmental assessment (EA) allows full consideration of historic resources under both processes.

The Section 106 process can help to determine whether an action qualifies for a categorical exclusion (CATEX) under NEPA. As discussed in Part II of this Handbook, not all FAA actions are undertakings requiring Section 106 review, but for those that are, the FAA must initiate the Section 106 process, including consultation and a plan to involve the public, even if they are covered by a CATEX. This interaction is illustrated in Figure 4.

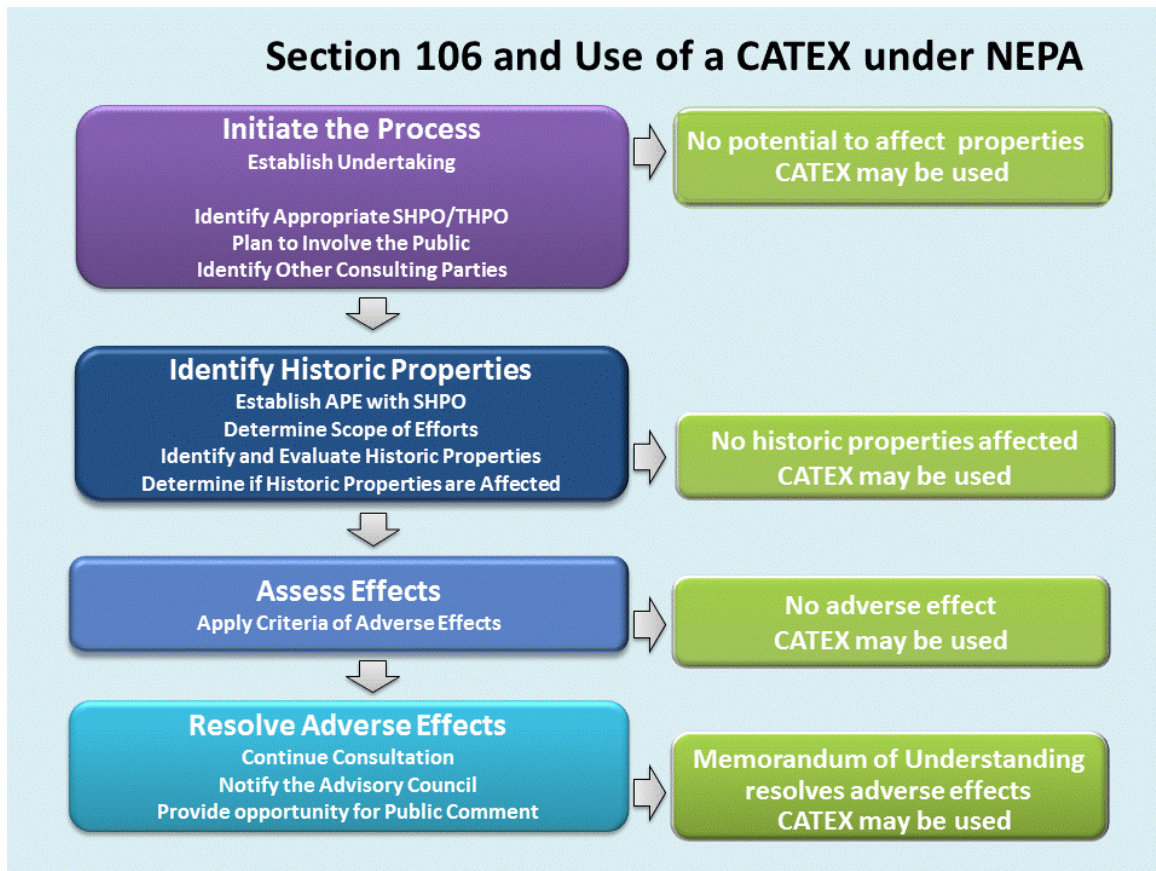


Figure 4: Section 106 and the Use of a CATEX under NEPA

A CATEX can be used if the FAA determines that the undertaking does not have the potential to affect properties, whether or not they are historic. If the undertaking does have the potential to affect properties, then it is necessary to complete Step 1 and proceed to Step 2 before deciding to apply a CATEX. If Step 2 results in a finding of “no historic properties affected,” and there are no other extraordinary circumstances, a CATEX is appropriate.

If historic properties may be affected, Step 3 must be completed before proceeding with a CATEX, because an adverse effect to historic properties may be an extraordinary circumstance requiring an EA or EIS, and is a factor to consider in determining whether there is a significant impact under NEPA. However, even an adverse effect finding does

not automatically trigger preparation of an EA or EIS or rule out use of a CATEX. Appropriate mitigation incorporated into project design that resolves the adverse effect can avoid the extraordinary circumstances that would preclude use of a CATEX or a FONSI. As shown in Figure 4, in some cases it may be necessary to go through the entire Section 106 process – including involving the public and consulting with the SHPO/THPO and other parties – *before* a decision is made to proceed with a CATEX.

Similarly, the Section 106 process can help to identify historic properties that may be subject to Section 4(f) of the Department of Transportation Act.¹⁷ A historic property would not be “used” for Section 4(f) purposes if the FAA issues a finding of no historic properties affected or no adverse effect under Section 106. However, findings of adverse effects do not automatically trigger section 4(f) unless the effects substantially impair the affected resource's historical integrity. For more information, see Chapters 5 and 8 of the 1050.1F Desk Reference.

E. The Importance of Consultation in the Section 106 Process

Consultation is at the heart of the Section 106 process. In addition to providing the general public with information and seeking their comment and input,¹⁸ the FAA must consult with the State Historic Preservation Office (SHPO) or Tribal Historic Preservation Officer (THPO) and other individuals or organizations with a special interest in the undertaking or in the historic properties that may be affected by the undertaking.¹⁹ “Consultation” means not only soliciting and considering the views of consulting parties but also, where feasible, seeking agreement.²⁰ (This distinguishes consultation from public involvement under both NEPA and Section 106.) However, Section 106 does not require that agreement be reached.

Information from consulting parties can help to identify historic resources that may be difficult to recognize, such as traditional cultural properties, and develop approaches to avoid, minimize or mitigate adverse effects.²¹ To be effective, consultation should be initiated early enough to help identify historic resources and allow a broad range of alternatives to be considered.²²

The SHPO or THPO is an essential consulting party.²³ Other consulting parties have the right to participate in the Section 106, as specified in the regulations, or may be invited to participate at the discretion of the lead federal agency. Federally-recognized Indian tribes and Native Hawaiian Organizations have special rights as consulting parties.²⁴ If Section 106 is triggered by an FAA grant, license, permit or approval, the applicant or sponsor would be another essential consulting party.²⁵ The Advisory Council on Historic Preservation (ACHP) typically does not participate in Section 106 review as a consulting party unless an undertaking has substantial impacts on important historic properties or a large number of historic properties; presents important questions of policy or interpretation; has the potential for procedural problems; or involves issues of concern to Indian tribes or Native Hawaiian organizations.²⁶

With the help of the SHPO, the FAA must identify other appropriate consulting parties and consider any written requests to be consulting parties.²⁷ These may include other federal, state or local agencies, representatives of local governments and individuals with a demonstrated interest in the undertaking or affected properties.²⁸ Under the Section 106 regulations, some of these parties have a right to participate in consultation, while others may participate at the FAA’s discretion.

F. Key Players in the Section 106 Process

Advisory Council on Historic Preservation (ACHP): The ACHP oversees federal agency compliance with Section 106 through its ***Office of Federal Agency Programs***. In addition to its regulations, the ACHP issues guidance and policy documents, available on its web site at www.ACHP.gov. Although the NHPA requires that the ACHP be given an opportunity to comment on Section 106 reviews, it formally participates as a consulting party only in certain circumstances.²⁹ Even where the ACHP is not a consulting party, the FAA and other parties may seek informal advice, guidance and assistance from ACHP staff on the application of the regulations to specific undertakings.³⁰ The federal preservation officer (FPO) serves as the primary point of contact between the FAA and the ACHP (see below).

Agency Official: The agency official is an individual with approval authority for an undertaking who can commit the agency to take appropriate action as a result of Section 106 compliance, including mitigation.³¹ The responsible FAA official for NEPA review of an action (i.e., the FAA employee with overall responsibility to independently evaluate the environmental issues, furnish guidance and participate in the preparation of NEPA documents and evaluate and take responsibility for the scope and content of the documents) typically also serves as the agency official for Section 106 purposes. This role is delegated to state officials under the FAA's State Block Grant Program.³²

Federal Preservation Officer (FPO): Under the NHPA, each agency is required to designate a qualified official to be the FPO.³³ The FAA's FPO is in the Office of Environment and Energy's Environmental Policy and Operations Division (AEE-400). The FPO is the liaison between the ACHP and the FAA line of business project managers who oversee the Section 106 review for individual undertakings. Along with the FAA Historian (AGC-002c), the FPO also serves as a resource for FAA lines of business and staff offices on issues involving the identification and management of historic properties.

Senior Policy Official: Under Executive Order 13287, "Preserve America," each agency is required to designate "an assistant secretary, deputy assistant secretary, or the equivalent, as appropriate to the agency organization" as the senior policy official with policy oversight responsibility for the agency's historic preservation program.³⁴ The FAA has designated the Deputy Assistant Administrator for Policy, International Affairs and Environment (APL-2) as its senior policy official.

State Historic Preservation Officer (SHPO): The SHPO is the person designated in each state or territory to administer the approved Preservation Program under the NHPA, including participation in Section 106 reviews.³⁵ A list of SHPOs can be found at: <http://www.nps.gov/nr/shpolist.htm> and <http://ncshpo.org/find/>.

National Conference of State Historic Preservation Officers (NCSHPO): NCSHPO is a non-profit professional association of State Historic Preservation Officers. NCSHPO may represent SHPOs in negotiations on nationwide or multistate programmatic agreements under Section 106.

Indian Tribes: Indian tribes, as the term is used in the Section 106 regulations, refers to federally-recognized Indian or Alaska Native tribes, bands, nations, villages or other organized groups. The Bureau of Indian Affairs maintains a list of federally-recognized tribes in the contiguous 48 states and in Alaska; available at: <http://www.bia.gov/WhoWeAre/BIA/OIS/TribalGovernmentServices/TribalDirectory/>.

Tribal Historic Preservation Officer (THPO): The THPO is the official designated by an Indian tribe to assume the responsibilities of the SHPO with respect to tribal lands.³⁶ Tribal lands are defined as land within Indian reservations and dependent Indian communities (areas set apart for the use of Indians and under the superintendence of the federal government).³⁷ More details about THPOs, including contact information for THPOs, can be found at <http://www.nps.gov/thpo/>.

National Association of Tribal Historic Preservation Officers (NATHPO): NATHPO is a national non-profit membership organization of Tribal government officials who implement federal and tribal preservation laws. NATHPO maintains a list of THPOs, which can be found at: http://www.nathpo.org/THPO/state_list.htm.

Native Hawaiian Organizations (NHOs): Native Hawaiians are descendants of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in what is now the State of Hawaii.³⁸ An NHO is an organization that serves and represents the interests of Native Hawaiians; provides services to Native Hawaiians; and has expertise in Native Hawaiian affairs.³⁹ NHOs are generally given the same status as Indian tribes under Section 106. A list of NHOs is available at: <http://www.doi.gov/ohr/nativehawaiians/list.cfm>.

National Park Service (NPS): The Department of the Interior has delegated its authority under the NHPA to the NPS, which has a number of programs to implement the law's provisions. NPS is also responsible for developing the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation, including standards for professional qualifications, preservation planning, and treatment of historic properties.

The **National Register of Historic Places (NRHP)** is the nation's official list of historic places worthy of preservation.⁴⁰ The **Keeper of the National Register** is the individual who has been delegated the authority to list historic properties nominated by SHPOs, THPOs, and FPOs and determine the eligibility of properties at the request of federal agencies.⁴¹ The Keeper further delegates this authority in many cases to NRHP staff reviewers, each of whom covers a particular region of the

country. Nominations or requests for Determinations of Eligibility involving archeological resources are also reviewed by a staff archeologist.

The ***National Historic Landmarks (NHL) Program*** nominates new landmarks and provides assistance to existing NHLs.⁴² The Secretary of the Interior designates NHLs based on the recommendations of the Landmarks Committee, made up of ten to twelve scholars and experts in history, archeology, architectural history, preservation, and cultural resource management appointed by the NPS Director.

The ***Federal Preservation Institute*** provides historic preservation news and information on training opportunities for Federal agency preservation officers, their staff, and contractors. (The Federal Preservation Institute should not be confused with the National Preservation Institute, which is a private non-profit organization).

The ***Departmental Consulting Archeologist (DCA)*** oversees the Federal Archeology Program, which includes activities under Section 106 as well as other federal laws. The DCA prepares periodic reports for Congress on federal activities to recover, protect, and preserve archeological sites, collections, and data, which draw on input from other federal agencies.⁴³

National Trust for Historic Preservation (NTHP): The NTHP is a privately-funded nonprofit organization chartered by Congress in 1949. In addition to managing historic properties under its ownership, the NTHP has a number of advocacy programs and may participate in Section 106 consultation and/or in litigation challenging federal actions that affect historic properties.

I. The Section 106 Review Process

The regulations implementing Section 106 establish a process for federal agencies to ensure they consider the effects of their actions on historic properties and give the ACHP a reasonable opportunity to comment.⁴⁴ Throughout the process, the federal agency must consult, as appropriate, with states, tribes, local governments, and individuals who may have specialized expertise or an interest in the area affected by the undertaking.⁴⁵ A simplified checklist covering the overall process is included as an appendix to this Handbook.

The FAA must complete the Section 106 process before approving the use of federal funds (other than funds for nondestructive project planning) or issuing a license, permit or other approval and the process must be initiated early enough to allow a broad range of alternatives to be considered.⁴⁶ If the FAA does not conduct Section 106 review or an undertaking is too far along before Section 106 review begins, the ACHP may determine that the FAA has failed to provide an opportunity to comment, and notify the agency head and the public of its determination.⁴⁷ The practical consequences of this determination could range from negative publicity to a lengthy delay in the undertaking.

In addition, Section 110(k) of the NHPA prohibits an agency from funding or approving a project if an applicant or sponsor has significantly adversely affected a historic property with the intent to avoid Section 106 requirements⁴⁸ (for example, by anticipatory demolition or demolition by neglect). If Section 106 review is deferred to a late stage of project review, the applicant or sponsor may have already taken actions that jeopardize the FAA's ability to approve the funding, license or permit.

The FAA may use the services of applicants, sponsors and/or consultants to prepare information, analyses, and recommendations to assist in the Section 106 process.⁴⁹ Funding for these services comes from the individual FAA line of business responsible for the undertaking, applicants or sponsors, and may be an eligible cost under FAA grants. However, the FAA is legally responsible for all findings and determinations under Section 106,⁵⁰ and for making

Section 106 review can take anywhere from months to years, depending on the complexity of the undertaking and the level of consensus among consulting parties. It is important to build in enough time early in the planning stage of an undertaking to identify and resolve any disagreements about the presence of historic properties and/or impacts to them.

“Anticipatory demolition” refers to demolishing a building prior to initiating Section 106 review when it is known or suspected that the property is historic. “Demolition by neglect” can occur when a building is intentionally allowed to deteriorate to the point that it cannot be restored or rehabilitated, and can be a form of anticipatory demolition.

Letters initiating consultation, invitations to consulting parties and formal findings under Section 106 should come from the FAA responsible official.

sure that individuals preparing this material meet the relevant Secretary of Interior Standards for Professional Qualification, which define the minimum education and experience required to perform different aspects of Section 106 review.⁵¹

The Section 106 implementing regulations identify four sequential steps in the Section 106 process. The Section 106 process begins when the FAA decides to pursue an **undertaking**. An undertaking is any project, activity or program carried out by or on behalf of the FAA; carried out with FAA financial assistance; or requiring an FAA permit, license or approval.⁵²

Most FAA actions that trigger NEPA are also subject to Section 106. Coordinating the reviews from the outset can make both more efficient.

FAA undertakings subject to Section 106 include actions as varied as approving Airport Layout Plans, providing AIP grants for sound insulation, implementing new airspace procedures, renovating FAA-owned air navigation facilities, and land acquisition. There may be additional requirements for historic properties that the FAA owns (see E.O. 13006).

Although it is typically described as occurring within the first step of the Section 106 process, establishing that an undertaking requires Section 106 review is a threshold determination made solely by the FAA. Only activities that could directly or indirectly affect properties are subject to review under Section 106. There is no need to initiate the Section 106 process if the FAA determines that the undertaking does not have the potential to affect historic properties.⁵³

NOTE: This determination must be based on the type of activity involved in the undertaking: the FAA cannot rely on an assumption that there is no potential to affect historic properties based on location, previous disturbance, or a belief that affected properties are not historic.⁵⁴

The FAA may combine steps to expedite consultation if the SHPO/THPO agrees it is appropriate and the consulting parties and the public have an adequate opportunity to express their views.⁵⁵ In addition, the regulations identify “program alternatives” which provide more flexibility in meeting the Section 106 requirements.⁵⁶

Be sure to seek agreement from the SHPO/THPO at the outset of the process if you plan to expedite consultation by addressing multiple steps in a single finding.

See Part III for a description of program alternatives.

A. STEP 1: INITIATE THE PROCESS

1) Establish the undertaking.

- a) Determine whether the undertaking is the type of activity that has the potential to affect historic properties, independent of whether any historic properties are known or suspected to be present in the area of the activity.⁵⁷ If the undertaking is a type of activity that does not have the potential to affect properties, *the FAA has no further obligations under Section 106.*⁵⁸
- b) If the undertaking has the potential to cause effects on properties, the FAA should formally initiate the Section 106 review process and coordinate it with other reviews, including NEPA.⁵⁹

An action that has the potential to affect properties is subject to Section 106 review, including consultation and public involvement, even if it is eligible for a CATEX under NEPA.

Historic properties can be affected by physical changes such as modification of buildings or land disturbance, or by indirect effects of noise, vibration or visual intrusions.

An administrative action such as procurement documentation would not have the potential to affect historic properties even if it occurs in a historic building. However, the replacement of a facility with a new one of similar size and purpose on the same site would affect the property, so it would be necessary to proceed to Step 2 of the Section 106 process even if the facility doesn't appear to be historic.

2) Notify the State Historic Preservation Officer and/or Tribal Historic Preservation Officer. Section 106 requires the FAA to consult with the SHPO and/or THPO.⁶⁰

- a) In most cases, the SHPO for the state in which the project or action is located will be a consulting party.
- b) If more than one state is involved in an undertaking, the SHPOs may agree to designate a lead SHPO to act on their behalf.⁶¹
- c) The THPO is the official representative for consultation instead of the SHPO if the undertaking is located on tribal lands (i.e., land within Indian reservations or dependent Indian communities),⁶² or the effects of the undertaking are felt on tribal lands, and the tribe has assumed the responsibility for Section 106.⁶³

It's a good idea to notify the appropriate SHPO and/or THPO as soon as you establish that an undertaking has the potential to affect historic properties, even if details of the project are not fully known. Establish a record of the Section 106 process by sending the SHPO/THPO(s) a letter initiating consultation. See Part I.E, Key Players in the Section 106 Process, for information on locating the appropriate SHPO/THPO.

Initial communication with tribes should be made by the FAA official with responsibility for the undertaking and addressed to the tribal leader. This can also serve as documentation of a reasonable, good-faith effort to obtain and consider appropriate tribal input under FAA Order 1210.20, American Indian and Alaska Native Tribal Consultation Policy and Procedures.

- d) If the undertaking is located on tribal lands or the effects of the undertaking are felt on tribal lands, but the tribe has not assumed Section 106 responsibilities, the SHPO will be a consulting party, but the tribe may also designate a representative who will have the same rights of consultation and concurrence as the SHPO.⁶⁴ The tribe may enter into an agreement with the SHPO specifying the scope and terms of the SHPO's participation.⁶⁵

For multi-state undertakings or those that involve both THPOs and SHPOs, notify each SHPO and THPO separately and then seek agreement on respective roles and protocols for the consultation process.

NOTE: Consultation with Indian tribes must be made on a government-to-government basis and in a sensitive manner respectful of tribal sovereignty.⁶⁶ See Order 1210.20, American Indian and Alaska Native Tribal Consultation Policy and Procedures (2004), for more information.

This government-to-government relationship cannot be delegated to applicants, sponsors or consultants.

- e) Both the SHPO and THPO may participate in consultation where an undertaking will affect both tribal and non-tribal lands, or where non-tribal owners of property on tribal lands request that the SHPO participate in addition to the THPO.⁶⁷

- 3) **Identify additional consulting parties.** Certain individuals or organizations have the right to be included in consultation if they choose. The FAA may invite others to participate as a consulting party.⁶⁸

Additional consulting parties may come forward at any point in the Section 106 process, but it usually is easier in the long run to include as many as possible and appropriate at the outset. See below for ways to identify appropriate consulting parties.

Section 106 consulting parties should be involved early in the NEPA process when the widest range of alternatives is under consideration.

- a) **By-right consulting parties.** Representatives of local governments with jurisdiction over the area where the undertaking may have effect are entitled to participate in the consultation process.⁶⁹ If the undertaking involves a grant, permit, or license, the applicant (e.g., the project sponsor) must be invited to be a consulting party.⁷⁰

- b) **Indian tribes and Native Hawaiian organizations.** The FAA must make a reasonable and good faith effort to identify any Indian tribes or

Native Hawaiian organizations that might attach religious and cultural significance to historic properties and invite them to participate as consulting parties.⁷¹ These Indian tribes and Native Hawaiian organizations have a statutory right to participate in consultation regardless of the location of the historic property.⁷² Because these resources frequently are located on ancestral, aboriginal or ceded lands, the relevant tribes or organizations may not be in the geographic vicinity of the undertaking.⁷³

SHPO/THPOs can recommend Indian tribes that may have an interest in an undertaking. HUD's "Tribal Directory Assessment Tool," available at <http://egis.hud.gov/tdat/Tribal.aspx> and NPS's "Native American Consultation Database," available at <http://grants.cr.nps.gov/nacd/index.cfm> are also good sources of information.

- c) **Additional consulting parties.** Individuals and organizations with a demonstrated interest in the undertaking, based on their legal or economic relation to the project or affected properties or their concern with the effect on historic resources, may be invited or request to participate as consulting parties.⁷⁴

Preservation groups and local historical societies can be consulting parties along with project proponents such as economic development organizations. National organizations or experts with a specialized interest in a certain type of historic resource (e.g., battlefields, lighthouses, World War II airfields) may also be appropriate consulting parties. The SHPO/THPO may have suggestions for potential consulting parties.

The NEPA scoping process (if applicable) can assist in identifying appropriate stakeholders to participate in the Section 106 process as consulting parties.

- d) **Requests to be a consulting party.** The FAA must consider all written requests of individuals and organizations to participate in consultation, and, after consulting with the SHPO/THPO, determine if the requester should be given consulting party status.⁷⁵

There is no regulatory deadline for responding to written requests for consulting party status, but a prompt response can avoid an escalation of issues by the party seeking to participate.

- e) **Participation by the ACHP:** The SHPO/THPO, an Indian tribe or Native Hawaiian organization, or the FAA may ask the ACHP to participate at any time.⁷⁶ The ACHP can enter a consultation on its own initiative if it determines that its involvement is necessary to ensure that the purposes of the NHPA and Section 106 regulations are fulfilled.⁷⁷ The ACHP must notify the parties of its intent to

formally participate in consultation, and document that its criteria for involvement have been met.⁷⁸

NOTE: *The ACHP will normally participate in consultation only at the request of the agency or one of the consulting parties and then only if the situation meets one or more of its criteria for involvement in reviewing individual Section 106 cases.*⁷⁹

Although the ACHP rarely participates formally in Section 106 consultation, staff often will monitor cases and have informal input through the FPO.

- 4) **Develop a plan to involve the public.** The FAA must provide the public with information about an undertaking and its effects on historic properties and seek public comment and input.⁸⁰ The type and level of public involvement required is based on the nature and complexity of the undertaking, its effects on historic properties and the likely interest of the public in those effects, confidentiality concerns and the extent of FAA's involvement in the undertaking.⁸¹

Even a small project or one in which the FAA has a limited role can trigger a high level of public interest based on the nature and significance of affected historic properties.

- a) Consult with the SHPO/THPO in developing a plan to involve the public.⁸² Identify points in the consultation process where public notification is required or appropriate, and mechanisms for soliciting public comment.⁸³

Section 106 does not require public meetings or formal comment period: the public involvement plan can include any method that furthers the goal of getting public input. The FAA can use web sites, social media, paper or electronic newsletters, and other methods to inform the public of the undertaking and gather input.

The NEPA process can be used to satisfy Section 106 if it provides adequate opportunities for public involvement. If a CATEX is being used for NEPA compliance, or a draft EA is not going to be published for comment, the FAA may need to make other arrangements to provide the public with enough time and information to meaningfully comment.

Note: *ACHP guidance states that at a minimum, public notice and information for the Section 106 process should be designed to effectively inform the public about the nature of the undertaking, its effects and the public's likely interest in it. However, there is no prescribed public notice and information standard.*⁸⁴

- b) In some situations it may be appropriate to withhold information about the location, character or ownership of a historic property from the public if disclosure could cause a significant invasion of privacy, risk harm to the historic property, or impede the use of a traditional religious site by practitioners.⁸⁵

See Part IV for more details on protecting confidential information about archeological sites.

Proprietary business information, such as certain aspects of development plans, may also need to be withheld from public review.

B. STEP 2: Identify historic properties.

Section 106 applies to “historic properties,” defined as districts, sites, buildings, structures, and objects that are included in or eligible for inclusion in the National Register of Historic Places (NRHP).⁸⁶ This includes prehistoric archeological sites and associated artifacts, records and remains, as well as properties of traditional religious and cultural importance to Indian tribes and Native Hawaiian organizations.⁸⁷ The NRHP criteria recognize properties that reflect historic trends (e.g., the civil rights movement or the industrial revolution) as well as those associated with a specific historical event or person.⁸⁸ Eligible properties may be a unique or rare specimen, or a characteristic example of a common type of building or structure.⁸⁹ Properties may be significant on a local basis or at the state or national level. Nationally-significant properties may also be designated as National Historic Landmarks.⁹⁰

See Part IV for a more about identifying and evaluating historic properties.

“Historic properties” are more than just buildings – they can also be sites (e.g., landscapes or places where events occurred), structures (e.g., beacon towers and airplanes) and objects (e.g., navigation equipment). The majority of properties in the NRHP are listed as part of districts, which are significant concentrations of sites, buildings, structures, and/or objects united by design or historic development.

NEPA includes consideration of the human environment, which includes ***historic, architectural, archeological and cultural resources***. Section 106 applies only to ***historic properties***, defined as districts, sites, buildings, structures and objects that are listed in or eligible for the National Register.

Historic properties don’t have to be very old: properties of “exceptional importance” may be eligible even if they are less than 50 years old. For example, Dulles Airport was determined eligible as the first airport in the United States to be designed specifically for jet planes and as the greatest work of architect Eero Saarinen just 16 years after it was built.

To be eligible for the National Register, a property must have the ability to convey its historic significance through its location, design, setting, materials, workmanship, feeling, and/or association. These are referred to as aspects of “integrity.”⁹¹ Not all aspects of integrity will be applicable to every property. A property that has enough of these aspects to convey its historic significance is said to “retain integrity.”⁹²

“Feeling” is a property’s ability to convey historic character. “Association” is the direct link between the property and the historic event or person. Because these aspects of integrity depend on individual perception, the property must retain some other aspects of integrity to be eligible for the National Register.

It is important to identify historic properties before deciding to use a CATEX, because an adverse effect on these properties may be an “extraordinary circumstance” and is a factor to consider in determining whether there is a significant impact under NEPA. *See Figure 4 and discussion on page 9-10.*

1) Determine the scope of identification efforts. The FAA must make a reasonable and good faith effort to identify historic properties.⁹³

a) Define the Area of Potential Effect (APE). The APE is the geographic area or areas where an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist.⁹⁴ The APE does not have to be one contiguous area, and different APEs can be defined for different kinds of effects.⁹⁵ The FAA is responsible for defining the APE in consultation with the SHPO/THPO.⁹⁶

Concurrence is not required for this phase of the Section 106 process, but the SHPO/THPO must be consulted and may later object to a finding of “No historic properties affected” based on an inadequate identification effort.

Define the initial APE and seek the SHPO/THPO’s comments as early as possible in the planning process. The APE can be refined as planning and analysis progress.

Section 106 does not require an APE for every NEPA alternative, but it does require consideration of alternatives that would avoid an adverse effect to historic resources. This can be done by defining an APE that covers all of the alternatives.

b) Review existing documentation. Before beginning surveys or other identification activities in the field, review available records of historic properties within the APE, including information about possible historic properties not yet identified.⁹⁷

SHPO/THPO staff typically will be the best source of advice for locating relevant information.

c) Seek information from others. As appropriate, gather input from individuals and organizations who may have knowledge of historic properties in the area, whether or not they are formally participating as consulting parties in the Section 106 process.⁹⁸

Checking with consulting parties and others familiar with the area before beginning archival or field research can reduce the time and resources needed to identify historic properties.

d) Consult Indian tribes and Native Hawaiian organizations. Indian tribes and Native Hawaiian organizations should be consulted for information about

properties that may have religious or cultural significance for them. In gathering this information, be aware that they may be reluctant to divulge specific information regarding the location, nature, and associated activities of these properties and be prepared to address confidentiality concerns about sharing information.⁹⁹

2) Identify properties listed in or eligible for the NRHP.

Based on the information gathered from existing records and consultation, identify those properties already listed in the NRHP, or formally determined eligible for listing, and evaluate other potential historic properties for eligibility.¹⁰⁰

A property that is eligible for listing has the same status under Section 106 as properties actually listed in the National Register.

a) Identify properties listed in the NRHP. The SHPO should be consulted as the first step in identifying listed properties and those in the process of nomination as well as properties that have been subject to a formal Determination of Eligibility (DOE) by the Keeper of the NRHP.¹⁰¹ National Historic Landmarks and historic units of the National Park System are automatically included in the NRHP.¹⁰²

Even though more than a million properties have been listed in the NRHP, either individually or as part of a district, many historic properties have not yet been nominated or identified as eligible.

b) Evaluate the eligibility of other properties. The FAA, in consultation with the SHPO/THPO, applies the NRHP criteria to properties that have not yet been listed or subject to a formal DOE.¹⁰³ Previously-evaluated properties should be reviewed because their eligibility status may change due to the passage of time, changing perceptions of historic significance, or incomplete prior evaluations.¹⁰⁴

See Part IV for a discussion of the NRHP criteria.

Properties less than 50 years old are ordinarily not eligible for the National Register, but should be reassessed when they are close to reaching 50 years.

i. Seek the opinion of the SHPO/THPO. If the SHPO/THPO and the FAA agree on a property's eligibility, it will be considered eligible (or ineligible) for purposes of Section 106.¹⁰⁵ This agreement must be documented so that any reviewing parties can understand the basis of the finding of eligibility or ineligibility.¹⁰⁶

Agreements between an agency and SHPO/THPO about a property's eligibility are often referred to as "consensus DOEs" These should not be confused with a formal DOE issued by the NRHP. See the discussion of DOEs in Part IV.

ii. **Obtain a Determination of Eligibility from the NRHP.** If the FAA and the SHPO/THPO disagree about the eligibility of a property, the FAA can request a formal DOE from the Keeper of the NRHP.¹⁰⁷

In some cases it may make sense to treat a property as “historic” for purposes of Section 106 rather than spending the time and resources to seek a formal DOE.

c) **Identify eligible properties of significance to Indian tribes or Native Hawaiian organizations.** Properties that are of religious or cultural significance to Indian tribes or Native Hawaiian organizations may be eligible for the NRHP. This evaluation must be done in consultation with the tribes and organizations which consider these properties significant and possess special expertise in assessing their eligibility.¹⁰⁸ If the Indian tribe or Native Hawaiian organization disagrees with the FAA about the eligibility of such a property, they may ask the ACHP to request that FAA obtain a DOE from the NRHP.¹⁰⁹

These resources typically would be considered “Traditional Cultural Properties” (TCPs) under the NRHP program. TCPs have to meet the same criteria for eligibility as other historic properties. See Part IV for more information.

Completing this step of the Section 106 process during the scoping phase for actions requiring an EIS or in the early stages of developing an EA can help to determine which historic, architectural, archeological and cultural resources are also subject to Section 106.

NOTE: The FAA can defer its final identification and evaluation of historic properties for undertakings affecting large land areas; where access to properties is restricted; pursuant to a memorandum of agreement or programmatic agreement; or where a phased approach is specifically provided for in NEPA documents.¹¹⁰

A phased approach may be appropriate for undertakings in which potential noise or visual impacts cover a large area. See Part IV for more discussion of phased identification and evaluation.

3) Determine if any historic properties are affected.

An undertaking has an *effect* on a historic property if it alters, directly or indirectly, any of the characteristics that qualify the property for inclusion in the NRHP.¹¹¹ This includes direct physical effects as well as noise and visual effects.¹¹² If historic properties *may* be affected by the undertaking, the FAA must notify all consulting parties and proceed to Step 3 in the Section 106 process, Assess Effects (see below).¹¹³

If there are no historic properties in the APE, or historic properties are present but would not be affected by the undertaking (that is, there would be no alterations to the characteristics of the property qualifying it for the NRHP), the FAA may make a finding of “**no historic properties affected**” and conclude the Section 106 process after completing the following steps.¹¹⁴

- a) Notify all consulting parties of the finding.
- b) Document the finding by describing the undertaking (specifying the FAA’s involvement); the APE, including photographs, maps, and drawings as necessary; the steps taken to identify historic properties; and the basis for determining that no historic properties are present or, if they are, that they are not affected.¹¹⁵
- c) Provide the documentation to the SHPO/THPO and make it available for public inspection prior to approving the undertaking.¹¹⁶

If the SHPO/THPO (and the ACHP, if it is formally participating in consultation) does not object within 30 days of receiving an adequately documented finding, *the FAA has no further obligations under Section 106.*¹¹⁷

4) Objections to a Finding of No Historic Properties Affected.

If the SHPO/THPO objects within 30 days of receiving an adequately documented finding, the FAA must either consult to resolve the disagreement, or request the ACHP’s review.¹¹⁸ The ACHP may, on its own initiative, object and

It is important to do a preliminary assessment of effects at this point in the process. The Section 106 process can be concluded if there is no potential to affect historic properties (e.g., if the only historic properties in the APE are archeological sites and the undertaking does not involve any ground disturbance).

As analysis progresses it may be possible to refine the APE to exclude areas where the undertaking would not cause effects. If potential historic properties can be excluded from the APE on this basis, it may be unnecessary to evaluate their eligibility for the NRHP.

There is no requirement to notify the ACHP of a “no historic properties affected” finding unless it has formally entered the Section 106 process.

The finding of “no historic properties affected” must be adequately documented and notice provided to consulting parties. Otherwise, the FAA may not be able to rely on an absence of objections as the basis for concluding the Section 106 process at this step.

provide its opinion on the finding.¹¹⁹ If the FAA decides to request the ACHP's review:

- a) The FAA must concurrently notify all consulting parties.¹²⁰
- b) The FAA must forward the finding and supporting documentation to the ACHP with the request and make it available to the public.¹²¹
- c) Once the ACHP receives a request from the FAA to review a finding of no historic properties affected it will have 30 days to review the finding and provide its opinion.¹²²
- d) The ACHP will determine whether to review the finding, guided by its criteria for involvement in reviewing individual Section 106 cases.¹²³
- e) If the ACHP decides to review the finding, it will follow the procedures described in Section 5, below. If the ACHP does not respond within 30 days to a request for review, or decides not to review the finding, *the FAA has no further obligations under Section 106.*¹²⁴

5) Review by the ACHP.

- a) Upon concluding its review, the ACHP may choose to provide its opinion to the FAA Administrator and the Secretary of Transportation as well as the responsible FAA official.¹²⁵
- b) The FAA must take the ACHP's opinion into account before reaching a final decision on the undertaking.¹²⁶
- c) The FAA must prepare a summary of that decision, including its rationale and evidence that the ACHP opinion was taken into consideration; and provide it to the ACHP, the SHPO/THPO and other consulting parties.¹²⁷
- d) The ACHP will retain a record of the FAA's responses to their opinions, and make them available to the public.¹²⁸

Although the ACHP rarely chooses to provide its comments directly to the head of an agency, doing so elevates the issue to policy-level officials and increases visibility of the dispute.

- e) If the FAA decides to revise its finding, it will be necessary to re-notify consulting parties, provide the revised documentation to the SHPO/THPO and make it available to the public, and continue the Section 106 process. If the FAA decides to revise its finding *the FAA has no further obligations under Section 106.*¹²⁹

C. STEP 3: ASSESS EFFECTS

- 1) **Criteria of adverse effects.** The effect of an undertaking is *adverse* if it alters any of the characteristics that qualify the property for inclusion in the NRHP in a way that diminishes the integrity of the property's location, design, setting, materials, workmanship, feeling, or association.¹³⁰

An undertaking may have an adverse effect if it:

- a) physically destroys or damages the property;
- b) alters the property in a way that is inconsistent with the Secretary of the Interior's Standards for Treatment of Historic Properties (see 36 CFR part 68);
- c) removes the property from its historic location;
- d) changes the character of the property's use, or of physical features within the property's setting that contribute to its historic significance;
- e) introduces an atmospheric, audible, or visual feature to the area that would diminish the integrity of the property's significant historic features (including its setting, provided the setting has been identified as a contributing factor to the property's historic significance); or
- f) results in neglect of a property which would cause its deterioration or the transfer, sale, or lease of a property out of federal ownership or control without adequate protection to ensure the long-term preservation of the property's historic significance.¹³¹

The criteria for "adverse effect" are tied to the reasons that the property is eligible for the NRHP.

Restoration, rehabilitation, repair, maintenance, stabilization or other changes made in accordance with the Secretary of Interior's Standards are not considered adverse effects provided the SHPO/THPO concurs.

Courts have upheld the FAA's application of its Part 150 land use compatibility guidelines to assess noise effects under Section 106. However, the part 150 guidelines may not be sufficient to determine the noise impact on historic properties where a quiet setting is a generally recognized purpose and attribute, such as a historic village preserved specifically to convey the atmosphere of rural life in an earlier era or a traditional cultural property used for meditation and reflection.

A significant impact under NEPA is not an *adverse effect* under Section 106 unless it alters the characteristics of a historic property that make it eligible for the NRHP and diminishes its ability to convey its historic significance (i.e., the property's integrity). For example, significant noise impacts may not have an adverse effect on a property notable for its architecture.

- 2) **Proposed finding of adverse effect.** If the undertaking would adversely affect historic properties, the FAA should consult with the SHPO/THPO and other parties to identify alternatives and/or modifications to the undertaking or impose conditions that could avoid the adverse effects.¹³²

Unlike NEPA, under Section 106 “avoidance” of adverse effects is distinct from “mitigation.” It is important to consider alternatives under NEPA that would avoid or reduce adverse effects on historic properties *before* developing mitigation measures.

- a) If the undertaking may have an adverse effect on a National Historic Landmark, the FAA must invite the ACHP and the Secretary of the Interior to participate in consultation.¹³³
- b) If the undertaking is modified or conditions imposed to avoid adverse effects, the FAA may propose a new finding of “no adverse effect.”¹³⁴ If the adverse effects cannot be avoided, the FAA must proceed to Step 4, Resolve Adverse Effects (see below).¹³⁵
- 3) **Proposed finding of “no adverse effect.”** If the undertaking's effects do not fit within one of the examples or otherwise meet the criteria for adverse effect, the FAA, in consultation with the SHPO/THPO, can propose a finding of no adverse effect. The FAA should seek the concurrence of any Indian tribe or Native Hawaiian organization that has identified that it attaches religious and cultural significance to a historic property subject to the finding.¹³⁶ The FAA must notify all consulting parties of

This is often referred to as a “conditional no effect” finding.

A proposed finding of “No Adverse Effect” typically is formally presented in a letter to the SHPO and other consulting parties, but it is a good idea to discuss the proposed finding with them first.

the proposed finding and provide the following documentation for a 30-day review period:¹³⁷

- a) A description of the undertaking, specifying the FAA’s involvement, and the APE, including photographs, maps and drawings as necessary.
 - b) A description of the steps taken to identify historic properties.
 - c) A description of the affected historic properties, including information on the characteristics qualifying them for the NRHP.
 - d) A description of the undertaking’s effects on historic properties.
 - e) An explanation of why the criteria of adverse effect were found to be inapplicable, including any conditions or future actions to avoid adverse effects.
 - f) Copies or summaries of any views provided by consulting parties and the public.¹³⁸
- 4) **No objection to finding of “no adverse effect.”** If the SHPO/THPO agree with a finding of no adverse effect or does not respond, and there is no objection from a consulting party or the ACHP within 30 days, the FAA can issue a final finding of no adverse effect and implement the undertaking in accordance with the findings as documented.¹³⁹
- a) The FAA must retain a record of its final no adverse effect finding and provide information on it to the public on request.¹⁴⁰
 - b) If the undertaking is implemented as documented in this finding, *the FAA has no further obligations under Section 106.*¹⁴¹

Although not required by the regulations, it is good practice to close out the Section 106 process with a letter to consulting parties confirming the finding of “No Adverse Effect.”

The documentation used to support the proposed finding of “No Adverse Effect,” updated as necessary, should be included with the final finding in the NEPA document.

5) **Objection to proposed finding of no adverse effect.** If the SHPO/THPO or any consulting party notifies the FAA in writing within the 30-day review period that it disagrees with the finding, the FAA must either continue consultation to resolve the disagreement or ask the ACHP to review the finding.¹⁴²

a) If the FAA requests the ACHP's review, it must concurrently notify all consulting parties.¹⁴³ All relevant documentation must be included in the FAA's request to the ACHP to review a finding, and this documentation must be made available to the public.¹⁴⁴

b) An Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to a historic property subject to the finding may object to the finding and ask the ACHP to review it.¹⁴⁵

c) The ACHP may also object to the proposed finding on its own initiative within the 30-day review period.¹⁴⁶

6) **Review by the ACHP.** The ACHP will decide whether to review the finding based on its criteria for involvement in individual Section 106 cases.¹⁴⁷

a) The ACHP has 15 days to review the proposed finding, but may extend the review to 30 days at its discretion and with notice to the FAA.¹⁴⁸

b) The ACHP will provide its opinion on whether the criteria of adverse effect have been correctly applied.¹⁴⁹

c) The ACHP may address its opinion to the Secretary of Transportation and the FAA Administrator as well as the responsible FAA official.¹⁵⁰

d) The FAA must take the ACHP's opinion into account in reaching a final decision; prepare a summary of that decision, including its rationale and evidence that the ACHP opinion was taken into consideration; and provide it to the ACHP, the SHPO/THPO and other consulting parties. (If the

Notify the FAA's Federal Preservation Officer (FPO) prior to requesting the ACHP's review of a finding of "No Adverse Effect."

ACHP provided its opinion to the Secretary and Administrator, these duties may be delegated to the senior policy official.)¹⁵¹ The ACHP will retain a record of the FAA’s response to its opinion, and make it available to the public.¹⁵²

- e) The FAA may decide to revise its finding and/or modify the undertaking and reopen consultation.
- f) If the FAA affirms its initial finding of no adverse effect, *the FAA has no further obligations under Section 106.*¹⁵³

Agencies rarely affirm a finding of “no adverse effect” and proceed with an undertaking over the objections of the ACHP.

A finding of *adverse effect* does not necessarily require an EIS or even an EA if the adverse effects can be successfully resolved through Step 4 of the Section 106

D. STEP 4: RESOLVE ADVERSE EFFECTS

- 1) **Continue consultation.** If the FAA finds that the undertaking will have adverse effects on one or more historic properties, consultation must continue to resolve those effects.

Consultation may include developing and evaluating alternatives and modifications to the undertaking that avoid effects, and/or conditions that could be imposed to minimize or mitigate the adverse effects. If the undertaking will have an adverse effect on a National Historic Landmark (NHL), the FAA, in consultation with the ACHP and Secretary of the Interior, is required to minimize harm to the property.¹⁵⁴

There is no formal time table for this phase of consultation – the FAA is expected to provide a reasonable time for consulting parties to review and respond to a finding of adverse effect, and consulting parties are expected to act in a timely fashion.

Efforts to engage consulting parties at this stage, along with any response or failure to respond, should be carefully documented as part of the record before concluding the Section 106 process.

Although the word “mitigation” is broadly used in the NEPA process to cover measures or alternatives that would avoid or reduce the impact, under Section 106 it has the more specific meaning of compensating for adverse effects.

- a) **Additional consulting parties.** The FAA, SHPO/THPO, and the ACHP (if participating) may

Consultation does not necessarily require face-to-face meetings; electronic exchanges of documents and comments or telephone conferences are all acceptable ways to consult.

agree to invite others to become consulting parties at this phase. Any individual or organization that will have a specific role or responsibility in a memorandum of agreement (MOA) must be invited to be a consulting party.¹⁵⁵

- b) **Documentation.** The FAA must provide consulting parties with all relevant documentation,¹⁵⁶ and make the notice of adverse effect finding, along with the accompanying information, available to the public.¹⁵⁷
- c) **Public involvement.** The FAA must provide the public with an opportunity to express their views through an appropriate mechanism to ensure that they are considered in resolving adverse effects.¹⁵⁸
 - i. The mechanism for public involvement should take into account the magnitude of the undertaking, its effects on historic properties, and the FAA's involvement.

The FAA should also consider the extent of notice and information provided to the public in earlier steps in the Section 106 process.¹⁵⁹

Additional public notice may not be necessary if the NEPA process already has provided all relevant information in such a way that a wide audience was reached; the public had the opportunity to make its views known on ways to resolve the adverse effects; and no new information is available at this stage in the process that would assist in the resolution of adverse effects.

- 2) **Notify the ACHP of Adverse Effects.** The FAA must notify the ACHP of its adverse effect finding and provide the following documentation:
 - a) A description of the undertaking, specifying the FAA's involvement, and the APE. Photographs, maps and drawings should be included as necessary.
 - b) A description of the steps taken to identify historic properties.

- c) A description of the affected historic properties, including information on the characteristics qualifying them for the NRHP.
 - d) A description of the undertaking's effects on historic properties.
 - e) An explanation of why the criteria of adverse effect were found to be applicable.
 - f) Copies or summaries of any views provided by consulting parties and the public.¹⁶⁰
- 3) **Invite ACHP participation.** In the notice of its adverse effect finding, the FAA should indicate whether the ACHP is invited to participate in further consultation.
- a) The FAA may ask the ACHP to participate in consultation for any undertaking.¹⁶¹
 - b) The FAA *must* invite the ACHP to participate in Section 106 consultation if an NHL will be affected or a programmatic agreement (PA) will be developed.¹⁶² (*See Part III for a discussion of PAs.*)
 - c) The ACHP will inform the FAA of its decision within 15 days of receiving a request to participate.¹⁶³ The ACHP will not always elect to participate even if one or more of its criteria is met.¹⁶⁴
 - d) If the ACHP decides to participate, it will provide written notification to the FAA and all consulting parties, as well as the Secretary of Transportation and FAA Administrator.¹⁶⁵ If the ACHP decides not to participate, the FAA can proceed with consultation.¹⁶⁶
- 4) **Develop a Memorandum of Agreement.** The FAA, SHPO/THPO and other consulting parties (along with the ACHP if participating), negotiate the terms and conditions that will be implemented to resolve adverse effects, and record them in an MOA.¹⁶⁷ The FAA is responsible for ensuring that the undertaking is carried out in accordance with the MOA.¹⁶⁸ In addition to the terms and conditions

for resolving adverse effects, the MOA should include provisions for:

- a) Terminating the MOA or reconsidering its terms if the undertaking has not been implemented within a specified time.¹⁶⁹
 - b) Monitoring and reporting on implementation of terms and conditions.¹⁷⁰
 - c) Subsequent discovery or identification of additional historic properties.¹⁷¹
- 5) **Execute the MOA.** Once the terms and conditions for resolving adverse effects have been negotiated, the parties can execute an MOA. An executed and implemented MOA is evidence of the FAA's compliance with Section 106.¹⁷²
- a) **Signatories.** The signatories of the MOA have sole authority to execute, amend or terminate the agreement.¹⁷³ The FAA and the SHPO/THPO (and the ACHP if participating) can execute an MOA if they agree on how to resolve adverse effects, without the need for other signatories.¹⁷⁴
 - b) **Additional signatories.** The FAA may invite additional parties to be signatories to the MOA. These parties have the same rights to seek amendment or termination of the MOA as other signatories.¹⁷⁵
 - i. Any individual or organization that will assume responsibility under an MOA should be invited to be a signatory.¹⁷⁶
 - ii. The refusal of any invited party to become a signatory does not invalidate the MOA.¹⁷⁷
 - c) **Concurring parties.** The FAA may invite any other consulting parties to concur in the MOA, and with the agreement of the signatories, may invite others to be concurring parties. Concurring parties do not have the same rights to seek amendment or termination of the MOA as signatories, and refusal of any invited party to concur does not invalidate the MOA.¹⁷⁸
 - d) **Distribution.** The FAA must provide each consulting party with a copy of the executed MOA.¹⁷⁹

Concurring parties may sign the MOA as a way to express agreement with or support for the outcome of the Section 106 process.

- 6) **File the executed MOA with the ACHP.** The FAA must submit a copy of the executed MOA to the ACHP prior to approving the undertaking,¹⁸⁰ along with documentation of any substantive revisions or additions to the documentation submitted with the notification of the adverse effect finding; an evaluation of any measures considered to avoid or minimize those effects; and a summary of the views of consulting parties and the public.¹⁸¹ Filing the MOA with the ACHP completes the process and *the FAA has no further obligations under Section 106.*

The Final EIS or EA should include the executed MOA if possible. If extenuating circumstances delay signing the MOA, a draft MOA should be included in the final NEPA document and the executed MOA can be issued before or in conjunction with the FONSI or ROD.

- 7) **Failure to resolve adverse effects.** After consulting to resolve adverse effects, the FAA, SHPO/THPO and/or the ACHP may determine that further consultation would not be productive and notify the other parties in writing that they are terminating consultation.¹⁸²
- a) If the FAA and the SHPO/THPO cannot agree on the terms of the MOA, the FAA must ask the ACHP to join the consultation and must provide the ACHP the following documentation:
- i. Any substantive revisions to the documentation provided with the finding of adverse effects.
 - ii. A description and evaluation of any alternatives or mitigation measures proposed by the FAA to resolve adverse effects, as well as those considered but not chosen along with the reasons for their rejection.
 - iii. Copies or summaries of any views submitted to the FAA on adverse effects and alternatives to reduce or avoid those effects.¹⁸³
- b) If the ACHP decides not to participate, it will provide comments as described below. The ACHP may determine that it is appropriate to provide advisory

Terminating consultation should be considered as a last resort after all other options, including soliciting the informal assistance of the ACHP have failed.

comments even if it is not participating and further consultation results in an MOA; these comments will be provided to the responsible FAA official when the MOA is executed.¹⁸⁴

c) If the ACHP decides to participate, consultation continues until agreement is reached or one or more parties decide to terminate consultation.¹⁸⁵

i. If the FAA terminates consultation, an FAA official with agency-wide responsibilities must notify all consulting parties and ask the ACHP to provide comments.¹⁸⁶

ii. If the SHPO terminates consultation, the FAA and the ACHP may execute the MOA without the SHPO's involvement.¹⁸⁷

iii. If the THPO terminates consultation, the ACHP will provide comments.¹⁸⁸

iv. The ACHP may consult with the FAA FPO to seek to resolve issues before terminating consultation. If the ACHP terminates consultation, it will notify the responsible FAA official, the FAA FPO, and all consulting parties and provide comments.¹⁸⁹

8) ACHP Comments. The ACHP will provide advisory comments to the FAA if consultation is terminated.¹⁹⁰ Comments will be transmitted within 45 days of a request to provide comments or termination of consultation by the ACHP unless otherwise agreed to by the FAA.¹⁹¹

a) The ACHP will provide an opportunity to the FAA, all consulting parties, and the public to provide their views during the development of comments.¹⁹²

b) Comments are transmitted to the Secretary of Transportation, the FAA Administrator, the FAA FPO, and all consulting parties, as well as to others as appropriate.¹⁹³

II. Program Alternatives

Federal agencies have the option of developing alternatives means of complying with Section 106 by adopting their own procedures, using programmatic agreements (PA) and prototype PAs, or establishing exempted categories of undertakings.¹⁹⁴ Each of these alternatives allows federal agencies to tailor the Section 106 process to meet their needs. The ACHP has issued guidance on the various kinds of program alternatives, available at <http://www.achp.gov/progalt/>. Except for a small number of PAs, the FAA has not made use of these alternatives, but they are available to address situations that do not lend themselves to the standard Section 106 process or to streamline reviews.

A. Alternate procedures

Alternate procedures allow federal agencies to substitute their own procedures in whole or in part for the ACHP's Section 106 regulations.¹⁹⁵ Federal agencies may develop alternate procedures in consultation with the ACHP, the National Council of State Historic Preservation Officers or individual SHPO/THPOs and Indian tribes and Native Hawaiian organizations, as appropriate, and with public input. Proposed alternate procedures must be published in the Federal Register and submitted to the ACHP for review. ACHP will notify the agency if it finds the procedures to be consistent with its regulations, at which point the agency may adopt them and follow them for purposes of complying with Section 106. Indian tribes may enter into agreements with the ACHP to substitute tribal regulations for ACHP regulations, in which case those substitute regulations govern undertakings on tribal lands.¹⁹⁶

B. Programmatic agreements (PA)

A PA is similar to an MOA, but is used to document the terms and conditions agreed upon to resolve the potential adverse effects for a program of undertakings or a complex project.¹⁹⁷ The FAA may negotiate a PA with SHPO/THPOs (or with the National Conference of State Historic Preservation Officers if a project will be repeated in several different states), the ACHP¹⁹⁸ and other consulting parties as appropriate. A PA may be negotiated in the following situations:

- 1) When effects on historic properties are similar and repetitive or are multi-state or regional in scope;
- 2) When effects on historic properties cannot be fully determined prior to approval of an undertaking;
- 3) When non-federal parties are delegated major decisionmaking responsibilities;
- 4) Where routine management activities are undertaken at federal installations, facilities, or other land-management units; or

- 5) Where other circumstances warrant a departure from the normal Section 106 process.¹⁹⁹

Compliance with the procedures established by an approved PA satisfies Section 106 responsibilities for all individual projects of the program covered by the agreement until it expires or is terminated by one of the parties to the PA. If the ACHP determines that the terms of the PA are not being carried out, or that the agreement has been terminated, the FAA would have to comply with the Section 106 consultation requirements with regard to the individual projects of the program covered by the agreement.

C. Prototype programmatic agreements

A prototype PA is an agreement document (e.g., an MOA or PA) designated by the ACHP for use in future undertakings of the same type.²⁰⁰ Once designated, a prototype PA can be used as the basis for subsequent agreements with the appropriate SHPO/THPO on future undertakings and can be modified within the established parameters without the need for ACHP consultation or signature.

D. Exempted categories

Actions that would otherwise qualify as undertakings, but have foreseeable potential effects that are likely to be minimal or not adverse, may be categorically exempted from Section 106 review.²⁰¹ The FAA may propose a program or category of agency undertaking exempt from further review under Section 106, or the ACHP may propose an exemption on its own initiative. Exempting a category of undertakings must be consistent with the purposes of the National Historic Preservation Act.

E. Standard treatments

The ACHP has authority to establish standard methods for treating a category of properties, a category or undertakings, or a category of effects on historic properties on its own initiative or at the request of a federal agency or other party.²⁰² Federal agencies are not obligated to follow approved standard treatments, but may elect to do so when they feel standard treatments will be of benefit in meeting their Section 106 compliance requirements. Standard treatments are distinct from, but should comport with the Secretary of the Interior's Standards for the Treatment of Historic Properties.²⁰³

F. Program comments

At the request of a federal agency or on its own initiative the ACHP may provide comments on a category of undertakings in lieu of conducting individual reviews.²⁰⁴

III. Identifying and Evaluating Historic Properties

Section 106 applies to historic properties: buildings, sites, structures, objects, and districts included in or eligible for inclusion in the National Register of Historic Places (NRHP).²⁰⁵ The term “historic properties” includes prehistoric archeological sites and associated artifacts, records and remains, as well as properties of traditional religious and cultural importance to Indian tribes and Native Hawaiian organizations.²⁰⁶

The term eligible for inclusion includes any property that meets the criteria for listing in the NRHP, even if it has not yet been determined eligible.²⁰⁷ The Section 106 regulations recognize the challenge of identifying historic properties in several ways. First, the FAA is expected to make a reasonable and good faith effort to identify historic properties.²⁰⁸ Second, the regulations allow for a phased approach, under which identification and evaluation can be deferred.²⁰⁹ Finally, the regulations provide for post-review identification or discovery of historic properties.²¹⁰ These provisions are discussed in more detail below, along with other aspects of the identification and evaluation process.

A. Designing a “Reasonable and Good Faith” Identification Effort

The Section 106 regulations call for “appropriate identification efforts,” and gives as examples background research, consultation, oral history interviews, sample field investigation and field survey.²¹¹ The regulations also direct the federal agency to take into account “past planning, research and studies; the magnitude of and nature of the undertaking and the degree of federal involvement; and the likely nature and location of historic properties.”²¹² This means that the scope of identification may be different for different undertakings. An undertaking in which FAA is the project proponent may call for a greater levels of effort than one for which FAA has a minimal role; undertakings that affect an area known to be rich in archeological resources may necessitate a more comprehensive field survey than one which affects a heavily disturbed area; and the availability of extensive studies may lessen the need for additional research.

Properties can be eligible for the National Register for many reasons. They may be associated with a historic person or event (e.g., Orville Wright or the first flight) or with the broad pattern of history (e.g., the development of the air navigation system). They can be eligible for unique or distinctive architecture (e.g., Dulles Airport), as a representative example of a common construction method (e.g., Quonset huts), or for their potential to provide information about another time and culture, (e.g., a prehistoric archeological site or the remains of a Colonial-era bakery).

Although it must consult with the SHPO/THPO and other parties, the FAA is ultimately responsible for determining the scope and intensity of its identification efforts.

In addition to the factors cited in the regulations, the FAA should weigh the expenditure of resources against the possibility of overlooking historic properties that could delay approval or implementation of the undertaking if identified later on in the process.

1) ACHP Guidance

The guidance document, *Meeting the “Reasonable and Good Faith” Identification Standard in Section 106 Review* (http://www.achp.gov/docs/reasonable_good_faith_identification.pdf), provides additional insight into what the ACHP considers a reasonable identification effort. According to the ACHP, identification efforts should be “logically designed to identify eligible properties without being either excessive or inadequate” in light of the regulatory factors (i.e., past planning, the nature of the undertaking and the likely nature and location of historic properties).²¹³ The FAA should be able to explain how these factors inform the content and intensity of its identification plan.

The ACHP considers that a reasonable identification plan must include, at a minimum, a review of existing information on properties within the area of potential effect (APE), and should include:

- Documentation of the of the boundaries of the APE, including how far above and/or below ground level it extends, accounting for direct and indirect effects.
- A review of existing information, including information on properties not yet identified as historic.
- A clear description of steps that will be taken to determine the presence or absence of historic properties.
- Recognition of applicable professional, state, tribal, and local laws, standards and guidelines; as well as effective methodologies used in other historic property surveys in the area.²¹⁴

The ACHP considers an identification plan to be in good faith when it is carried out in consultation with appropriate parties; initiated in a timely manner (with adequate time for review by consulting parties); implemented by qualified individuals and acknowledges the special expertise of Indian tribes and Native Hawaiian organizations; fully supported by adequate funding and other necessary resources; and does not manipulate or ignore evidence. The ACHP has also made clear that a reasonable and good faith identification effort does not require the approval of the SHPO/THPO or other consulting party. The ACHP also has clarified that a reasonable and good faith effort does not

The FAA can decide how much effort to put into identifying properties beyond those already listed in the NRHP or documented by the SHPO

An undertaking that involves excavation might have an APE that includes below grade resources, while an undertaking that involves air traffic or airport actions could have an APE that extends upwards to cover noise and visual impacts from aircraft overflights.

necessarily require identification of every historic property within the APE; investigations outside of, or below, a properly defined APE or ground verification of the entire APE.²¹⁵

2) The Secretary's Standards

In 1998, the National Park Service (NPS) in conjunction with the ACHP, issued the *Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs*.²¹⁶ Standard 2 addresses the timely identification and evaluation of historic properties, and in turn reference the *Secretary's Standards for Preservation Planning*.²¹⁷

The Secretary's Standards have no regulatory effect, but serve as guidance to federal agencies and are referenced in the Section 106 regulations.

3) Use of Consultants

Identification and evaluation of historic resources must be done by professionals meeting the Secretary of the Interior's Professional Qualification Standards for archeology and historic preservation.²¹⁸ FAA field staff can identify previously-evaluated resources through database searches, but developing the thorough understanding of an area's history necessary to identify and evaluate additional historic resources requires professional expertise. The FAA typically relies on consultants retained directly by the FAA, by an applicant or sponsor, or as a sub-contractor to a consultant preparing the NEPA analysis, who meet these qualifications, to perform the identification and evaluation work. Many large consulting firms maintain in-house Cultural Resources staff or have a relationship with one or more firms as sub-contractors. Contractors should meet the Secretary's Standards for Professional Qualifications.²¹⁹

Most SHPOs can provide lists of qualified Cultural Resources contractors familiar with the region.

Previously-completed archeological studies can usually only be obtained by archeologists meeting the Secretary of Interior's Standards.

Hiring a Cultural Resources contractor may be advisable for a large project or when there is a potential to affect archeological resources or unlisted historic properties.

B. Defining the Area of Potential Effect

The area of potential effect (APE) is the geographic area or areas affected by the undertaking, and covers both direct and indirect effects. Although the regulations do not define the term indirect effect, the criteria of adverse effects cover reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance, or be cumulative.²²⁰ This is similar to the definition of "indirect effects" under NEPA, which further defines the term as including growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate.²²¹ However, the APE is also influenced by the scale and nature of the undertaking,²²² and the

Because the APE determines the geographic scope of identification, a properly-defined APE is critical to ensuring that identification efforts are neither inadequate nor excessive.

FAA's level of identification effort should take into account these factors as well as the degree of FAA involvement in the undertaking.²²³ The APE may be different for different kinds of effects.²²⁴

The APE(s) can be refined as planning and analysis progresses. In the early stages of project planning, it may be necessary to define APEs for several of the alternatives being evaluated under NEPA. Section 106 does not require identification and evaluation of historic properties for all NEPA alternatives,²²⁵ although in some cases, it will be necessary to evaluate one or more project alternatives as a means of avoiding or mitigating adverse effects.²²⁶

C. Identifying Properties Listed in the National Register

Typically the first step in identification efforts is identifying properties within the APE already listed in the National Register of Historic Places (NRHP). NRHP records are available online at <http://www.nps.gov/nr/research>. Documentation for properties listed after 2012 is fully available electronically. Some properties listed before 2013 have been digitized; others are available only in summary form. Universal Transverse Mercator (UTM) coordinates, included on NRHP nomination forms, can be used to verify the location of a specific listed property or the boundaries of a site or district. Listed properties in the unrestricted NRHP database can be located using the NPS Cultural Resources GIS program (http://www.nps.gov/nr/research/data_downloads.htm.)

Properties that were the subject of a previous Determination of Eligibility under 36 CFR Part 63 are not technically listed in the NRHP and are not currently available in the NRHP database; however, the NRHP staff maintains a spreadsheet of federal agency DOEs, which is available at: <http://nrhp.focus.nps.gov/natreg/docs/Download.html>.

Most State Historic Preservation Offices maintain a database of listed properties in their state, which may be searchable in a more convenient way than the official NRHP records.

In some cases, defining multiple APEs can make identification efforts more efficient. For example, by defining separate APEs for ground-disturbance and noise, it may be possible to limit archeological investigations to the project footprint. A larger area subject to noise and/or visual effects may be surveyed for above-ground resources.

NRHP listings are organized by state and county, rather than city, and the summary listing is not always readily associated with a particular location.

NPS cautions that use of this database does not in itself constitute compliance with Section 106 in the identification and evaluation of historic properties.

NRHP staff generally can verify the status of a property and may be able to provide documentation that may not be available on-line; the FAA FPO can provide contact information for the appropriate NRHP staff person.

D. Identifying Potential Historic Properties

Many SHPO/THPOs have extensive inventories or surveys of properties that have been documented to some degree; these can provide a good starting point for identifying resources in a project area, as well as helpful information for evaluating additional historic properties. The SHPO/THPO may also have information on properties that have been informally evaluated through a consensus DOE or a preliminary eligibility opinion, but not yet listed. The FAA should be able to obtain any information necessary to conduct Section 106 review, although contractors may need to verify that they are conducting research on behalf of the FAA and/or meet the DOI professional qualifications to gain access to all relevant information.

Recognized methods for identifying historic properties in the APE range from predictive computer modeling and “windshield” surveys to comprehensive archeological investigations and building-by-building inventories. Different methods generally are used to identify below-ground (archeological) resources and above-ground buildings and structures. Other types of resources, such as sites of historic events, landscapes and traditional cultural properties may require a combination of approaches.

1) Historic Contexts

Historic properties need to be considered in the context of a particular historic event or trend and evaluated in relationship to other similar properties. This organizational framework is called a historic context.²²⁷ The eligibility of a resource for the NRHP depends heavily on the historic context, which gives a resource its meaning. According to National Register Guidance, “knowledge of historic contexts allows applicants to understand a historic property as a product of its time and as an illustration of aspects of heritage that may be unique, representative, or pivotal.”²²⁸

Historic contexts are organized by theme, place, and time, and are usually documented in written narratives describing the significant events and/or broad patterns of development in an area over a defined period. Historic contexts can make it easier to recognize potential historic properties by identifying property types associated with the events or patterns of development. Property types should represent the full range of activities associated with

Existing records should be examined and background research should be conducted before any field work. Depending on the size and location of the APE, reviewing existing documentation can require consulting more than one source of information.

Some SHPOs have begun charging a fee for access to online records to offset the cost of digitizing paper records and maintaining the database. It may be more cost-effective to pay the fee for online access than to send a researcher to review documents in person at the SHPO archives; contractors may have monthly or annual accounts.

There is no single “best” method for identifying historic properties that are not listed in the NRHP.

Historic contexts can be developed at various geographic and chronological scales. For example, a historic context for Coal Mining in Northeastern Pennsylvania between 1860 and 1930 would look at a specific region over a 70-year timespan, while a historic context for World War II airfields might look at nationwide development over a much shorter period.

the historic context. For example, the historic context for the industrial revolution in a particular region might identify property types for mill buildings, workers' housing, and prominent civic structures built by mill owners. The historic context should also characterize the locational distribution of these property types (e.g., Mills were located on rivers and streams able to produce water power).²²⁹

Historic contexts often can be found in Multiple Property Documentation Forms,²³⁰ which contain information common to related properties, and facilitates the evaluation and registration of individual properties. For example, the Kansas SHPO has prepared a historic context statement for World War II-Era aviation-related facilities in that state, available at http://www.kshs.org/resource/national_register/MPS/worldwarII/Airbases_MPDF.pdf. The NRHP maintains a spreadsheet of Multiple Property documentation forms, available at <http://nrhp.focus.nps.gov/natreg/docs/Download.html>.

2) Reconnaissance Surveys

A reconnaissance survey is defined as “an examination of all or part of an area accomplished in sufficient detail to make generalizations about the types and distributions of historic properties that may be present” within a given project area.²³¹ For above-ground resources, this might take the form of a “windshield survey” limited to what can be seen from a public right-of-way (literally through the windshield of a car). For below-ground resources (e.g., archeological sites) and certain kinds of traditional cultural properties, a reconnaissance survey might look for terrain features that could indicate the likely presence or absence of resources, and may include limited shovel testing. The results of a reconnaissance survey inform the decision about the need for and scope of any additional surveys.

3) Intensive Surveys

Intensive surveys are conducted when it is necessary to know precisely what historic properties exist in a given area or when information sufficient for later evaluation and treatment decisions is needed on individual historic properties.²³² Intensive surveys may involve a comprehensive systematic property-by-property review, or may be targeted to specific properties within the APE.

Before beginning an identification effort under Section 106 process, it's a good idea to check to see if any SHPOs or other agencies have developed historic context statements or studies that might be applicable.

The Department of Defense has prepared context statements on a number of themes, available, at: <http://www.denix.osd.mil/cr/HistoricBuildingsStructures/ConTextStudies.cfm>.

A reconnaissance survey provides a sense of the character of the APE and an idea of the types of resources that are likely to exist within it.

The result of an intensive survey is often referred to as a cultural resource inventory.

4) Archeological Surveys

An archeological survey is usually required for any project involving ground disturbance in an area which hasn't previously been surveyed. Archeological investigation usually follows three levels of evaluation, each more intensive than the next. The levels usually consist of survey, evaluation, and mitigation (although the terminology varies by region), and are sometimes called Phase I, II, and III, respectively. The field methodology for Phase I may include field reconnaissance, shovel test pits, and perhaps metal detecting across an area to identify the presence or absence of sites. If evidence of a site is identified, a Phase II evaluation will try to obtain more information on the type of site and features present, and delineate the boundaries. Phase II evaluation methods may include more closely spaced shovel test pits as well as excavation of a limited number of larger test pits, designed to see if the first evidence is part of something larger and, if possible, to characterize the site in terms of extent and dates it was occupied. Phase II work should be designed to provide a project manager conclusive recommendations on the type of site and its historic significance, to inform decisions about how to proceed.

Phase III archeology is excavation of the site. It is usually done only when Phase II evaluations determine a significant site is present and there is no option within the project design that can avoid the site. If Phase II evaluation indicates a significant site is present, efforts should be made to avoid disturbance of the site. In extreme cases, sites can potentially be sealed in place to preserve them. An archeological site is a non-renewable resource which can only be excavated once, and excavation destroys the site. Consequently, Phase III excavations are considered an adverse impact to a historic property, and should be considered a last resort option when there is no other feasible option for avoidance. For administrative purposes, excavation is considered mitigation of the adverse impacts, because it records the information the site contains. Excavation is generally conducted under the terms of a Memorandum of Agreement (MOA) with the SHPO and any other consulting parties.

In terms of project planning, archeological survey is a significant unknown variable. Archeological excavation requires specific technical expertise and takes time, which can also make it

expensive. If an unidentified site is discovered in the survey process, the project timeline and cost projections will be affected. For this reason, surveys should begin as early as possible to give adequate time for evaluation of a project area. Be aware that some states require a permit even for basic Phase I reconnaissance of an area, and work on federal land also has unique requirements.

5) Confidentiality of certain information.

If disclosure of information about the location, character or ownership of a historic property may cause a significant invasion of privacy, risk harm to the property, or impede its use as a traditional religious site, the FAA must consult with the ACHP and Secretary of the Interior to determine whether to withhold that information.²³³ If an Indian tribe or Native Hawaiian organization objects to the disclosure of information the FAA must treat it as confidential.²³⁴ If information is determined confidential, the ACHP and Secretary of the Interior will determine who may have access to it for purposes of carrying out the Section 106 review.²³⁵ Other federal laws may also limit public disclosure of certain information.²³⁶

The FAA's policy is to not depict the exact location of archeological sites on a publicly-available map because of concerns with intentional disturbance or theft of artifacts.

E. Evaluating Properties for National Register Eligibility

The FAA, in consultation with the SHPO, is responsible for making a finding of eligibility for those resources that have not previously been evaluated.²³⁷ Therefore, it is important for anyone fulfilling the role of agency official under Section 106 to have some familiarity with the process and criteria for assessing the eligibility of properties for the NRHP. Detailed guidance for applying National Register criteria can be found at <http://www.nps.gov/nr/publications>.

Although a Cultural Resources contractor can generally provide recommendations on the potential eligibility of resources, the actual finding of eligibility or ineligibility must be made by the FAA.

To be eligible for the NHRP, a property not only must be significant in American history, architecture, archeology, engineering and/or culture, but also must possess integrity, which means that it retains enough of its original attributes to convey that significance. These concepts are discussed in more detail below.

1) Types of Historic Properties

The NRHP recognizes different types of resources as historic properties:

- **Buildings** are constructions created principally to shelter any form of human activity.²³⁸ An eligible building includes all of its structural elements; parts of buildings, such as facades or interiors, are not eligible independent of the rest of the building.²³⁹ Buildings that have lost any basic structural components are considered ruins and categorized as sites.²⁴⁰
- **Structures** are interdependent and interrelated parts in a definite pattern of organization, such as large engineering projects,²⁴¹ and generally include constructions made for purposes other than human shelter.²⁴² Like buildings, an eligible structure includes all of the existing components; a structure that has lost its historic configuration or pattern or organizations is considered a ruin and categorized as a site.²⁴³
- **Objects** are material things that may be moveable by nature or design but are related to a specific setting or environment, such as archeological artifacts.²⁴⁴ Small objects that are not designed for a specific location, such as furniture, and objects that have been relocated to a museum generally are not eligible for the NRHP.²⁴⁵
- **Sites** are locations of an event, occupation, or activity.²⁴⁶ A site can also be the location of a building or structure, where the location itself maintains archeological or historical value regardless of the value of any existing structure.²⁴⁷ A site does not need to be marked by physical remains, and may be a natural landmark associated with significant events or activities.²⁴⁸
- **Districts** are geographically-definable areas possessing a significant concentration, linkage or continuity of sites, buildings, structures and/or objects united by a common history or plan.²⁴⁹ A district may be composed of parts that are not individually eligible, but that collectively are significant. Properties within a district can be contributing or non-contributing to its significance.²⁵⁰

Although many people associate historic properties with buildings, the NRHP also includes structures, objects, sites, and districts.

Aircraft, highways, and radio towers are all considered structures.

Monuments, outdoor sculpture and mileposts are examples of objects that can be listed in the National Register.

Sites include designed landscapes, such as city parks and cultural landscapes, such as farms.

Non-contributing properties within eligible districts are treated as eligible for purposes of Section 106 review; however, their non-contributing status is relevant to the assessment and resolution of adverse effects.

2) Criteria for Evaluation

To be eligible for the NRHP, a property must be significant in American history, architecture, archeology, engineering, and/or culture and meet one or more of the criteria for evaluation. Properties can be significant for more than one reason, and can be listed under more than one criterion. The criteria for evaluation are defined in 36 CFR 60.4:

- a. The property is associated with events that have made a significant contribution to the broad patterns of our history;
- b. is associated with the lives of persons significant in our past;
- c. embodies the distinctive characteristics of a type, period, or method of construction; represents the work of a master; possesses high artistic values; or represents a significant and distinguishable entity whose components may lack individual distinction; or
- d. have yielded, or may be likely to yield, information important in prehistory or history.

To be eligible for the NRHP, a property must be significant within a relevant historic context.²⁵¹ Properties can be significant at the local, state or national level depending on the scope of the historic context.²⁵²

3) Periods of Significance

In addition to identifying the applicable criteria; the eligibility evaluation should define a period of significance for each criterion met. A period of significance may be as brief as a single year (e.g., the date of construction for a property that is significant for its architecture) or a period of several decades (e.g., the length of time that a property was associated with an important person).²⁵³

4) Boundaries

Evaluating an eligible property includes identifying the boundaries of the property.²⁵⁴ Boundaries should encompass the resources that contribute to the property's significance, and include surrounding land that contributes to the significance of the resources by functioning as the setting.²⁵⁵ Boundaries for listed properties may need to be revised for nominations prepared in the early years of the

Although a property only needs to be documented as significant under one criterion to be listed, other criteria, if applicable, may be important in assessing effects and identifying appropriate measures to resolve any adverse effects.

The NRHP criteria are generally referred to by their regulatory subsections (e.g., Criterion A, Criterion B, etc.)

Criterion D is most often applied to archeological sites.

The period of significance can be important in assessing the effects of an undertaking.

Boundaries for certain kinds of properties, such as rural historic landscapes and traditional cultural properties, often encompass large land areas and can be challenging to identify and justify.

National Register program, when nominations had limited or vague boundary documentation.²⁵⁶

5) Exceptions to Otherwise Ineligible property types

Ordinarily, properties less than 50 years old and certain types of properties are not considered eligible for the NRHP, unless they are integral parts of an eligible district. However, some of these properties may qualify if they fall within one of the following criteria considerations (as with the criteria for evaluation, these are often referred to by the regulation's subsection):

- a. A **religious property** that derives its primary significance from architectural or artistic distinction or historical importance.
- b. A building or structure **moved from its original location** which is primarily significant for its architectural value, or which is the surviving structure most importantly associated with a historic person or event.
- c. A **birthplace or grave** of a historical figure of outstanding importance if there is no appropriate site or building associated with his or her productive life.
- d. A **cemetery** that derives its primary importance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events.
- e. A **reconstructed building** when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan, and when no other building or structure with the same association has survived.
- f. A property primarily **commemorative** in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance.
- g. A property achieving significance **within the past 50 years** if it is of exceptional importance.

Exceptional importance for properties that are less than 50 years old can be based on the extraordinary importance of an event or trend, or on the fragility of an entire category of resources that were not built to last that long (e.g., temporary housing), or, by their nature, are subject to circumstances that destroy their integrity before 50 years have elapsed.²⁵⁷ The intent of the 50-year threshold is to prevent properties of passing contemporary interest

Do not assume that a property is not eligible for the NRHP just because it is less than 50 years old; or that properties over 50 years old are automatically eligible.

A less-than-50 year old property that meets one or more of the NRHP criteria should be assessed for exceptional importance. If it is not exceptionally important, but is close to 50 years or will reach 50 years within the project timeline, it can be treated as eligible for management purposes.

from being listed.²⁵⁸ Additional guidance on evaluating these resources is available at:

<http://www.nps.gov/nr/publications/bulletins/pdfs/nrb22.pdf>.

6) Traditional Cultural Properties

Traditional cultural properties (TCPs) are historic properties that derive significance from the role they play in a community's historically rooted beliefs, customs, and practices. The physical resource associated with the practices, customs and/or beliefs may be eligible for listing in the NRHP. A TCP does not have to be the product or construction of humans; a natural feature can be an eligible site if it was the location of significant historic or prehistoric activity, even if there is no visible evidence of that activity. TCPs must meet one or more of the NRHP criteria for significance.

A TCP generally has the following characteristics:

- It is associated with a community that existed historically and continues to the present;
- the community shares cultural practices, customs, or beliefs that are rooted in its history;
- these shared cultural practices, customs, or beliefs continue to be held or practiced today and are important in maintaining the continuing cultural identity and values of the community;
- the community transmits or passes down these shared cultural practices, customs, or beliefs through the generations, usually orally or through practice; and
- the property is directly associated with the identified cultural practices, customs or beliefs.²⁵⁹

In 2011, the ACHP adopted a Native American Traditional Cultural Landscapes Action Plan to address consideration of TCPs in the Section 106 process; more information can be found at: http://www.achp.gov/na_culturallandscapes.html. NPS is conducting consultation regarding traditional cultural landscapes and potential revisions to the *National Register Bulletin: Guidelines for Evaluating and Documenting Traditional Cultural Properties*. The current version of that document can be found at: <http://www.nps.gov/nr/publications/bulletins/nrb38/>.

TCPs are not a separate property type. Most often TCPs are sites, but buildings, structures, objects or districts can also be TCPs.

TCPs are typically identified through consultation with tribes or other consulting parties that have cultural affiliation with resources within the APE.

TCPs are treated like other historic properties listed in or eligible for the NRHP for the purposes of Section 106. As with other types of historic resources, it is important to identify the characteristics that make the property eligible for the NRHP in order to assess effects under Section 106.

Defining the period of significance and boundaries for a TCP can be challenging, particularly when it encompasses a large land area.

7) Integrity

A property must be able to convey its significance through the original location, design, setting, materials, workmanship, feeling and/or association. These are referred to as aspects of “integrity.” Not all aspects of integrity will be applicable to all properties. To determine whether a property has sufficient integrity to be eligible for the NRHP, it is necessary to identify why, where and when it was important, and to define the essential physical features that represent its importance. These features should be visible enough to convey the property’s significance (unless the property is primarily significant under criterion D for information potential). The NRHP regulations list seven aspects of integrity:

- **Location:** A building or structure will have integrity of location if it has not been moved from its original site.
- **Design:** Alterations to or removal of the elements that create the form, plan, space, structure and style of a property may affect the property’s integrity of design.
- **Setting:** A property will have integrity of setting if the physical features that define the area surrounding the property convey the essential character of the setting as it was during the period of significance.
- **Materials:** Removal or deterioration of the materials originally used to construct a building or structure may result in a loss of the property’s integrity of materials.
- **Workmanship:** The property should retain physical evidence of the craft or skill used to construct the property.
- **Feeling:** A property that is able to express the aesthetic or historic sense of a particular period of time through its physical features retains integrity of feeling.
- **Association:** A property retains integrity of association if it is the place where events or activity occurred and is sufficiently intact to convey that relationship to an observer.

Additional guidance, including guidance on which aspects of integrity are most important in evaluating a particular property, can be found in the National Register Bulletin: How to Apply the National Register Criteria for Evaluation, available at:

<http://www.nps.gov/nr/publications/bulletins/pdfs/nrb16a.pdf>

Eligible properties will always have several, and usually most of the relevant aspects of integrity.

Evaluating integrity can require detailed assessment of the interior and exterior condition of a property and documentation of alterations to original materials, design and setting.

Once you have identified the physical features relevant to the property’s significance, you can determine which aspects of integrity are most important to conveying that significance.

Integrity of feeling and association, which depend on individual perceptions, are never sufficient to support eligibility on their own.

F. Determinations of Eligibility, Nominations and Appeals

1) Consensus DOEs and Formal DOEs

Under Section 106, the FAA, in consultation with the SHPO/THPO, determines if the NRHP criteria are met, and, if the FAA and SHPO/THPO agree, the property can be considered eligible (or not eligible) for purposes of Section 106 review.²⁶⁰

This is the most common determination by FAA project managers. Technically these determinations are distinct from a formal determination of eligibility (DOE), which is a decision by the Department of the Interior (through the Keeper of the National Register) that a property meets the NRHP criteria.²⁶¹

If the SHPO/THPO does not agree with the FAA that a property is ineligible, or if the FAA determines that a question exists about its eligibility, then the FAA can ask for a formal determination of eligibility (DOE) from the Keeper of the National Register under a process, which is governed by separate regulations at 36 CFR Part 63.²⁶²

A request for a DOE must include or be accompanied by a description of the property, a statement of significance, photographs, a map, and, if available, the opinion of the SHPO/THPO.²⁶³ The NRHP staff will ask for the SHPO/THPO's opinion (if it is not included with the request); if it is not received within three weeks, the Keeper will proceed with the determination.²⁶⁴ The Keeper will respond in writing with 45 days. If the documentation submitted with the request is not sufficient to make a professional evaluation, the Keeper will advise the FAA in writing of the additional information needed, and will re-start the 45-day period upon receipt of the requested information.²⁶⁵

There are two other situations in which formal DOEs are issued under the NRHP regulations: when a property is removed from the NRHP for procedural deficiencies,²⁶⁶ and when a private property owner (or the majority of private property owners in a district) objects to listing.²⁶⁷ A property that has been formally determined eligible in either of these situations is treated in the same way as listed properties for purposes of Section 106.

Consensus DOEs between the FAA and a SHPO/THPO do not have any binding effect.

Although the NRHP regulations provide for FPOs to seek a formal DOE from the Keeper to confirm a consensus DOE, this rarely occurs in practice.

Only Federal agencies can request a formal DOE from the Keeper of the NRHP under Part 63; however, anyone can obtain the Keeper's review of eligibility by appealing the refusal of an SHPO or FPO to nominate a property. See discussion of nomination appeals, below.

Failure to adequately document a DOE request can extend the review period well beyond the initial 45 days.

The Keeper's determination that a property is eligible for the National Register does not mean that the property must be preserved; but it does mean that the Section 106 process must be completed before any actions are taken affecting that property.

2) Nominations

Outside of the Section 106 process, the SHPO/THPO has the lead role in evaluating and nominating properties to the NRHP.²⁶⁸ A private citizen can work with the SHPO to develop a nomination. Nominations from the SHPO/THPO are reviewed by a State Review Board prior to being submitted to the NRHP.²⁶⁹ Federal agencies can also nominate properties to the NRHP. These nominations are submitted to the appropriate SHPO for review and comment, but are not subject to review by the State Review Board.²⁷⁰ If the NRHP finds that the property meets the criteria for eligibility it will be listed in the NRHP within 45 days, unless a private property owner (or the majority of private property owners in a district) objects to the listing, in which case it will be determined eligible.²⁷¹

Listing in the NRHP does not have any effect on private property rights or prevent any actions which may otherwise be taken by a property owner under federal law.

3) Requests for Nominations and Appeals

Any person or organization can complete a NRHP registration form and submit it to the SHPO or, in the case of a federally-owned property, to the FPO with a request that the property be nominated.²⁷² The SHPO or FPO must respond in writing within 60 days with a technical opinion on whether the property is adequately documented and if it appears to meet the NRHP criteria; if the documentation is adequate and meets the criteria, the SHPO/FPO must process the nomination and forward it to the NRHP.²⁷³ If the SHPO/FPO decides not to nominate the property for any reason or simply fails to do so within the regulatory timeline, any person or local government may appeal the refusal to nominate to the Keeper of the NRHP.²⁷⁴ The Keeper's decision is the final administrative action on such appeals.²⁷⁵

APPENDIX A: SECTION 106 REVIEW CHECKLIST

NOTE: This is a simplified outline of the procedures under Section 106 and should not be relied on as the sole basis for compliance with the regulatory requirements.

STEP 1: INITIATE THE PROCESS

Identify the undertaking: *Is it a type of activity that could affect historic properties if any were present?*

NO: Document the finding to conclude Section 106 review.

YES: Complete the following and proceed to Step 2.

- Notify the SHPO/THPO.
- Identify additional consulting parties.
- Develop a plan to involve the public.

STEP 2: IDENTIFY HISTORIC PROPERTIES

- Define the APE and seek SHPO/THPO concurrence.
- Review existing documentation.
- Seek information from others (e.g., consulting parties, tribes)
- Identify properties listed in the NRHP.
- Identify and evaluate properties potentially eligible for the NRHP and seek SHPO/THPO concurrence.

Does the SHPO/THPO concur in the FAA's eligibility findings?

NO: Treat the property as eligible for purposes of Section 106 and proceed to Step 3;

or

Work with the FPO to submit a request for a Determination of Eligibility (DOE) from the National Register; if the Keeper determines the property eligible proceed to Step 3.

YES: *Are historic properties present, and if so, could they be affected by the undertaking?*

YES: Proceed to Step 3.

NO: Propose a finding of "No Historic Properties Affected" and do the following:

- Provide documentation to the SHPO/THPO.
- Notify all consulting parties.
- Make documentation available for public inspection.

Did the SHPO/THPO (or the ACHP, if involved) object within 30 days?

YES: Continue consultation or ask the ACHP to review the finding and notify the FPO.

NO: **Make a finding of “No Historic Properties Affected” to conclude Section 106 review.**

STEP 3: ASSESS EFFECTS

Apply criteria of adverse effects: *Could the reasonably foreseeable effects of the undertaking (direct and indirect) diminish the integrity of any property eligible for the National Register?*

YES: Proceed to Step 4.

NO: Propose finding of no adverse effects and do the following:

- Provide documentation to SHPO/THPO.
- Notify consulting parties.

Did the SHPO/THPO (or the ACHP, if involved) or any consulting party object within 30 days?

NO: **Make a finding of “No Adverse Effects” to conclude Section 106 review.**

- Maintain a record of the finding.
- Provide information on the finding to the public on request.

YES: Continue consultation or ask the ACHP to review the finding and notify the FPO.

STEP 4: RESOLVE ADVERSE EFFECTS

- Notify the ACHP of the finding of adverse effects.
- Provide documentation to all consulting parties.
- Make documentation publicly available and provide an opportunity for the public to express their views.
- Consult to avoid, minimize or mitigate adverse effects.

Does the SHPO/THPO (and ACHP if participating) agree on how to resolve adverse effects?

NO: Notify the FPO to evaluate options.

YES: Do the following:

- Develop a Memorandum of Agreement (MOA).
- Invite additional parties to be signatories.
- Invite other consulting parties to concur
- Have all of the parties sign the MOA.
- Submit a copy of the executed MOA and supporting documentation to the ACHP to conclude Section 106 review.**

END NOTES

¹ National Historic Preservation Act (NHPA) of 1966, Pub. L. 102-575, *codified at* 54 U.S.C. § 300101 et seq.

² 54 U.S.C. § 304101.

³ 54 U.S.C. § 302101-302701.

⁴ 54 U.S.C. § 306108.

⁵ 54 U.S.C. § 302701.

⁶ See 65 Fed. Reg. 77698 (Dec. 12, 2000).

⁷ See <http://www.nps.gov/thpo/>.

⁸ 54 U.S.C. §§ 306101 - 306114.

⁹ See also, 36 CFR 60.2(a) (“Having complied with this procedural requirement [at 36 CFR part 800] the Federal agency may adopt any course of action it believes is appropriate. While the Advisory Council comments must be taken into account and integrated into the decisionmaking process, program decisions rest with the agency implementing the undertaking.”)

¹⁰ See, e.g., 36 CFR § 800.3(a) (establish undertaking); 800.4(a) (determine scope of identification); § 800.4(b)(1) (reasonable and good faith effort to carry out appropriate identification); § 800.4(d)(1)(iv)(C) (final decision to affirm finding of no historic properties affected); § 800.5 (final decision to affirm finding of no adverse effect); § 800.7(c)(4) (final decision after failure to resolve adverse effects).

¹¹ See 36 CFR § 800.8.

¹² 36 CFR § 800.8(c).

¹³ 40 C.F.R. § 1501.2.

¹⁴ Council on Environmental Quality and Advisory Council on Historic Preservation, *NEPA and NHPA, A Handbook for Integrating NEPA and Section 106* (March 2013), available at http://www.achp.gov/docs/NEPA_NHPA_Section_106_Handbook_Mar2013.pdf and http://www.whitehouse.gov/sites/default/files/nepa_and_nhpa_handbook.pdf.

¹⁵ 36 CFR § 800.8(a)(1).

¹⁶ 36 CFR § 800.8(b).

¹⁷ 49 U.S.C. § 303(c).

¹⁸ 36 CFR § 800.2(d)(2).

¹⁹ 36 CFR § 800.2(a)(4).

²⁰ 36 CFR § 800.16(f).

²¹ 36 CFR § 800.1(a).

²² 36 CFR § 800.1(c).

²³ 36 CFR § 800.2(c)(1).

²⁴ See 36 CFR § 800.2(c)(2).

²⁵ 36 CFR § 800.2(c)(4).

²⁶ 36 CFR part 800, Appendix A.

²⁷ 36 CFR § 800.3(f).

²⁸ 36 CFR § 800.2(c).

²⁹ See 36 CFR part 800, Appendix A – *Criteria for Council Involvement in Reviewing Individual section 106 Cases*.

³⁰ 36 CFR § 800.2(b).

³¹ 36 CFR § 800.2(a).

³² 49 U.S.C. § 47128(b)(4); 36 CFR § 800.2(a).

³³ 54 U.S.C. § 306104.
³⁴ E.O. 13287 (Mar. 3, 2003).
³⁵ 54 U.S. C. § 302301(1).
³⁶ 54 U.S. C. § 302702.
³⁷ 36 CFR § 800.16(x).
³⁸ 54 U.S.C. § 300313.
³⁹ 54 U.S.C. § 300314.
⁴⁰ 54 U.S. C. § 302101.
⁴¹ 36 CFR parts 60 and 63.
⁴² 36 CFR part 65.
⁴³ See <http://www.nps.gov/archeology/sites/fedarch.htm>.
⁴⁴ 36 CFR § 800.1(a).
⁴⁵ 36 CFR § 800.2(a)(4).
⁴⁶ 36 CFR § 800.1(c).
⁴⁷ 36 CFR § 800.9(b).
⁴⁸ NHPA § 110(k), codified at 16 USC 470h-2(k); 800.9(c)(1).
⁴⁹ 36 CFR § 800.2(a)(4).
⁵⁰ 36 CFR § 800.2(a)(3).
⁵¹ 54 U.S.C. § 306131; 36 CFR § 800.2(a)(1), (3). The Department of the Interior issued Professional Qualification Standards as part of the Secretary's Standards and Guidelines for Archeology and Historic Preservation in 1983 (48 Fed. Reg. 44716). These standards and guidelines are not regulatory, and in some cases have been revised or updated without being republished. See http://www.nps.gov/local-law/arch_stnds_9.htm or http://www.cr.nps.gov/local-law/gis/html/table_of_contents.html.
⁵² 36 CFR § 800.16(y).
⁵³ 36 CFR § 800.3(a)(1).
⁵⁴ See NEPA and NHPA, p. 11.
⁵⁵ 36 CFR § 800.3(g).
⁵⁶ 36 CFR § 800.14.
⁵⁷ 36 CFR § 800.3(a).
⁵⁸ 36 CFR § 800.3(a)(1).
⁵⁹ 36 CFR § 800.3(b).
⁶⁰ 36 CFR § 800.3(c).
⁶¹ 36 CFR § 800.3(c)(2).
⁶² 36 CFR § 800.16(x).
⁶³ 36 CFR § 800.2(c)(2)(i)(A).
⁶⁴ 36 CFR § 800.2(c)(2)(i)(B); 800.3(d).
⁶⁵ 36 CFR § 800.3(d).
⁶⁶ 36 CFR § 800.2(c)(2)(ii)(B)-(C).
⁶⁷ 36 CFR § 800.2(c)(1)(ii); 800.3(c)(1).
⁶⁸ 36 CFR § 800.3(f).
⁶⁹ 36 CFR § 800.2(c)(3).
⁷⁰ 36 CFR § 800.2(c)(3)-(4); 800.3(f)(3).
⁷¹ 36 CFR § 800.2(c)(2)(ii)(D); see also § 800.3(f)(2).

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- ⁷² Pub. L. 102-575, § 101(d)(6)(B); codified at 16 U.S.C. 470a; 800.2(c)(2)(ii).
- ⁷³ 36 CFR § 800.2(c)(2)(ii)(D).
- ⁷⁴ 36 CFR § 800.2(c)(5); 800.3(f).
- ⁷⁵ 36 CFR § 800.3(f)(3).
- ⁷⁶ 36 CFR § 800.6(a)(1)(ii).
- ⁷⁷ 36 CFR § 800.2(b)(1).
- ⁷⁸ 36 CFR § 800.2(b)(1); 36 CFR part 800, Appendix A.
- ⁷⁹ 36 CFR part 800, Appendix A.
- ⁸⁰ 36 CFR § 800.2(d); § 800.3(e).
- ⁸¹ 36 CFR § 800.2(d)(1).
- ⁸² 36 CFR § 800.3(e).
- ⁸³ 36 CFR § 800.3(e).
- ⁸⁴ See Section 106 Regulations: Section-by-Section Questions and Answers, available at <http://www.achp.gov/106q&a.html>.
- ⁸⁵ 36 CFR § 800.2(d)(2); 800.11(c)(1).
- ⁸⁶ 54 U.S.C. § 306108; 36 CFR § 800.16(1).
- ⁸⁷ 36 CFR § 800.16(1)(1).
- ⁸⁸ 36 C.F.R. §60.4(a)-(b).
- ⁸⁹ 36 C.F.R. §60.4(c).
- ⁹⁰ See National Register Bulletin: How to Complete the National Register Registration Form, pp. 51, 68-70, available at <http://www.nps.gov/nr/publications/bulletins/pdfs/nrb16a.pdf>; 36 CFR part 65.
- ⁹¹ 36 C.F.R. §60.4.
- ⁹² See National Register Bulletin: How to Apply the National Register Criteria for Evaluation, Chapter VIII, How to Evaluate the Integrity of a Property; National Register Bulletin: How to Complete the National Register Registration Form; available at <http://www.nps.gov/nr/publications/bulletins/pdfs/nrb16a.pdf>.
- ⁹³ 36 CFR § 800.4(b)(1).
- ⁹⁴ 36 CFR § 800.16(d).
- ⁹⁵ 36 CFR § 800.16(d).
- ⁹⁶ 36 CFR § 800.4(a)(1).
- ⁹⁷ 36 CFR § 800.4(a)(2).
- ⁹⁸ 36 CFR § 800.4(a)(3).
- ⁹⁹ 36 CFR § 800.4(a)(4).
- ¹⁰⁰ 36 CFR § 800.4(b).
- ¹⁰¹ 36 CFR § 63.2(a).
- ¹⁰² 36 CFR § 60.1.
- ¹⁰³ 36 CFR § 800.4(c)(1).
- ¹⁰⁴ 36 CFR § 800.4(c)(1).
- ¹⁰⁵ 36 CFR § 800.4(c)(2).
- ¹⁰⁶ 36 CFR § 800.11(a).
- ¹⁰⁷ 36 CFR § 800.4(c)(2); 36 CFR part 63.
- ¹⁰⁸ 36 CFR § 800.4(c)(1).
- ¹⁰⁹ 36 CFR § 800.4(c)(2).
- ¹¹⁰ 36 CFR § 800.4(b)(2).

111 36 CFR § 800.16(i).
112 36 CFR § 800.4(d)(1).
113 36 CFR § 800.4(d)(2).
114 36 CFR § 800.4(d)(1).
115 36 CFR § 800.11(d).
116 36 CFR § 800.4(d)(1).
117 36 CFR § 800.4(d)(1)(i).
118 36 CFR § 800.4(d)(1)(ii).
119 36 CFR § 800.4(d)(1)(iii).
120 36 CFR § 800.4(d)(1)(ii).
121 36 CFR § 800.4(d)(1)(ii).
122 36 CFR § 800.4(d)(1)(iv).
123 36 CFR § 800.4(d)(iv)(A); Appendix A.
124 36 CFR § 800.4(d)(1)(iv).
125 36 CFR § 800.4(d)(1)(iii), (iv)(A). The regulations refer to the “head of the agency”; in the past the ACHP has stated that it interprets that to mean the Secretary of a Department with component agencies or bureaus, and that comments would also be transmitted to the agency or bureau head. See ACHP, Section 106 Regulations, Section-by-Section Questions and Answers, available at <http://www.achp.gov/106q&a.html>. The decision to provide its opinion to the head of an agency is guided by the criteria in Appendix A of 36 CFR part 800.
126 36 CFR § 800.4(d)(1)(iv)(B).
127 36 CFR § 800.4(d)(1)(iv)(C).
128 36 CFR § 800.4(d)(1)(iv)(D).
129 36 CFR § 800.4(d)(1)(iv)(C).
130 36 CFR § 800.5(a)(1).
131 36 CFR § 800.5(a)(2).
132 36 CFR § 800.5(d)(2); 800.6(a).
133 36 CFR § 800.6(a)(1)(i)(B); 800.10(b), (c).
134 36 CFR § 800.5(b).
135 36 CFR § 800.5(d)(2).
136 36 CFR § 800.5(c)(2)(iii).
137 36 CFR § 800.5(c).
138 36 CFR § 800.11(e).
139 36 CFR § 800.5(c)(1).
140 36 CFR § 800.5(d)(1).
141 36 CFR § 800.5(d)(1).
142 36 CFR § 800.5(c)(2).
143 36 CFR § 800.5(c)(2)(i).
144 36 CFR § 800.5(c)(2)(i).
145 36 CFR § 800.5(c)(2)(iii).
146 36 CFR § 800.5(c)(2)(ii).
147 36 CFR § 800.(c)(3)(i); 36 CFR part 800, Appendix A.
148 36 CFR § 800.5(c)(3)(i).
149 36 CFR § 800.5(c)(3)(i).

150 36 CFR § 800.5(c)(2)(ii); 800.5(c)(3)(i).
151 36 CFR § 800.5(c)(3)(ii)(A)-(B).
152 36 CFR § 800.5(c)(3)(ii)(C).
153 36 CFR § 800.5(c)(3)(ii)(B).
154 54 U.S.C. § 306107; 36 CFR § 800.10(a).
155 36 CFR § 800.6(a)(2).
156 36 CFR § 800.6(a)(3).
157 36 CFR § 800.6(a)(4).
158 36 CFR § 800.6(a)(4).
159 36 CFR § 800.6(a)(4).
160 36 CFR § 800.11(e).
161 36 CFR § 800.6(a)(1)(i)(A).
162 36 CFR § 800.6(a)(1)(i)(B)-(C).
163 36 CFR § 800.6(a)(1)(iii).
164 36 CFR part 800, Appendix A (b).
165 36 CFR § 800.6(a)(1)(iii).
166 36 CFR § 800.6(a)(1)(iv).
167 36 CFR § 800.16(o).
168 36 CFR § 800.6(c).
169 36 CFR § 800.6(c)(5).
170 36 CFR § 800.6(c)(4).
171 36 CFR § 800.6(c)(6); see also 800.13.
172 36 CFR § 800.6(c).
173 36 CFR § 800.6(c)(1).
174 36 CFR § 800.6(b)(1)(iv); 36 CFR § 800.6(b)(2); 36 CFR § 800.6(c)(1)(i), (ii).
175 36 CFR § 800.6(c)(2)(i).
176 36 CFR § 800.6(c)(2)(iii).
177 36 CFR § 800.6(c)(2)(iv).
178 36 CFR § 800.6(c)(3).
179 36 CFR § 800.6(c)(9).
180 36 CFR § 800.6(b)(1)(iv).
181 36 CFR § 800.11(f).
182 36 CFR § 800.7(a).
183 36 CFR § 800.6(b)(1)(v).
184 36 CFR § 800.7(b).
185 36 CFR § 800.6(b)(1)(v); 36 CFR § 800.7(a).
186 36 CFR § 800.7(a)(1).
187 36 CFR § 800.7(a)(2).
188 36 CFR § 800.7(a)(3).
189 36 CFR § 800.7(a)(4).
190 36 CFR § 800.7(c).
191 36 CFR § 800.7(c)(2).
192 36 CFR § 800.7(c)(1).
193 36 CFR § 800.7(c)(3).
194 36 CFR part 800, supart C.

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- ¹⁹⁵ 36 CFR § 800.14(a).
¹⁹⁶ 36 CFR § 800.14(a)(4).
¹⁹⁷ 36 CFR § 800.14(b).
¹⁹⁸ 36 CFR § 800.6(i)(C).
¹⁹⁹ 36 CFR § 800.14(b).
²⁰⁰ 36 CFR § 800.14(b)(4).
²⁰¹ 36 CFR § 800.14(c).
²⁰² 36 CFR § 800.14(d).
²⁰³ 36 CFR part 68.
²⁰⁴ 36 CFR § 800.14(e).
²⁰⁵ 36 CFR § 800.16(l).
²⁰⁶ 36 CFR § 800.16(l)(1).
²⁰⁷ 36 CFR § 800.16(l)(2).
²⁰⁸ 36 CFR § 800.4(b)(1).
²⁰⁹ 36 CFR § 800.4(b)(2).
²¹⁰ 36 CFR § 800.13.
²¹¹ 36 CFR § 800.4(b)(1).
²¹² 36 CFR § 800.4(b)(1).
²¹³ ACHP, Meeting the “Reasonable and Good Faith” Identification Standard in Section 106 Review, p. 2; 36 CFR § 800.4(b)(1).
²¹⁴ Meeting the “Reasonable and Good Faith” Identification Standard, p. 2.
²¹⁵ Meeting the “Reasonable and Good Faith” Identification Standard, p. 3
²¹⁶ Secretary of the Interior’s Standards and Guidelines for Federal Agency Historic Preservation Programs, available at <http://stage.historicpreservation.gov/%7Bdyn.file%7D/c6c6433f882740c986b22415b546c6db/>
²¹⁷ http://www.cr.nps.gov/local-law/arch_stnds_1.htm.
²¹⁸ 36 CRR Part 61.
²¹⁹ http://www.cr.nps.gov/local-law/gis/html/table_of_contents.html.
²²⁰ 36 CFR § 800.5(a)(1).
²²¹ 40 CFR 1508.8
²²² 36 CFR § 800.16(d).
²²³ 36 CFR § 800.4(b)(1).
²²⁴ 36 CFR § 800.16(d).
²²⁵ CEQ/ACHP at 13.
²²⁶ CEQ/ACHP at 13
²²⁷ See National Register Bulletin: How to Apply the National Register Criteria for Evaluation, Chapter V, How to Evaluate a Property within its Historic Context; National Register Bulletin: How to Complete the National Register Registration Form; available at <http://www.nps.gov/nr/publications/bulletins/pdfs/nrb16a.pdf>; and the Secretary’s Guidelines for Preservation Planning, Developing Historic Contexts, available at http://www.cr.nps.gov/local-law/arch_stnds_1.htm
²²⁸ National Register Bulletin: How to Complete the National Register Registration Form, p. 4.
²²⁹ National Register Bulletin: How to Apply the National Register Criteria for Evaluation, p.8.

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- ²³⁰ See National Register Bulletin: How to Complete the National Register Multiple Property Form, available at <http://www.nps.gov/nr/publications/bulletins/pdfs/nrb16b.pdf>.
- ²³¹ Secretary of the Interior's Guidelines for Identification, available at http://www.nps.gov/local-law/arch_stnds_2.htm.
- ²³² Secretary of the Interior's Guidelines for Identification, available at http://www.nps.gov/local-law/arch_stnds_2.htm.
- ²³³ 36 CFR § 800.11(c).
- ²³⁴ 36 CFR § 800.6(a)(5).
- ²³⁵ 36 CFR § 800.11(c).
- ²³⁶ 36 CFR § 800.11(c).
- ²³⁷ 36 CFR § 800.4(c)(1).
- ²³⁸ 36 CFR § 60.3(a).
- ²³⁹ National Register Bulletin: How to Apply the National Register Criteria for Evaluation, p. 4.
- ²⁴⁰ National Register Bulletin: How to Apply the National Register Criteria for Evaluation, p. 4.
- ²⁴¹ 36 CFR § 60.3(p).
- ²⁴² National Register Bulletin: How to Apply the National Register Criteria for Evaluation, p.4
- ²⁴³ National Register Bulletin: How to Apply the National Register Criteria for Evaluation, p.4
- ²⁴⁴ 36 CFR § 60.3(j).
- ²⁴⁵ National Register Bulletin: How to Apply the National Register Criteria for Evaluation, p.5.
- ²⁴⁶ 36 CFR § 60.3(l).
- ²⁴⁷ 36 CFR § 60.3(l).
- ²⁴⁸ National Register Bulletin: How to Apply the National Register Criteria for Evaluation, p. 5.
- ²⁴⁹ 36 CFR § 60.3(d).
- ²⁵⁰ National Register Bulletin: How to Apply the National Register Criteria for Evaluation, p. 5.
- ²⁵¹ National Register Bulletin: How to Apply the National Register Criteria for Evaluation, p. 9.
- ²⁵² National Register Bulletin: How to Apply the National Register Criteria for Evaluation, p. 9;
National Register Bulletin: How to Complete the National Register Registration Form, p.51.
- ²⁵³ National Register Bulletin: How to Complete the National Register Registration Form, p. 42.
- ²⁵⁴ National Register Bulletin: How to Complete the National Register Registration Form, pp. 56-57.
- ²⁵⁵ National Register Bulletin: Defining Boundaries for National Register Properties, pp. 1-2, available at: <http://www.nps.gov/nr/publications/bulletins/boundaries/>.
- ²⁵⁶ National Register Bulletin: Defining Boundaries for National Register Properties, p. 4.
- ²⁵⁷ National Register Bulletin: How to Apply the National Register Criteria for Evaluation, pp. 42-43.
- ²⁵⁸ National Register Bulletin: How to Apply the National Register Criteria for Evaluation, p. 41.
- ²⁵⁹ National Register Bulletin: Guidelines for Evaluating and Documenting Traditional Cultural Properties, available at <http://www.nps.gov/nr/publications/bulletins/nrb38/>.
- ²⁶⁰ 36 CFR § 800.4(c)(2).
- ²⁶¹ 36 CFR § 60.3(c).
- ²⁶² 36 CFR § 63.2(c). These regulations were issued in 1977, and although they have been re-designated they have never been amended. Some of the provisions, such as the Keeper's request that the federal agency or SHPO nominate a property within six months of a DOE, 36 CFR § 63.6, have rarely if ever been implemented.
- ²⁶³ 36 CFR § 63.2(d).

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- ²⁶⁴ 36 CFR § 63.2(e).
²⁶⁵ 36 CFR § 63.2(e).
²⁶⁶ 36 CFR § 63.4(b).
²⁶⁷ 36 CFR § 60.6(s).
²⁶⁸ 36 CFR § 60.6(a).
²⁶⁹ 36 CFR § 60.6(j).
²⁷⁰ 36 CFR § 60.9.
²⁷¹ 36 CFR § 60.6(r); 60.9(h).
²⁷² 36 CFR § 60.11(a).
²⁷³ 36 CFR § 60.11(c) - (g).
²⁷⁴ 36 CFR § 60.12.
²⁷⁵ 36 CFR § 60.12(e).