



# NATIONAL HISTORIC PRESERVATION ACT

A Guidebook on Section 106 | August 2013



UNITED STATES MARINE CORPS



## NATIONAL HISTORIC PRESERVATION ACT



### PURPOSE

This *Guidebook on Section 106 of the National Historic Preservation Act* identifies the requirements for the United States Marine Corps (USMC) to comply with the National Historic Preservation Act (NHPA). The information included in this Guidebook is intended to inform Marine Corps personnel about the NHPA and the Section 106 Review Process, and how these integrate into the National Environmental Policy Act (NEPA) planning process.

## INTRODUCTION

In the National Historic Preservation Act of 1966, Congress established a comprehensive program to preserve our nation's historic properties. The NHPA establishes the federal government's policy to provide leadership on the preservation of historic properties and to administer federally owned or controlled historic properties in the spirit of stewardship. Regulation 36 of the Code of Federal Regulations (CFR) Part 800 sets forth the procedural requirements to identify, evaluate, and determine the effects of all undertakings, or proposed actions, on historic properties.

### What are Historic Properties?

A historic property is a prehistoric or historic district, site, building, structure, landscape, or object included in or eligible for inclusion in the National Register of Historic Places (NRHP). This term includes artifacts, records, and remains that are related to and located within these National Register properties. The term also includes properties of traditional religious and cultural importance to an Indian Tribe or Native Hawaiian Organization (NHO), so long as that property also meets the criteria for listing in the National Register.

*Source: Advisory Council on Historic Preservation*

### The National Register of Historic Places

The National Register of Historic Places is the nation's official list of properties recognized for their significance in American history, architecture, archaeology, engineering, and culture. It is administered by the National Park Service, which is part of the Department of the Interior. The Secretary of the Interior established the criteria for evaluating the eligibility of properties for the National Register. In short, the property must be significant, of a certain age, and have integrity.

- ▶ **Significance** means that the property is associated with events, activities, or developments that were important in the past, with the lives of people who were historically important, with distinctive architectural history, landscape history, or engineering achievements; or that it has the potential to yield important information through archaeological investigation about our past.
- ▶ **Age** means that the property typically is 50 years old or older, although there are exceptions for newer properties with high significance.
- ▶ **Integrity** means that the property and its setting still look and feel the way they did at the time the property was constructed.

*Source: Advisory Council on Historic Preservation*

## INTEGRATING SECTION 106 INTO THE NEPA PLANNING PROCESS

The National Environmental Policy Act (NEPA) requires federal agencies to consider the environmental impacts of their actions before they are implemented, document those considerations, and involve the public in their planning process. When the proposed action has the potential to impact historic properties, federal agencies are encouraged to coordinate the Section 106 process with the NEPA process to save time and reduce costs. For detailed information on the NEPA process, please see the U.S. Marine Corps NEPA Planning Process Guidebook (available at: <https://intranet.emportal.usmc.mil/sites/hqnepa/nepa/#default.aspx>).

## SECTION 106 REVIEW

### What is Section 106 Review?

Section 106 is a crucial part of the NHPA because it requires federal agencies to consider the effects on historic properties of actions that they carry out, approve, or fund. Additionally, federal agencies must provide the Advisory Council on Historic Preservation (ACHP) an opportunity to comment on such actions prior to the agency's decision to proceed with the action. In practice, the ACHP delegates this responsibility to the State Historic Preservation Officer (SHPO), and only engages in reviews if the project will have adverse effects on a historic property.

The Section 106 process is designed to:

1. Identify possible conflicts between historic preservation objectives and the proposed action, and
2. Resolve those conflicts in the public interest through consultation.

Section 106 review encourages, but does not mandate, historic preservation. Sometimes there is no way for a needed project to proceed without impacting historic properties. However, a Section 106 review does ensure that preservation values are factored into federal agency planning and decisions. Because of Section 106, federal agencies must assume responsibility for the consequences of the actions they carry out, approve, or fund and be publicly accountable for their decisions.

*Source: Advisory Council on Historic Preservation*

### Marine Corps Responsibility in Section 106 Review

Section 106 of the NHPA requires that the head of a federal agency with jurisdiction over a federal or federally assisted project:

*"shall, prior to the approval of the expenditure of any federal funds on the undertaking or prior to the issuance of any license...take into account the effect of the undertaking on*

*any district, site, building, structure or object that is included in or eligible for inclusion in the National Register. The head of any such federal agency shall afford the Advisory Council on Historic Preservation...a reasonable opportunity to comment with regard to such undertaking.”*

For the Marine Corps, this requirement applies to actions both on federal property and non-federal property. The Marine Corps must take into account the effects of an action on historic properties and afford the ACHP/SHPO and other interested parties a reasonable opportunity to comment on such effects. Failure to do so can result in a letter from the Secretary of the Interior to the Secretary of the Navy stating that the Marine Corps foreclosed the ACHP’s ability to comment on the project and its effects. The foreclosure letter is made public, often leading to litigation or other forms of redress, which can be used against the USMC in a manner that can halt or delay critical activities or programs.

## KEY ELEMENTS OF THE SECTION 106 REVIEW PROCESS

### ROLES OF THE PARTICIPANTS

36 CFR 800 identifies participants in the Section 106 review process and outlines their roles and responsibilities.

Potential participants include agency officials, ACHP, SHPO, Indian Tribes, and NHOs; representatives of local governments; applicants for federal assistance, permits, licenses and other approvals; additional consulting parties; and the public.

### INVOLVING THE PUBLIC

Public involvement is a critical aspect of the Section 106 process. The type of public involvement will depend upon various factors, including but not limited to, the nature and complexity of the undertaking, potential impact, and historic property, and the likely interest of the public in preservation issues. The public must be notified, with sufficient information to allow meaningful comments, so that they can express their views during the various stages and decision-making points of the Section 106 process.

### CONSULTATION

“Consultation” is a dynamic, good-faith process of seeking, discussing, and considering the views of other participants and, where feasible, seeking agreement with them regarding matters in the Section 106 process.

Throughout the Section 106 process, the agency is to involve the consulting parties in the findings and determinations.

### DOCUMENTATION

During resolution of adverse effects, the purpose of consultation is to seek ways to avoid, minimize, or mitigate any adverse effects, and to incorporate the results of that consultation into a Memorandum of Agreement.

The agency should ensure that a determination, finding, or agreement reached through the Section 106 process is supported by sufficient documentation to enable any reviewing parties (including the public) to understand its basis.

Remember, the NHPA and ACHP regulations do not require that all historic properties must be preserved. Rather, the regulations require the agency to consider input from the SHPO, Native American tribes/ NHOs, other interested parties, and the public; seek ways to avoid, minimize, or mitigate the effects; and fulfill the procedural requirements of the NHPA prior to proceeding with the proposed action.

*Source: United States Marine Corps Cultural Resources Manager's Toolbox*

## **Steps in the Section 106 Review Process**

When an agency proposes an action that has the potential to affect historic properties, federal agencies are responsible for initiating a Section 106 review in coordination with the SHPO. Appointed by the governor, the SHPO coordinates the state's historic preservation program and consults with the federal agency during the Section 106 review.

In addition, federal agencies must also consult with officials of federally recognized Indian Tribes or NHOs when the action has the potential to:

1. affect historic properties on tribal lands or lands governed by federal treaty rights, or
2. affect historic properties of significance to tribes/NHOs located off tribal lands.

Some tribes have officially designated Tribal Historic Preservation Officers (THPOs), while others designate representatives to consult with agencies as needed. In Hawaii, agencies consult with NHOs.

To successfully complete a Section 106 review, federal agencies must do the following:

- ▶ establish the Area of Potential Effects (APE) for the action;
- ▶ identify whether any historic properties are present in the APE;
- ▶ determine how those historic properties might be affected;
- ▶ explore measures to avoid, minimize or mitigate negative effects ("adverse effect") to historic properties; and
- ▶ if the action will have adverse effects on historic properties, negotiate a Memorandum of Understanding with the SHPO/THPO/NHO (and the ACHP in some cases) on measures to resolve the adverse effects.

Regulations issued by the ACHP spell out the Section 106 review process, specifying actions federal agencies must take to meet their legal obligations. The regulations are published in 36 CFR Part 800, "Protection of Historic Properties," and can be found on the ACHP's website at <http://www.achp.gov/regs-rev04.pdf>.

**1 INITIATE SECTION 106 PROCESS**

**ESTABLISH REQUIREMENT FOR SECTION 106 REVIEW**  
United States Marine Corps (USMC) determines whether the proposed action is an Undertaking (federally funded, permitted, takes place on federal property) and is the type of action that could impact historic properties, as per 36 CFR 800.16.

No undertaking:  
Section 106 process ends

No potential to cause effects:  
Section 106 process ends

**IDENTIFY APPROPRIATE STATE/TRIBAL HISTORIC PRESERVATION OFFICER/NATIVE HAWAIIAN ORGANIZATION (SHPO/THPO/NHO)**  
USMC identifies appropriate SHPO/THPO/NHO to be involved in the Section 106 process.

**PLAN TO INVOLVE THE PUBLIC**  
In consultation with the SHPO/THPO/NHO, USMC develops a plan for public involvement in the Section 106 process.

**IDENTIFY OTHER CONSULTING PARTIES**  
In consultation with the SHPO/THPO/NHO, USMC identifies others entitled to be consulting parties and invites them for inclusion in the Section 106 process.

**2 IDENTIFY HISTORIC PROPERTIES**

**DETERMINE SCOPE OF EFFORTS**  
In consultation with the SHPO/THPO/NHO, USMC:  
1) determines and documents the area of potential effect;  
2) reviews existing information on historic properties in the area of potential effect; and,  
3) seeks information from consulting parties, as appropriate.

**IDENTIFY HISTORIC PROPERTIES**  
In consultation with the SHPO/THPO/NHO, USMC identifies historic properties within the area of potential effect.

No historic properties affected:  
Section 106 process ends

**3 ASSESS ADVERSE EFFECTS**

**APPLY CRITERIA OF ADVERSE EFFECTS**  
In consultation with SHPO/THPO/NHO, USMC applies the criteria of adverse effects to the area of potential effect, as per 36 CFR 800.5.

No historic properties adversely affected:  
Section 106 process ends

**HISTORIC PROPERTIES ARE ADVERSELY AFFECTED**

**4 RESOLVE ADVERSE EFFECTS**

**CONTINUE CONSULTATION**  
USMC consults with SHPO/THPO/NHO and other consulting parties to develop and evaluate alternatives or modifications to the project that could avoid, minimize or mitigate adverse effects on historic properties.

Failure to agree:  
Request that Secretary of Navy terminates Section 106 process.

**MEMORANDUM OF AGREEMENT**

ACHP comment:  
The ACHP renders advisory comments to the head of the agency, which must be considered when the final agency decision on the project is made.

- ▶ **Establishing the APE.** The APE is typically defined as the area where the action will have direct effects, such as the construction footprint for a new building. Because the Section 106 process also requires that federal agencies account for indirect and cumulative effects on historic properties, an APE is often more broadly defined to include areas where the project could have indirect or cumulative effects. For example, construction of a new wind turbine may not directly impact a historic building, but it does represent an intrusive new visual element into that building's setting. Accordingly, the APE for the wind turbine could be defined to include historic buildings if the viewshed or line of site is altered by the turbine.
- ▶ **Identify Historic Properties.** Identifying historic properties present in the APE is not always just a simple exercise of checking the NRHP to see if there are listed resources that occur within the APE. In many cases, all or part of an APE has not been subject to previous survey or, if surveyed, there may be a number of resources that were identified but not evaluated for their NRHP eligibility. A historic property need not be formally listed in the National Register to be considered under the Section 106 process. Resources that have been determined eligible for listing, even if not actually listed, have equal protection/consideration under the Act. Similarly, if the action will affect resources that have not been formally evaluated for NRHP eligibility, agencies must either evaluate such resources and obtain SHPO/THPO/NHO concurrence on the eligibility determination, or must treat such resources as eligible for the purposes of completing the Section 106 review process. For more information on eligibility determinations, visit the National Register website at [www.cr.nps.gov/nr](http://www.cr.nps.gov/nr).
- ▶ **Determining Effects.** In determining whether the action will have an adverse effect on a historic property, the key concept is whether the action will alter or remove the "character-defining features" of that property that make it eligible for listing in the NRHP. For example, original windows and doors are often considered character-defining features of historic buildings. Removal of original windows and doors can thus be considered an adverse effect on a historic building; however, this effect can be mitigated by replacing the windows with windows constructed of "in-kind" materials that match the design of the original windows, as outlined in the Secretary of Interior's Standards for Renovation, Rehabilitation, and Restoration" (<http://www.nps.gov/hps/tps/standguide/>).
- ▶ **Consultation to Resolve Adverse Effects.** If the action will have adverse effects, it is critical that the Marine Corps demonstrate good faith in discussing potential options or alternatives to implementing the action. For example, if a proposed utility corridor would impact an eligible archaeological site and there is sufficient room to

## SECTION 106: WHAT IS AN ADVERSE EFFECT?

If an action may alter characteristics that qualify a specific property for inclusion in the National Register in a manner that would diminish the integrity of the property, or alter/remove character-defining features of the property, that action is considered to have an adverse effect on the property. Integrity is the ability of a property to convey its significance, based on its location, design, setting, materials, workmanship, feeling, and association.

Adverse effects can be direct or indirect and include the following:

- ▶ physical destruction or damage
- ▶ alteration inconsistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties
- ▶ relocation of the property
- ▶ change in the character of the property's use or setting
- ▶ introduction of incompatible visual, atmospheric, or audible elements
- ▶ neglect (including deferred maintenance) that leads to deterioration
- ▶ transfer, lease, or sale of a historic property out of federal control without adequate preservation restrictions

*Source: Advisory Council on Historic Preservation*

alter the corridor to avoid the site, the agency should consider and discuss the pros and cons of that alternative openly with the SHPO/THPO/NHO. If the Marine Corps has no viable options to avoid adverse effects, the Marine Corps must be prepared to discuss its planning process and constraints in an open and good faith manner. The Marine Corps should also be prepared to discuss mitigation options if avoidance or minimization are not viable options. The greater the transparency, the easier it is to convey that we have done due diligence in considering options, and the greater the potential for a successful consultation.

The Marine Corps also must engage the public and other interested parties in the Section 106 process, notifying the public of the proposed action and potential effects. The Marine Corps must seek public input on the project and consider any information provided regarding the potential effects of the action on historic properties, as well as any potential options/alternatives that could avoid or minimize effects on historic properties.

If, after following the Section 106 process, the Marine Corps and the SHPO/THPO/NHOs are unable to reach agreement on the effects of the project, or how to resolve adverse effects, the Marine Corps can request that the Secretary of the Navy officially terminate the Section 106 consultation process. Termination requires that the Marine Corps provides

documentation of our Section 106 process (correspondence, meeting minutes, etc.) to the ACHP and identify our proposed way forward with respect to the project. The ACHP has 45 days to provide comments to the Secretary of the Navy (SECNAV), which the Marine Corps will need to take into account prior to implementing its action. As a rule, few Section 106 consultations are officially terminated due to the need to elevate the issues to the SECNAV and obtain SECNAV's approval to terminate. Marine Corps action proponents should not consider termination to be a "get out of jail free" card that can be used to avoid difficult consultations, nor will SECNAV agree to terminate a consultation unless the Marine Corps can clearly prove that we have made every effort to consult openly and in good faith regarding alternatives and effects.

Section 106 reviews ensure federal agencies fully consider historic preservation issues and the views of the public during project planning. Section 106 reviews do not mandate the approval or denial of projects.

*Source: Advisory Council on Historic Preservation*

## **MARINE CORPS QUICK GLANCE**

### **Why do I have to care?**

All federal agencies must complete a Section 106 review before approving an action that may impact historic properties. If the agency acts without properly completing a Section 106 review, the ACHP can issue a finding that the agency has prevented meaningful review of the action (foreclosure). This means that, in the ACHP's opinion, the agency has failed to comply with Section 106 and, therefore, has not met the requirements of federal law. A foreclosure letter significantly increases the risk of litigation from non-governmental organizations, and requires the agency to demonstrate its compliance with the Section 106 process.

### **How long does the Section 106 process usually take?**

The duration of the Section 106 process depends on the historic property, anticipated effect, proposed undertaking, complexity of consultation and negotiation, and the extent of public interest or controversy. There are regulations, however, that provide specific time limits for some SHPO and ACHP actions in response to agency requests for comment.

### **Who pays/programs funds for this process?**

Funding of a Section 106 review comes from the project proponent. The installation Cultural Resources Manager (CRM) is typically the lead for coordinating Section 106 reviews.

*Source: Advisory Council on Historic Preservation & National Park Service*

## SOURCES/REFERENCES

1. Advisory Council on Historic Preservation, "Protecting Historic Properties: A Citizen's Guide to Section 106 Review," 2011.
2. United States Marine Corps, "Cultural Resources Manager's Toolbox," Version 1, 2009.
3. Code of Federal Regulations: 36 CFR Part 800 – Protection of Historic Properties
4. Advisory Council on Historic Preservation Website: <http://www.achp.gov/index.html>
  - a. <http://www.achp.gov/106summary.html>
  - b. <http://www.achp.gov/work106.html>
  - c. <http://www.achp.gov/usersguide.html>
5. National Park Service Website: <http://www.nps.gov/nhl/qa.htm#15>

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### National Conference of State Historic Preservation Officers

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For the SHPO in your state, see:  
[www.ncshpo.org/fi nd/index.htm](http://www.ncshpo.org/fi nd/index.htm)

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