

8. Historical, Architectural, Archeological, and Cultural Resources

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Historical, architectural, archeological, and cultural resources encompass a range of sites, properties, and physical resources relating to human activities, society, and cultural institutions. Such resources include past and present expressions of human culture and history in the physical environment, such as prehistoric and historic archaeological sites, structures, objects, districts, which are considered important to a culture or community. Historical, architectural, archeological, and cultural resources also include aspects of the physical environment, namely natural features and biota, which are a part of traditional ways of life and practices and are associated with community values and institutions.

8.1. Regulatory Setting

Exhibit 8-1 lists the primary statutes, regulations, Executive Orders (EOs), and other requirements related to historical, architectural, archeological, and cultural resources. See Appendix B.7 for more detail on these requirements.

Exhibit 8-1. Statutes, Regulations, Executive Orders, and Other Requirements Related to Historical, Architectural, Archeological, and Cultural Resources

Statute or Executive Order	Location in U.S. Code or <i>Federal Register</i>	Implementing Regulation(s)	Oversight Agency ^a	Summary ^a
American Indian Religious Freedom Act	42 U.S.C. § 1996	43 CFR § 7.7 43 CFR § 7.32 25 CFR § 262.7	Not applicable	Requires consultation with Native American groups concerning actions on sacred sites or affecting access to sacred sites. Requires federal agencies to consider the impacts of their actions on religious sites and objects that are important to Native Americans, including Alaska Natives and Native Hawaiians, regardless of the eligibility for the NRHP.
Antiquities Act of 1906	54 U.S.C. §§ 320301-320303	43 CFR part 3	DOI; NPS	Authorizes the President to declare areas of public lands as national monuments and to reserve or accept private lands for that purpose.
Archeological and Historic Preservation Act	54 U.S.C. §§ 312501-312508	36 CFR part 68 36 CFR part 79 Guidelines for Archeology and Historic Preservation: Standards and Guidelines, 48 <i>Federal Register</i> 44716, (September 29, 1983)	NPS; Departmental Consulting Archeologist and Archeological Assistance Program	Provides for the preservation of historical and archeological data which might otherwise be destroyed or irreparably lost due to a federal action, federally-licensed action, or federally-funded action. DOI's Standards and Guidelines for Archeology and Historic Preservation (see 36 CFR part 68) advise federal agencies on implementation of this law.

Statute or Executive Order	Location in U.S. Code or <i>Federal Register</i>	Implementing Regulation(s)	Oversight Agency ^a	Summary ^a
Archaeological Resources Protection Act	16 U.S.C. §§ 470aa-470mm	43 CFR part 7 36 CFR part 79 25 CFR part 262	NPS; Departmental Consulting Archeologist and Federal Archaeology Program	Prohibits unauthorized excavation of archaeological resources on federal or Indian lands, and establishes standards for permissible excavation by permit (see Section 8.2.2 below). Requires federal agencies to identify archaeological sites on federal lands.
Department of Transportation Act, Section 4(f)	49 U.S.C. § 303	23 CFR part 774	DOT	See Chapter 5 of this Desk Reference for a discussion of Section 4(f) of the DOT Act.
Historic Sites Act of 1935	54 U.S.C. §§ 320101-320106	36 CFR part 65	DOI; NPS	Declares as national policy the preservation for public use of historic sites, buildings, objects, and properties of national significance. Provides the basis for the National Historic Landmarks program for designating properties having exceptional value in commemorating or illustrating the history of the United States.
National Historic Preservation Act	54 U.S.C. § 300101 et seq.	36 CFR part 800 (Section 106 process); 36 CFR part 60 (NRHP); 36 CFR part (state and local preservation programs); 36 CFR part 62.1 (National Natural Landmarks); 36 CFR part 65 (National Historic Landmarks); 36 CFR part 68 (standards); 36 CFR part 73 (World Heritage Program); 36 CFR part 78 (waiver of federal agency section 110 responsibilities); 36 CFR part 79 (curation)	NPS; ACHP; SHPO; THPO	Establishes the ACHP, an independent agency, and the NRHP within the NPS. Section 106 of the NHPA requires federal agencies to consider the effects of their undertaking (or action) on properties listed in or eligible for listing in the NRHP. Section 110 of the NHPA governs federal agencies' responsibilities to preserve and use historic buildings; designate an agency Federal Preservation Officer; and identify, evaluate, and nominate eligible properties under the control or jurisdiction of the agency to the NRHP. Section 112 of the NHPA addresses professional standards. Section 314 discusses confidentiality requirements that may apply to an undertaking.

Statute or Executive Order	Location in U.S. Code or <i>Federal Register</i>	Implementing Regulation(s)	Oversight Agency ^a	Summary ^a
Native American Graves Protection and Repatriation Act	25 U.S.C. §§ 3001-3013	43 CFR part 10 25 CFR § 262.8	NPS; NAGPRA Review Committee	Addresses the disposition of certain Native American cultural items, including human remains, by a federally-funded repository, and governs the inadvertent discovery of Native American cultural items on federal and tribal lands.
Public Building Cooperative Use Act	40 U.S.C. §§ 601a, 601a1, 606, 611c, and 612a4	41 CFR parts 101-117	GSA	Encourages the acquisition and use of space in suitable buildings of historic, architectural, or cultural significance.
Executive Order 11593, Protection and Enhancement of the Cultural Environment	36 <i>Federal Register</i> 8921, (May 13, 1971)	Not applicable	ACHP	Requires that federal plans and programs contribute to the preservation and enhancement of sites, structures, and objects of historic, architectural, or archaeological significance.
Executive Order 13006, Locating Federal Facilities on Historic Properties in Our Nation's Central Cities	61 <i>Federal Register</i> 26071, (May 24, 1996)	Not applicable	ACHP	Requires federal agencies, when operationally appropriate and economically prudent, to use and maintain historic properties and districts, especially those located in central business areas, and to give first consideration when locating federal facilities to historic properties within historic districts, then developed or undeveloped sites within historic districts, and lastly to historic properties outside of historic districts.
Executive Order 13007, <i>Indian Sacred Sites</i>	61 <i>Federal Register</i> 26771, (May 29, 1996)	Not applicable	Assistant to the President for Domestic Policy	Requires federal agencies to consult on a government-to-government basis with Indian Tribes if the proposed project involves an Indian Sacred Site.
Executive Order 13175, Consultation and Coordination with Indian Tribal Governments	65 <i>Federal Register</i> 67249, (November 9, 2000)	Not applicable	Not applicable	Requires federal agencies to have an accountable tribal consultation process that ensures timely and meaningful input from Indian Tribes on the development of federal policies that have tribal implications. Directs executive departments and agencies to engage in government-to-government relations with Native American tribal governments in a knowledgeable, sensitive manner.

Statute or Executive Order	Location in U.S. Code or <i>Federal Register</i>	Implementing Regulation(s)	Oversight Agency ^a	Summary ^a
DOT Order 5650.1, Protection and Enhancement of the Cultural Environment, November 20, 1972	Not applicable	Not applicable	DOT	Requires that federal plans and programs contribute to the preservation and enhancement of sites, structures, and objects of historic, architectural, or archaeological significance.
Executive Memorandum, Government-to-Government Relations with Native American Tribal Governments (April 29, 1994) Executive Memorandum on Tribal Consultation (Nov. 5, 2009)	65 <i>Federal Register</i> 67249, (November 9, 2000)	Not applicable	Not applicable	Directs executive departments and agencies to develop a detailed plan of action to implement Executive Order 13175.

^a ACHP = Advisory Council on Historic Preservation; CFR = Code of Federal Regulations; DOI = U.S. Department of the Interior; DOT = U.S. Department of Transportation; GSA = Government Services Administration; NAGPRA = Native American Graves Protection and Repatriation Act; NHPA = National Historic Preservation Act; NPS = National Park Service; NRHP = National Register of Historic Places; SHPO = State Historic Preservation Officer; THPO = Tribal Historic Preservation Officer; U.S.C. = United States Code.

8.1.1. NEPA and Section 106 of the NHPA

This chapter describes the analysis of historical, architectural, archeological, and cultural resources within the context of National Environmental Policy Act (NEPA) review. Since Section 106 of the National Historic Preservation Act (NHPA) is the principal statute concerning such resources, this chapter is primarily focused on the Section 106 process and its interaction with NEPA review. However, it is important to evaluate proposed projects in the context of the other applicable cultural resources laws summarized in Exhibit 8-1 and Appendix B.7.

The Section 106 implementing regulations use the term *undertaking* to mean a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including those carried out by or on behalf of a federal agency; those carried out with federal financial assistance; and those requiring a federal permit, license, or approval (see 36 CFR § 800.16(y)). This term is analogous to a proposed federal action, as used in the NEPA context.

NEPA and the NHPA are two individual statutes, with separate sets of implementing regulations. Under NEPA, the Federal Aviation Administration (FAA) is responsible for analyzing the impacts of its action on historical, architectural, archeological, and cultural resources as part of a broader review of the human environment. A proposed action or alternative(s) with the potential to affect historic properties is subject to Section 106 review regardless of whether the action is eligible for a Categorical Exclusion (CATEX) under NEPA. Section 106 of the NHPA focuses on a specific subset of historical, architectural, archeological, and cultural resources: those properties that are listed on or meet the eligibility criteria for the NRHP (discussed further in

Section 8.2.3.1). Under Section 106, an agency is responsible for taking into account the effects of undertakings on historic properties and affording the Advisory Council on Historic Preservation (ACHP) the opportunity to comment on such undertakings (see 36 CFR § 800.1(a)). Although NEPA and Section 106 are distinct and contain separate requirements, they both require scoping, consultations, and public involvement; therefore, coordinating efforts under NEPA and Section 106 can make both reviews more efficient.¹

Section 106 review must be completed prior to making a CATEX determination, signing a Finding of No Significant Impact (FONSI), or issuing a Record of Decision (ROD). Typically, conducting the Section 106 process, as set forth in 36 CFR part 800 and described below, is an effective way to gather the information needed to assess impacts on historical, architectural, archeological and cultural resources for NEPA review. The FAA has prepared a Section 106 Handbook to help practitioners assess the effects of FAA actions on historic properties under Section 106². The NEPA documentation should report the results of the Section 106 review and explain how they relate to the NEPA significance determination.

Adverse effects on historic properties under Section 106 of the NHPA that also have the potential for significant impact under NEPA constitute an extraordinary circumstance under paragraph 5-2 of Order 1050.1F, and thus would preclude the use of an otherwise applicable CATEX. However, adverse effects that would not be significant under NEPA (including, for example, those that are fully resolved through the Section 106 process) would not preclude use of an otherwise applicable CATEX.

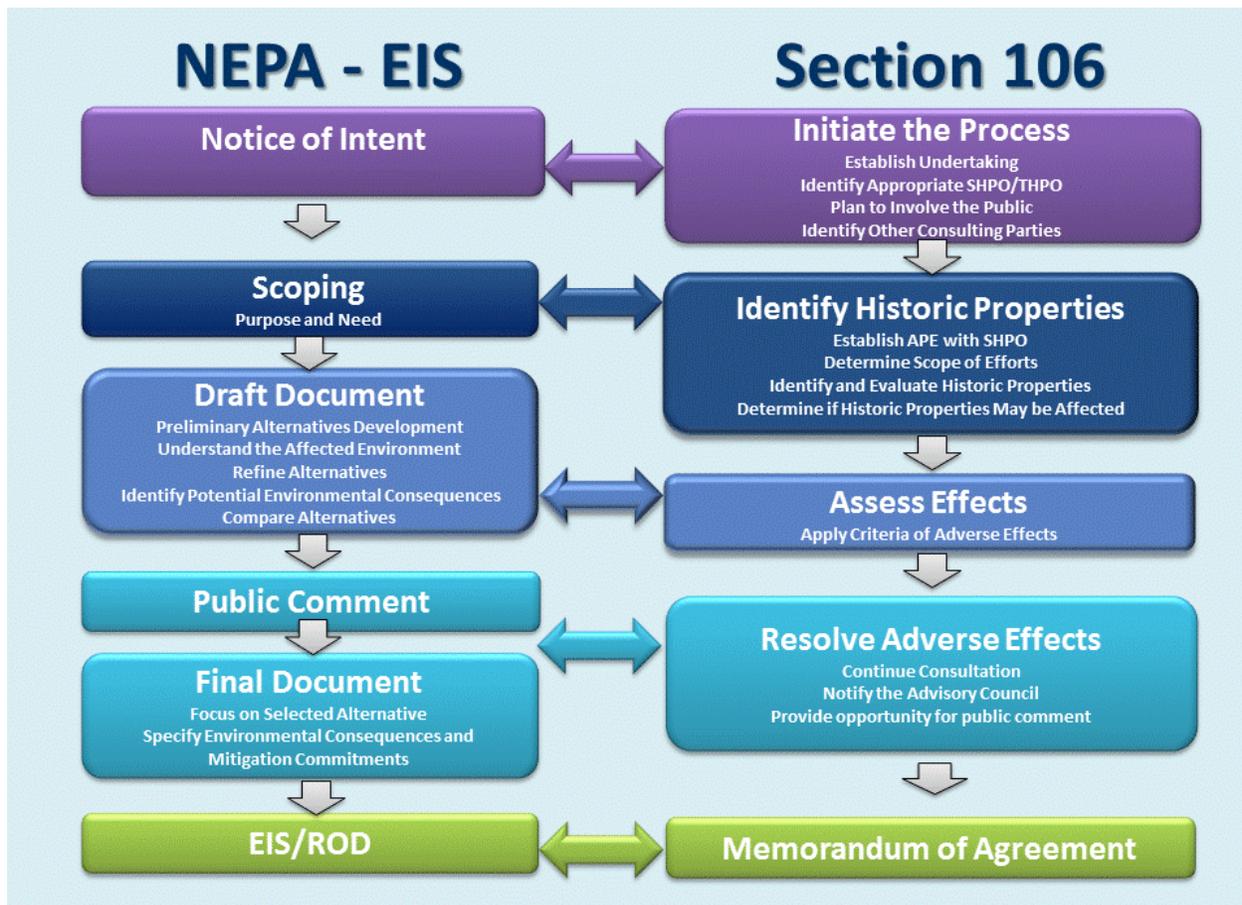
Consultation under Section 106 is not required if the undertaking has no potential to affect historic properties. The regulations implementing Section 106 state: “If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency official has no further obligations under section 106 or this part.” 36 CFR § 800.3(a)(1). Note that this initial determination is based on the characteristics of the activity, independent of whether any historic properties are known or suspected to be present in the affected area.

The timing of the Section 106 process relative to NEPA will depend on the level of environmental review. Exhibit 8-2 illustrates how the Section 106 consultation process can be coordinated with the NEPA process for an Environmental Impact Statement (EIS). Further information on the coordination of the Section 106 process and NEPA for CATEXs and Environmental Assessments (EAs) is provided in *NEPA and NHPA, A Handbook for Integrating NEPA and Section 106* (March 2013)³ issued jointly by Council on Environmental Quality (CEQ) and the ACHP.

¹ Note that the “One Federal Decision” approach calls for federal agencies to agree to a permitting timetable, including Section 106 consultations, where applicable. Updated information on “One Federal Decision” is available through DOT’s Infrastructure Permitting Improvement Center, available at: <https://www.transportation.gov/PermittingImprovementCenter>.

² Section 106 Handbook: How to Assess the Effects of FAA Actions on Historic Properties under Section 106 of the National Historic Preservation Act is available at: www.faa.gov/go/1050deskreference.

³ https://ceq.doe.gov/docs/ceq-publications/NEPA_NHPA_Section_106_Handbook_Mar2013.pdf.

Exhibit 8-2. Coordination of the EIS Process with Section 106 of the NHPA^a

^a If the FAA has executed a Memorandum of Agreement (MOA) with other signatories before it circulates the draft EIS for comment, the draft EIS should include the MOA. In all cases, an executed MOA must be included in the final EIS, unless extenuating circumstances prohibit this.

EIS = Environmental Impact Statement; ROD = Record of Decision.

8.1.1.1. Roles and Responsibilities under Section 106 of the NHPA

Federal Agency – The FAA is responsible for fulfilling the requirements of Section 106. The responsible FAA official is also the *agency official* (see 36 CFR § 800.2(a)) for Section 106 coordination. If an Indian Tribe is a consulting party,⁴ the FAA must engage in government-to-government consultation consistent with FAA Order 1210.20, *American Indian and Alaska Native Tribal Consultation Policy and Procedures*, and cannot delegate this responsibility to an applicant. The FAA can negotiate and incorporate mitigation measures where a project could result in adverse effects to historic properties and must be a signatory to any legal agreements

⁴ Indian tribes recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, are entitled to participate in consultation for undertakings on tribal lands or that may affect historic properties of significance to them. 36 CFR 800.2(c)(3).

(such as a Programmatic Agreement [PA] or Memorandum of Agreement [MOA]) carried forth as part of the consultation.

Federal Preservation Officer – The Federal Preservation Officer (FPO) is a qualified official designated by each agency who is responsible for coordinating the agency’s activities under the NHPA. FAA’s FPO is located within the Office of Environment and Energy’s Environmental Policy and Operations Division (AEE-400). FAA’s FPO serves as the agency’s primary liaison with the ACHP and provides national program oversight, while the agency officials are responsible for carrying out Section 106 compliance on individual projects.

Applicant – The applicant is considered a Section 106 consulting party, and may also be delegated the responsibility by the FAA to undertake certain aspects of Section 106 consultation (see 36 CFR § 800.2(c)(4)), primarily the collection of information for the identification of historic properties. The applicant may have specific responsibilities under a legal agreement, such as an MOA, if consultation includes the mitigation of adverse effects to historic properties.

State Historic Preservation Officer – In accordance with Section 101(b)(3) of the NHPA, the State Historic Preservation Officer (SHPO) has a specific consultative function in the Section 106 process and advises and assists federal agencies in carrying out their Section 106 responsibilities. The SHPO reflects the interests of the state and its citizens, and is a technical advisor in the consultation process to help ensure that historic properties are taken into consideration throughout an undertaking’s planning and development. SHPO responsibilities include participating in consultation and reviewing an agency’s documentation and effect finding.

Indian Tribes⁵ and Native Hawaiian organizations – Indian tribes and Native Hawaiian organizations have the right to participate in consultation on historic properties of significance to them, as they may have a unique interest in an undertaking based on their ancestral homelands or current geographic affiliations. Consultation may include commenting on the effects of an undertaking, providing information on present or potentially affected sites, or consulting on properties of unique tribal significance.

Tribal Historic Preservation Officer – A Tribal Historic Preservation Officer (THPO) assumes some or all of the functions of a SHPO on tribal lands. A THPO is officially designated by a Federally Recognized Indian Tribe pursuant to Section 101(d)(2) of the NHPA to direct a tribal cultural resources program approved by the National Park Service (NPS). If an undertaking is occurring on tribal lands where a THPO has been designated, or the effects of the undertaking are felt on tribal lands, the FAA must consult with the THPO in lieu of the SHPO (however, the SHPO, under certain circumstances, may still be considered a consulting party). Please note that while the THPO may be a primary point of contact and technical advisor during consultation regarding resources on tribal lands, other tribes may also be consulting parties and afforded government-to-government consultation status. If all or part of the undertaking is on tribal land

⁵ Federally Recognized Indian Tribes includes any American Indian or Alaska Native Tribe, Band, Nation, Pueblo, Village, or Community the Secretary of the Interior recognizes as an Indian Tribe under the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479a. A Federally Recognized Indian Tribe is eligible for the programs, services, and other government-to-government relationships established by the United States for Indians because of their status as Indian Tribes. The DOI, Bureau of Indian Affairs, annually publishes a list of Federally Recognized Indian Tribes in the *Federal Register* and maintains this list on its website. The term “tribe” may also refer to state-recognized tribes under specific authorities for certain DOT programs, especially related to surface transportation that may be associated with a particular FAA project.

where the tribe does not have a designated THPO, the FAA must consult with that tribe about undertakings on or affecting its lands on the same basis as it would with a THPO, in addition to the SHPO. If an undertaking's area of potential effects (APE) is located outside tribal lands but includes historic resources of religious and cultural significance to a tribe, the THPO does not assume the responsibilities of the SHPO, but may serve as the official representative designated by the tribe to represent its interests as a consulting party under Section 106.

Advisory Council on Historic Preservation – The ACHP is an independent federal agency that oversees federal historic preservation and tribal programs. The ACHP issues regulations to implement Section 106; provides guidance and advice on the application of the regulations; and generally oversees the operation of the Section 106 process. The ACHP must be afforded the opportunity to comment on federal undertakings subject to Section 106. The ACHP, however, typically reserves its comments either for complex consultations in which it has had previous involvement or for consultations wherein a federal agency seeks ACHP comment on unresolved consultation issues. In the event an undertaking is particularly complex or large in scope, or if there are disagreements between parties, the ACHP can be invited to participate in the process (see 36 CFR § 800.2(b)(1)). The ACHP must be informed of adverse effects to historic properties and may participate directly in consultation to mitigate adverse effects.

Other Consulting Parties – Other entities that may have a consultative role in Section 106 review include representatives of local governments, organizations with a demonstrated interest in the undertaking (e.g., local historical societies, a local museum, a club or non-profit with interest in a project area, or other federal or state agencies with an interest in a project), and the public. Parties that express an interest in the undertaking may provide comments or express opinions on the effects of the undertaking on historic properties.

Cultural Resources Contractor – A Cultural Resources contractor is a contractor that meets the Secretary of Interior's Professional Qualifications Standards at 36 CFR part 61. Cultural Resources contractors may be employed to conduct identification efforts, including cultural resources surveys, and provide professional and technical advice and recommendations on the identification of and effects to historic properties. A contractor may consult with certain consulting parties. The contractor, however, should do so only under the instruction of the FAA or applicant, as applicable. The contractor should not undertake tribal consultation, except under specific direction by the responsible FAA official.

8.1.2. Section 106 and Department of Transportation Act, Section 4(f)

Historic sites listed in, or eligible for inclusion in, the NRHP are also protected under the DOT Act, Section 4(f). Analyses and findings made in accordance with Section 106 also support DOT Section 4(f) determinations. Findings of no historic properties present or affected, or no historic properties adversely affected, under Section 106 support determinations of no use (either constructive or physical) under Section 4(f) of the DOT Act. Findings of adverse effects do not automatically trigger Section 4(f); however, if there is a physical taking of the property, or adverse effects that substantially impair the affected resource's historical integrity, there may be a "use" under Section 4(f). Refer to Chapter 5 of this Desk Reference for a discussion of Section 4(f).

8.1.3. Consultations, Permits, and Other Approvals

Consultation should be initiated early in the planning process. Beyond the public participation requirements of NEPA, there are specific Section 106 consultation procedures that must be followed, as outlined in 36 CFR §§ 800.2-800.6. These include consultation on the APE, on identification of historic properties, on determinations of effect, and on resolution of adverse effects (described below). Those consultations should be discussed in the NEPA document as a function of Section 106 compliance.

The regulations implementing Section 106 require the FAA to consult with certain parties, such as the SHPO and THPO; require the FAA to invite other parties to participate in consultation, such as representatives of local governments, the applicant, and any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the APE; and gives the FAA discretion to invite additional parties to consult, such as individuals and organizations with a demonstrated interest in the undertaking (see 36 CFR § 800.2(c)). The FAA should plan consultations appropriate to the scale of the proposed action or alternative(s). The NEPA scoping process can assist in identifying appropriate stakeholders to invite as consulting parties under Section 106. 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.

Section 106 contains specific consultation requirements and often requires separate meetings among consulting parties and concurrence letters from the SHPO. When coordinating the two processes, notification of any public meetings, hearings, or listening sessions for a NEPA document should explicitly state that Section 106 will also be addressed. NEPA scoping alone will not fulfill all the consultation requirements of a Section 106 review. There are also some unique considerations for consultation with Indian tribes, including the government-to-government protocols.

Exhibit 8-3 provides a basic framework of required documents needed for basic consultation; however, consultation may include additional correspondence and/or steps. The FAA may expedite consultation by combining multiple steps if the SHPO/THPO agrees and consulting parties and the public have an adequate opportunity to express their views.

Exhibit 8-3. Section 106 Consultation Framework

Framework
Section 106 initiation letter to appropriate SHPO/THPO, Indian Tribes, and any other parties identified as potential consulting parties.
Section 106 initiation letter following government-to-government protocols to any Indian Tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the APE.
APE letter and documentation to SHPO/THPO and consulting parties.
Results of Identification Efforts and a proposed Effect Determination letter to SHPO/THPO and consulting parties. Include copies of technical reports.
When applicable , notice to the ACHP, consulting parties, and the public of an <i>Adverse Effect</i> determination with requisite documentation.

In addition, Section 8.9 provides a series of sample letters that can assist with the Section 106 process.

8.1.3.1. Consultation with Indian Tribes and Native Hawaiian Organizations

For a specific project, the FAA must make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to a resource that may be affected by the undertaking and invite them to be consulting parties to assist in the identification of resources in the study area. This commonly requires contacting the SHPO for suggestions about which entities might have an interest in the undertaking and then contacting the identified entities by letter.

Federally Recognized Indian Tribes are independent sovereign nations with their own cultures and government processes. The FAA has a legal responsibility to engage interested Federally Recognized Indian Tribes in government-to-government consultation (see 36 CFR § 800.2(c)(2)(ii)(C)). Government-to-government consultation with Federally Recognized Indian Tribes is distinct from and has different requirements than general Section 106 consultation set forth under 36 CFR § 800.2(a)(4). Initial contact with tribes should be addressed to the tribal leadership and should come from an agency official with a respectfully senior position (e.g., management level). These communication protocols should be observed until the tribe delegates project responsibilities to staff. Specific policies on engaging in government-to-government tribal consultation can be found in FAA Order 1210.20, *American Indian and Alaska Native Tribal Consultation Policy and Procedures*. Even when aspects of the Section 106 process are delegated, for example, in the State Block Grant program, it is still the responsibility of the FAA to conduct government-to-government consultation. A ‘one-size-fits-all’ approach to tribal consultation may not be effective. It is important to listen to tribal concerns and respond accordingly.

Non-Federally Recognized Indian Tribes may also be important participants in Section 106 consultation as interested parties. Non-Federally Recognized Indian Tribes that have a demonstrated interest in the undertaking should be invited to participate in consultation.

Additional resources for tribal consultation can be found in the provisions in Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, 65 *Federal Register* 67249, (November 9, 2000), and the Executive Memorandum, *Government-to-Government Relations with Native American Tribal Governments* (April 29, 1994). The FAA is required, in formulating policies significantly or uniquely affecting tribes, to be guided, to the extent permitted by law, by principles of respect for tribal self-government and sovereignty, for tribal treaty and other rights, and for responsibilities that arise from the unique legal relationship between the federal government and tribes. The ACHP has prepared a guidance document about tribal consultation, *Consultation with Indian Tribes in the Section 106 Process: A Handbook* (see the ACHP’s website at: <http://www.achp.gov/>). The ACHP has also published a guidance document on Native Hawaiian Organizations, *Consultation with Native Hawaiian Organizations in the Section 106 Review Process: A Handbook* (see the ACHP’s website at: <http://www.achp.gov/>).

8.2. Affected Environment

The affected environment section of the NEPA document will discuss historic, architectural, archeological, and cultural resources in the study area that may be affected by the proposed action or alternative(s). This section outlines specific details of the Section 106 process, including how to define the APE under study and the scope of resources within that area. The general steps in the process involve:

1. establishing the APE;
2. identifying any resources in the area; and
3. determining whether the resources are included or eligible for inclusion in the NRHP or protected under other related statutes (e.g., the Native American Graves Protection and Repatriation Act (NAGPRA); see Exhibit 8-1).

8.2.1. The Area of Potential Effects

It is the FAA's responsibility to define the APE in consultation with the SHPO/THPO (see 36 CFR § 800.4(a)). The APE is "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. [The APE] is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking" (see 36 CFR § 800.16(d)). Note that the APE is delineated based on the undertaking's potential effects, not on the location of historic properties. The APE must include all direct and reasonably foreseeable indirect effects, but does not have to be one contiguous area.

An APE should be based on a thorough understanding of the undertaking and the extent of its potential impacts, including any proposed construction and potential ongoing operations that will be introduced into the environment. Each alternative proposed in the NEPA document should be considered concurrently under Section 106. The APE, therefore, should encompass all alternatives under consideration.

Some effects to consider when defining the APE include:

- operational effects including noise, vibration, lighting, and increased traffic; and
- ground effects including ground-disturbing activities, staging and construction areas, and construction of access roads.

The FAA must consult with the SHPO/THPO on the definition of the APE and should seek the SHPO/THPO's concurrence. It is advisable to secure written concurrence prior to investing in extensive resource identification efforts.

8.2.2. Identification of Historical, Architectural, Archeological, and Cultural Resources in the Area of Potential Effects

The FAA, in consultation with consulting parties, must identify historic properties that are either in, or eligible for listing in, the NRHP as set forth in 36 CFR § 800.4(b). Not all resources are known, and the FAA is expected to make a good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, and field surveys. Identification efforts can vary greatly depending on the scope of

the undertaking and its potential effects. The scope of the undertaking may also help in deciding whether a cultural resources contractor is necessary to assist in properly identifying, documenting, and evaluating historic properties and other cultural resources.

Resources to assist in such identification efforts include:

- **The NRHP database** at: <https://www.nps.gov/subjects/nationalregister/database-research.htm>.
- **The SHPO/THPO.** Contact information for SHPOs can be found at: <https://www.nps.gov/subjects/nationalregister/state-historic-preservation-offices.htm>. Contact information for THPOs can be found at: <http://www.nathpo.org/thpos/find-a-thpo/>. Most SHPOs maintain databases or archives of previous surveys and previously identified cultural resources. THPOs also may maintain records of previously identified cultural resources. Look on the SHPO/THPO website or contact the SHPO/THPO to see how to access this information. Also consult state registries maintained by the SHPO.
- **Consulting Indian tribes and Native Hawaiian organizations.** Indian tribes and Native Hawaiian organizations can provide information on sites and properties to which they attach religious and cultural importance. This information may not be available in SHPO-maintained archives, databases, or registries.
- **Local museums, historical societies, and special interest organizations** may also provide information about historic properties or sites in the APE.

Background research and consultation may conclude that additional research or field survey is necessary to identify the presence of resources. Hiring a Cultural Resources contractor may be advisable for a large project in an area that is sensitive in terms of historical or archaeological resources and when there is a potential to affect these resources. Most SHPO offices can provide lists of qualified Cultural Resources contractors.

If field investigations are necessary and the undertaking includes federally-managed land or tribal land, all identification efforts should be conducted in consultation with the appropriate agency or tribe. Agencies and tribes may have particular guidance and/or requirements for identification and survey on their land.

Archeological resources may be listed or eligible for listing on the NRHP. The level of identification effort should include archeological field testing and should confirm whether a federal or state permit is required. Federal regulations regarding protection of archaeological resources are set forth in 43 CFR part 7, and a permit is required for any person proposing to excavate or remove archaeological resources from public lands or Indian lands. To carry out activities associated with excavation or removal, the person must apply to the federal land manager for a permit for the proposed work and cannot begin the proposed work until a permit has been issued. See 43 CFR §§ 7.5-7.12 for information on permits. Please note that any human remains, funerary objects, sacred objects, and objects of cultural patrimony found on federal or tribal land are subject to NAGPRA. States may have their own permit processes for surveys, excavations, or other related activities.

Additional information may be obtained from the FAA's FPO in AEE.

8.2.3. Types of Historical, Architectural, Archeological, and Cultural Resources and Eligibility

Not all cultural resources identified in the APE may necessarily be considered culturally or historically important. Section 106 prescribes that an agency consider effects to *historic properties*, defined as any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the NRHP (see 36 CFR § 800.16(l)(1)). The eligibility of resources is determined through the use of the NRHP criteria for evaluation of historic resources and through Section 106 consultation.

It is the FAA's responsibility to make a determination of resource eligibility. A Cultural Resources contractor, when involved in resource identification and evaluation efforts, will generally provide recommendations on the potential eligibility of resources.

8.2.3.1. Historic Properties (including Archeological Sites)

Historic properties are resources listed in the NRHP, or determined eligible for listing in the NRHP. The NRHP is the official federal list of historic properties which have been found to meet criteria of significance and integrity stated in 36 CFR § 60.4. Not all historic properties have been nominated to the NRHP, but if a property is eligible for listing, it is afforded the same status under Section 106 as listed properties. A district, site, building, structure, or object that possesses integrity of location, design, setting, materials, workmanship, feelings, and association can be considered eligible for inclusion in the NRHP if it meets one or more of the following criteria presented in Exhibit 8-4.

Exhibit 8-4. National Register of Historic Places Eligibility Criteria

Criterion A	The property is associated with events that have made a significant contribution to the broad patterns of our history;
Criterion B	Is associated with the lives of persons significant in our past;
Criterion 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
Criterion D	Yields, or may be likely to yield, information important in prehistory or history.

Guidance on how to apply the criteria can be found in the NPS's National Register Bulletin, *How to Apply the National Register Criteria for Evaluation at*: <http://www.nps.gov/nr/publications/bulletins/nrb15/>.

A thorough determination of eligibility requires a historic context, an assessment of a property's integrity, and an evaluation of significance. (Note: An evaluation that a historic property is significant for Section 106 purposes is different from a NEPA determination of significant impact). A Cultural Resources contractor can assist in gathering the information for eligibility determinations and providing recommendations on the eligibility of historic properties.

The FAA, in consultation with the SHPO/THPO, evaluates a property's eligibility for inclusion in the NRHP (see 36 CFR § 800.4(c)). In some cases determinations of eligibility can be combined with determinations of effect (described below) and submitted together to the SHPO. In most cases, the FAA should be able to reach agreement with the SHPO/THPO on a property's

eligibility, and no further evaluation will be necessary. If the FAA and the SHPO/THPO disagree about eligibility, the FAA must obtain a determination of eligibility (DOE) from the Keeper of the NRHP, (see 36 CFR § 800.4(c)(2) and 36 CFR part 63).⁶ The Keeper will make the final eligibility determination.

8.2.3.2. Traditional Cultural Properties

A unique type of cultural resource that can be eligible for listing in the NRHP is called a traditional cultural property (TCP). A TCP is generally defined as a property that is eligible for the NRHP because of its association with cultural practices or beliefs of a living community that are rooted in that community's history and are important in maintaining the continuing cultural identity of the community. (See criteria in 36 CFR § 60.4). When evaluating TCPs, it is important to note that significance derives from past and continuous use of the site for specific cultural practices.

TCPs are typically identified through consultation with tribes or other consulting parties that have cultural affiliation with the APE. Guidance on evaluating TCPs can be found in the NPS bulletin *Guidelines for Evaluating and Documenting Traditional Cultural Properties* at: <http://www.nps.gov/nr/publications/bulletins/nrb38/>. If determined eligible for the NRHP, TCPs are treated like historic properties for the purposes of evaluating impacts under Section 106 and NEPA.

8.2.3.3. Native American Sacred Sites

Sacred sites are places of significant spiritual value for Native Americans and are integral to the practice of Native American religions. Sacred sites are considered significant cultural resources and are also protected under the American Indian Religious Freedom Act (AIRFA). AIRFA requires federal agencies to consider the impacts of their actions on religious sites and objects that are important to Native Americans, including Alaska Natives and Native Hawaiians, regardless of the eligibility for the NRHP. Religious and sacred sites are typically identified through consultation with tribes.

8.2.3.4. Other Properties Afforded Consideration

National Historic Landmarks – National Historic Landmarks (NHLs) are nationally significant historic places designated by the Secretary of the Interior because they possess exceptional value or quality in illustrating or interpreting the heritage of the United States. NHLs are automatically listed in the NRHP. Section 110(f) of the NHPA requires the FAA to undertake such planning and actions as may be necessary to minimize harm to NHLs that may be adversely affected by an undertaking. If an NHL is identified in the APE, assess impacts to the NHL per Section 8.3.1 of this Desk Reference and, if applicable, follow the procedures in 36 CFR § 800.10.

Protected Tribal Resources – Protected Tribal Resources are those natural resources, properties, sites, and items of traditional or customary religious or cultural importance, either on or off Indian lands, retained by, or reserved by or for, tribes through treaties, statutes, judicial

⁶ The Keeper is the individual who has been delegated the authority by the Secretary of the Interior to list properties and determine their eligibility for the National Register of Historic Place (NRHP). The Keeper may further delegate this authority as he or she deems appropriate (see 36 CFR § 60.3).

decisions, or Executive Orders, including tribal trust resources. For example, subsistence resources protected under the Alaska National Interest Lands Conservation Act (Public Law 96-487) are protected tribal resources.

Properties Protected by Local and State Laws – Some states may afford special protection to certain cultural resources (i.e., laws related to identified burial sites), or to those sites listed on state and/or local historic registries. Consult state statutes or the SHPO to determine if certain state laws apply to an undertaking.

8.2.4. Documenting the Affected Environment in a NEPA Document

The Affected Environment section in the NEPA document should describe the APE's physical boundaries, briefly summarize the historical and environmental context, and describe identified historical, architectural, archeological, and cultural resources. If there are numerous cultural resources present in the APE, consider listing them in a table for clarity (see Exhibit 8-5). Technical reports can be appended to the NEPA document, but these reports may be lengthy or contain sensitive data and it may be more effective to incorporate the information by reference. The level of description should be commensurate with the anticipated level of impact. Before appending any technical reports, the FAA should consider whether they contain confidential or sensitive information (36 CFR § 800.11(c)).

Exhibit 8-5. Cultural Resources Identified in the APE (Example)

Resource #	Description	Land Ownership Status	NRHP Eligibility Determination	Project Area Location ^a
LA 001	2.2 acres; artifact scatter; Early Archaic Period	State	Eligible	Access road
LA 002	12 acres; artifact scatter; Paleo-Indian Period	State, Private	Undetermined	Utility corridor

^a The FAA has a responsibility under Section 304 of the NHPA to acknowledge the sensitive nature of some cultural resources and keep geographic information confidential when disclosure may cause significant invasion of privacy, risk harm to the resource, or impede the use of a traditional religious site by practitioners. In most cases, the NEPA document should not present the location of historic properties on a map because of concerns with intentional disturbance or theft of the properties.

8.3. Environmental Consequences

8.3.1. Determining Potential Impacts

After describing the affected environment for historical, architectural, archaeological, and cultural resources, the consequences of the proposed action or alternative(s) on those resources should be evaluated. The Section 106 process assesses the effects an undertaking would have on historic properties. The determination of effects must be reported in the NEPA document when discussing impacts. Resources that are listed in or eligible for the NRHP are covered by the Section 106 process; historic, architectural, archaeological, and cultural resources that are not eligible but are afforded protection under other laws should be discussed separately in the environmental document.

In making a Section 106 effect determination, the FAA must consider several different types of impacts to historic properties, including direct and indirect impacts from both construction and operation activities. For the Section 106 process, provide a written effects determination along with supporting documentation to the SHPO/THPO and the consulting parties (see 36 CFR § 800.5). Determinations make one of the following conclusions:

1. no historic properties present in the APE;
2. no adverse effect on historic properties; or
3. adverse effect on historic properties.

These are described in detail below.

8.3.1.1. No Historic Properties Present in the Area of Potential Effects

If an undertaking has the potential to cause effects on historic properties, but no such properties have been identified in the APE, a finding of **No Historic Properties Affected** is appropriate. If no historic properties have been identified within the APE, and no resources have been identified that are subject to the Archaeological Resources Protection Act, NAGPRA, AIRFA, Section 4(f) of the DOT Act, the Archeological and Historic Preservation Act, Executive Order 13007, *Indian Sacred Sites*, 61 *Federal Register* 26771, (May 29, 1996), or other laws covering specific types of cultural resources, then no further analysis is needed in the NEPA document.

In making this finding, the FAA must provide the information described in 36 CFR § 800.11(d) to the SHPO/THPO, notify consulting parties, and make the documentation available for public inspection prior to approving the undertaking. If the SHPO/THPO agrees with the finding, the FAA's responsibilities under Section 106 are concluded. If the SHPO/THPO does not respond within 30 days, the FAA's responsibilities under Section 106 are fulfilled, and the agency may proceed with the undertaking.

8.3.1.2. Historic Properties Present in the Area of Potential Effects

If there are historic properties in the APE, the FAA must assess what effect the undertaking would have on those historic properties. An effect is defined as an alteration to the characteristics of a historic property qualifying it for inclusion in, or eligible for inclusion in, the NRHP (see 36 CFR § 800.16(i)). There are three possible outcomes when assessing effects:

1. no historic properties affected;
2. no adverse effect on historic properties; or
3. adverse effect on historic properties.

No Historic Properties Affected

If the undertaking will have no effect on historic properties, a finding of **No Historic Properties Affected** is appropriate (e.g., project-related noise that does not permanently alter a setting that contributes to the historic significance of a qualified historic property for the NRHP). The FAA must provide the documentation outlined in 36 CFR § 800.11(d) to the SHPO/THPO, notify consulting parties, and make the documentation available for public inspection prior to approving the undertaking. If the SHPO/THPO agrees with the finding, the FAA's responsibilities under Section 106 are concluded. If the SHPO/THPO does not respond within

30 days, the FAA's responsibilities under Section 106 are fulfilled and the FAA may proceed with the undertaking.

No Adverse Effect on Historic Properties

If a historic property is present within the APE and it is possible that a project may affect the property's historic characteristics, the FAA must notify all consulting parties, invite their views on the effects, and apply the criteria of adverse effect listed in 36 CFR § 800.5(a)(1) in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified historic properties. In doing so, the FAA must consider any views provided by consulting parties and the public. Adverse effects on historic properties include but are not limited to those which:

- physically destroy or damage the property;
- alter 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);
- remove the property from its historic location;
- change the character of the property's use, or of physical features within the property's setting that contribute to its historic significance;
- introduce 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 historical significance); or
- result 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.

If the undertaking would not affect any historic properties in a way that would alter the characteristics that qualify those properties for the NRHP, or if the undertaking is modified or conditions are imposed to avoid such effects, the FAA, in consultation with the SHPO/THPO, can propose a finding of **No Adverse Effect**. **No Adverse Effect** determinations must be documented pursuant to 36 CFR § 800.11(e). The FAA must notify all consulting parties and provide them with the following documentation:

- A description of a project, specifying the federal involvement, and the APE, including photographs, maps, and drawings, as necessary;
- A description of the steps taken to identify historic properties;
- A description of the affected historic properties, including information on the characteristics that qualify them for the NRHP;
- A description of a project's effects on historic properties;
- An explanation of why the criteria of adverse effect were found applicable or not applicable, including any conditions or future actions to avoid, minimize or mitigate adverse effects; and
- Copies or summaries of any views provided by consulting parties and the public.

If the SHPO/THPO agrees with the finding, and no consulting party objects, the FAA has no further obligations under Section 106.

If the SHPO/THPO disagrees with the finding within the 30-day period, the SHPO/THPO must provide reasons for that objection. The FAA must either consult with the SHPO/THPO to resolve the disagreement, or ask the ACHP to review the finding and concurrently notify all consulting parties that the request has been made. Likewise, if any other consulting party objects to the finding within the 30-day period, they must also notify the FAA of their objection, explain the reasons for the objections, and ask the ACHP to review the FAA's finding. Also, the ACHP may, on its own initiative, within the 30-day period, request the FAA's finding. The responsible FAA official must take into account the ACHP's opinion in making a final finding of no adverse effects (see 36 CFR § 800.5); however, the opinion does not require the FAA to proceed in any specific manner. If the ACHP does not respond within 15 days (or 30 days, if the ACHP duly extends the time to issue its opinion), ACHP concurrence with the finding may be assumed.

A record of this finding must be maintained and information on it must be provided to the public when requested. In certain circumstances, however, such information may be treated by the FAA Administrator or any public official receiving grant assistance as confidential and non-releasable pursuant to Section 304 of the NHPA (see 36 CFR § 800.11(c)). The most common use of this confidentiality clause is to protect the location of sensitive archaeological sites.

In the event the proposed action or alternative(s) involves corridors, large land areas, or when access to the property is restricted, the FAA may implement phased assessments of effects for each alternative under consideration (see 36 CFR § 800.5(a)(3)).

Adverse Effect on Historic Properties

A proposed finding of **Adverse Effect on Historic Properties**, made in consultation with the SHPO/THPO and all other consulting parties, is appropriate when a project would:

- physically destroy or damage the property;
- alter 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);
- remove the property from its historic location;
- change the character of the property's use, or of physical features within the property's setting that contribute to its historic significance;
- introduce 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 historical significance);
- result in neglect of a property which would cause its deterioration; or
- result in 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.

If the above criteria for adverse effects apply, 36 CFR § 800.6 requires federal agencies to try to find a way to avoid, minimize, or mitigate those impacts. This is accomplished through

consultation with the SHPO/THPO, the ACHP, the public, and other consulting parties, as applicable. The agency must also document the finding to the ACHP and consulting parties pursuant to 36 CFR § 800.11(e) (see *No Adverse Effect on Historic Properties* under section 8.3.1.2). If the undertaking will have an adverse effect on an NHL, follow the procedures set forth in 36 CFR § 800.10. When the affected property is of religious or cultural importance to tribes or Native Hawaiian organizations, they must be included in the consultation and must receive information in 36 CFR § 800.11(e), unless the information is protected under the confidentiality provisions of 36 CFR § 800.11(c).

The public must be informed if an undertaking will have an adverse effect on historic properties. This may be satisfied as part of the Section 106 consultation process, but the NEPA process can also satisfy this requirement by describing potential adverse effects of the proposed action and the alternatives in a draft EA or draft EIS and affording the public an opportunity to comment. If a CATEX is being used for NEPA compliance or a draft EA is not going to be published for comment, the FAA should make other arrangements to provide the public with enough time and information to meaningfully comment prior to approval of the undertaking.

8.3.2. Significance Determination

The FAA has not established a significance threshold for this impact category; however, the FAA has identified a factor to consider when evaluating the context and intensity of potential environmental impacts for historical, architectural, archeological, and cultural resources (see Exhibit 4-1 of FAA Order 1050.1F).

This factor includes, but is not limited to, situations in which the proposed action or alternative(s) would result in a finding of Adverse Effect through the Section 106 process. Please note that this factor is not intended to be a threshold. The NHPA regulations at 36 CFR § 800.8(a) state that an adverse effect finding does not necessarily require an EIS under NEPA. An effect that is adverse under Section 106 is not necessarily significant under NEPA. The FAA makes the determination on the level of impact under NEPA and whether to prepare an EA or EIS. The Section 106 consultation process and advice from the ACHP and SHPO/THPO may assist the FAA in making this determination. Resolution of adverse effects under 36 CFR § 800.6 may be sufficient to avoid significance (see Section 8.4 below).

For historic properties subject to Section 4(f) of the DOT Act, a significant impact would occur when the action involves more than minimal physical use of a Section 4(f) resource or constitutes a “constructive use” based on an FAA determination that the aviation project would substantially impair the Section 4(f) resource (see Chapter 5 of this Desk Reference).

8.4. Mitigation – Resolution of Adverse Effects

Some examples of potential measures to avoid, minimize, or mitigate adverse impacts to historical, architectural, archeological, and cultural resources include the following:

- to the extent practicable, modifying, conditioning, or limiting activities associated with the undertaking to lessen effects;
- implementing standard Best Management Practices during construction and maintenance activities to reduce potential impacts;

- educating visitors, members of the general public, construction, maintenance, and operations personnel, as well as contractors, and tenant organizations, on the importance of cultural resources, the need to stay within defined work zones, and the legal implications of vandalism and artifact collecting;
- training construction, maintenance, operations, contractor, and tenant personnel to recognize when archaeological resources or human remains have been discovered or when inadvertent damage has occurred to a resource, to halt ground disturbing activities in the vicinity of the discovery, and to notify appropriate personnel;
- archival documentation of affected historic properties to Historic American Buildings Survey/Historic American Engineering Record standards;
- monitoring the resource(s) during construction to ensure the construction goes as planned and no unforeseen impacts to the resource(s) occur;
- monitoring by a qualified archaeologist of ground-disturbing activities during construction; and
- conducting data recovery excavations of archaeological sites.

These measures to avoid, minimize, or mitigate impacts will generally form the basis for a Memorandum of Agreement (MOA) on how a project will proceed.

In most instances, the FAA and SHPO/THPO, in consultation with other consulting parties, work to avoid, minimize, or mitigate identified adverse effects. Sometimes the ACHP is included in this effort when it chooses to enter the process or the FAA invites them to do so.

It is the FAA's intent to resolve adverse effects in all cases through consultation and cooperation. However, if the FAA, the SHPO/THPO, or the ACHP determine that further consultation would not be productive, any one of them may terminate consultation pursuant to the instructions in 36 CFR § 800.7. In such instances, the FAA must take into account the ACHP's comments in reaching a final determination regarding the action (see 36 CFR § 800.7(c)(4) and the Section 106 Handbook for instructions).

8.5. Memorandum of Agreement

An MOA is a document that records the terms and conditions agreed upon to resolve the adverse effects of an undertaking upon historic properties. If the FAA prepares an MOA to meet Section 106 requirements, the MOA must contain the information discussed in 36 CFR § 800.11(f). If the FAA executes an MOA with other signatories before it circulates a draft NEPA document for comment, the document should include the MOA. An executed MOA must be included in a final NEPA document, unless extenuating circumstances delay the MOA until the FONSI or ROD. In these circumstances, the draft MOA should be included in the final NEPA document.

The execution of an MOA between the FAA and the other signatories concludes the FAA's responsibilities under Section 106. The MOA describes the undertaking and contains instructions and terms that must be implemented to avoid, minimize, or mitigate adverse effects. Upon execution of the MOA, the undertaking will proceed under the terms of the MOA. When the FAA and the SHPO/THPO develop an MOA, the FAA must send a copy of the signed MOA to the ACHP. When the ACHP is not participating and the FAA and the SHPO/THPO cannot

agree, the FAA must request that the ACHP join in the consultation. Detailed information on MOAs is contained in 36 CFR § 800.6, particularly sections 800.6(b) and (c).

- **Signatories** – Signatories have sole authority to execute, amend, and terminate the MOA. If the ACHP is not participating in resolving adverse effects, the FAA and SHPO/THPO will sign the MOA. If the ACHP is participating, it too will sign the MOA.
- **Invited Signatories** – The FAA may invite other consulting parties to sign the MOA. Typically, these parties would be representatives of Indian tribes, Native Hawaiian organizations, or any other relevant organization in the area that attach religious or cultural significance to the affected historic property. Any party that will be responsible for implementing the terms and conditions of the MOA (e.g., airport sponsor or licensee for commercial space operations) should be invited to be a signatory. Invited signatories have the same rights with regard to seeking amendment or termination of the MOA as other signatories. It is important to note that the refusal of any invited party to be a signatory does not negate an MOA or make it invalid.
- **Concurring Parties** – The FAA or another signatory may invite all consulting parties to concur with the MOA. Concurring parties do not have the right to execute, amend, or terminate an MOA; their concurrence only indicates that they are in agreement with the MOA's terms. Refusal of a party to concur in the MOA does not negate or invalidate the MOA. All consulting parties, whether concurring or not, should receive a copy of the executed MOA.

8.6. Programmatic Agreement

A PA is a document that records the terms and conditions agreed upon to resolve the potential adverse effects of a federal agency program, complex undertaking, or other situations in accordance with 36 CFR § 800.14(b). To achieve agreement on how impacts will be treated in the future, often after the NEPA process is complete, the FAA and the ACHP (or the SHPO or other consulting party) may negotiate a PA. A PA may be negotiated in the following situations:

- when effects on historic properties are similar and repetitive or are multi-state or regional in scope;
- when effects on historic properties cannot be fully determined prior to approval of an undertaking;
- when non-federal parties are delegated major decision-making responsibilities;
- where routine management activities are undertaken at federal installations, facilities, or other land-management units; or
- where other circumstances warrant a departure from the normal Section 106 process.

Typically, it is necessary to describe a project, including the timeframe and whether a project will be staged, in order to successfully develop a PA. For example, before the ACHP will agree to the PA, it should be relatively clear when studies will be completed; the APE and the types of expected adverse effects; as well as the potential for mitigation. For more information, see 36 CFR § 800.14(b).

A PA may be negotiated with the ACHP and the National Conference of SHPOs if a project will be repeated in several different states. The FAA may work through the National Association of THPOs to facilitate coordination with tribes. If these circumstances arise, consult the FAA FPO in AEE to coordinate possible agreement options.

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 must comply with the Section 106 consultation requirements with regard to the individual projects of the program covered by the agreement.

8.7. Section 106 Documentation

In addition to reporting the outcome of Section 106 consultation in the body of the NEPA document, Section 106 consultation and correspondence should be referenced and included in an appendix to the NEPA document. Documentation should include all information needed to show Section 106 compliance, and not just a record of consultation. Documentation in the appendix should include, at a minimum, the following:

- Section 106 Initiation letters to SHPO/THPO and those parties identified as potential consulting parties and any responses received;
- requests for government-to-government tribal consultation sent to any tribes that expressed a desire to consult on the action and any responses received;
- correspondence related to consultation on the APE;
- the FAA's determination of effect;
- SHPO/THPO concurrence on an effect finding;
- any comments from consulting parties and/or the public; and
- an executed MOA or PA, if applicable.

The FAA has a responsibility under Section 304 of the NHPA to acknowledge the sensitive nature of some cultural resources and keep geographic information confidential when disclosure may cause significant invasion of privacy, risk, or harm to the resource, or impede the use of a traditional religious site by practitioners. In most cases, the NEPA document should **not** provide the location of, or any geographic information on, historic properties because of concerns with intentional disturbance or theft of the properties.

8.8. Post-NEPA Review Discoveries

At times, historic properties or unanticipated effects on historic properties may be discovered after completion of environmental review. In these cases, reasonable efforts should be taken to avoid, minimize, or mitigate adverse effects, if any, to such properties.

- **Discovery prior to project approval or prior to starting construction on an approved project.** If the FAA has not yet approved a project, or if construction on an approved project has not yet begun, and the FAA discovers historic properties or unanticipated

effects on the historic properties, the FAA must consult to resolve any adverse effects as defined in 36 CFR § 800.5.

- **Discovery after project approval or after construction has begun on an approved project.** If the FAA has approved a project and construction has begun, and then historic properties or unanticipated effects on the historic properties are discovered, project construction must stop immediately in the vicinity of the discovered resources. The FAA must determine what actions can be taken to resolve any adverse effects. Within 48 hours of discovery, the FAA must also notify the SHPO/THPO and any tribe, Native Hawaiian organization, or any other relevant organization in the area that might attach religious and cultural significance to the affected property, and the ACHP. The notification should describe the actions proposed by the FAA to resolve the adverse effects. The relevant entity and the ACHP will respond within 48 hours of notification and the FAA should take into account their recommendations and carry out appropriate actions. The FAA must also provide a report of the actions when they are completed.

8.8.1. Eligibility of post-review discoveries

Following consultation with the SHPO/THPO, the FAA may assume, for the purposes of Section 106 consultations, that the newly discovered properties are eligible for the NRHP. The FAA must list the NRHP criteria used to assume the property's eligibility so that the information can be used to resolve adverse effects.

8.8.2. Post-review discoveries on Tribal lands

The FAA must comply with applicable tribal regulations and procedures and obtain the concurrence of the tribe for a project if there is no process for addressing such post-review discoveries.

When discovered property is of value solely for its scientific, prehistoric, historic, or archaeological data

Where the FAA, SHPO/THPO, and any tribe, Native Hawaiian organization, or any other relevant organization that might attach religious and cultural significance to the affected property agree that the property is of value solely for its scientific, prehistoric, historic, or archaeological data, the FAA may comply with the Archeological and Historic Preservation Act instead of the procedures under Section 106 and mitigate the impacts to the property through excavation and analysis of the site, in what is commonly called "data recovery."

8.9. Sample Letters for Section 106

Sample letters that can assist the FAA in the Section 106 process can be provided on request from the FPO in AEE.

Note that all initiation letters addressed to a tribe should follow the government-to-government protocols discussed in Paragraph 2-4.4 of FAA Order 1050.1F and should be sent specifically to a tribe and not as a broadcast letter to many tribes. Once a tribe agrees to be a consulting party in the Section 106 process, then group correspondence copied to all would be appropriate unless a tribe specifically asked for some level of confidentiality.

Appendix B. Historical, Architectural, Archeological, and Cultural Resources

Federal activities affecting all environmental impact categories are governed by many statutes, regulations, and Executive Orders. Each impact category chapter of this Desk Reference (Chapters 1-14, as applicable) contains an exhibit with a tabular overview of the major applicable Federal statutes, regulations, Executive Orders, and the agencies responsible for overseeing their implementation. This appendix supplements the background information relevant to those requirements that is provided in the chapter exhibits. Please note that these requirements may not be applicable to every FAA action, and should only be included when relevant to the proposed project.

B.7. Historical, Architectural, Archeological, and Cultural Resources

The following statutes and Executive Orders govern the protection of historical, architectural, archeological, and cultural resources.

B.7.1. American Indian Religious Freedom Act

The American Indian Religious Freedom Act requires consultation with Native American groups concerning actions on sacred sites or affecting access to sacred sites. It establishes federal policy to protect and preserve the right to free exercise of religion for American Indians, Eskimos, Aleuts, and Native Hawaiians. It allows these people to access sites, use and possess sacred objects, and gives them the freedom to worship through ceremonial and traditional rites. In practical terms, the Act requires federal agencies to consider the impacts of their actions on religious sites and objects that are important to Native Americans, including Alaska Natives and Native Hawaiians, regardless of the eligibility for the National Register of Historic Places (NRHP). For more information on the American Indian Religious Freedom Act, see [http://uscode.house.gov/view.xhtml?req=\(title:42%20section:1996%20edition:prelim\)](http://uscode.house.gov/view.xhtml?req=(title:42%20section:1996%20edition:prelim)).

B.7.2. Historic Sites Act

The Historic Sites Act declares as national policy the preservation for public use of historic sites, buildings, objects, and properties of national significance. It gives the Secretary of the Interior authority to make historic surveys, to secure and preserve data on historic sites, and to acquire and preserve archeological and historic sites. The Act also establishes the National Historic Landmarks program for designating properties having exceptional value in commemorating or illustrating the history of the United States. It gives the Secretary of the Interior broad powers to protect nationally significant historic properties, including the Secretary's authority to establish and acquire nationally significant historic sites. For more information on the Historic Sites Act, see <https://www.nps.gov/history/local-law/hsact35.htm>.

B.7.3. National Historic Preservation Act

The National Historic Preservation Act (NHPA) establishes an independent agency, the Advisory Council on Historic Preservation (ACHP). It also establishes the NRHP within the National Park Service (NPS). Section 106 of NHPA requires federal agencies to consider the effects of their undertaking (or action) and consult with specific parties on properties listed on or eligible for listing on the NRHP. “Eligible” for listing in the NRHP includes all properties that meet the specifications laid out in the DOI regulations at 36 CFR § 60.4.

Section 110 of the NHPA governs federal agencies’ responsibilities to preserve and use historic buildings; designate an agency Federal Preservation Officer; and identify, evaluate, and nominate eligible properties under the control or jurisdiction of the agency to the NRHP. Section 112 of the NHPA addresses professional standards. Section 314 discusses confidentiality requirements that may apply to an undertaking. Section 402 discusses federal actions outside the United States that may adversely affect a property which is on the World Heritage List or on the applicable country’s equivalent of the NRHP. For more information on the NHPA, see the ACHP’s website at: <https://www.achp.gov/>.

B.7.4. Native American Graves Protection and Repatriation Act

The Native American Graves Protection and Repatriation Act (NAGPRA) deals with the disposition of cultural items, including human remains, by a federally-funded repository. Additionally, the NAGPRA governs the inadvertent discovery of cultural items on federal or tribal lands. It provides for the inventory, protection, and return of cultural items to affiliated tribes. NAGPRA requires Archaeological Resources Protection Act permits, as well as consultation with tribes, for intentional excavation and removal of cultural items from federal or tribal lands. Its regulations include provisions that, upon inadvertent discovery, the federal agency will cease all activity in the area of discovery, protect the discovered items, and immediately notify the affected tribe. Disposition of the items must then be carried out in accordance with NAGPRA procedures. For more information on NAGPRA, see the NPS’ website at: <http://www.nps.gov/archeology/tools/Laws/NAGPRA.htm>.

B.7.5. Executive Order 13007, *Indian Sacred Sites*; Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*; and Presidential Memorandum on Government-to-Government Relations with Native American Tribal Governments

Executive Order 13007, *Indian Sacred Sites*, 61 *Federal Register* 26771, (May 29, 1996) applies to federal agencies that manage federal lands, defined as “any land or interests in land owned by the United States, including leasehold interests held by the United States, except Indian trust lands.” Agencies, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, must:

1. accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners; and
2. avoid adversely affecting the physical integrity of such sacred sites.

Agencies must maintain the confidentiality of sacred sites by virtue of their established religious significance to, or ceremonial use by, an Indian religion, provided the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site. Executive Order 13007 requires federal agencies to consult on a government-to-government basis with tribes if the proposed project involves an Indian Sacred Site. This provides meaningful and timely input in development of regulatory policies on matters that significantly or uniquely affect their communities. Additional information may be obtained from the FAA Federal Preservation Officer. For more information on Executive Order 13007, see <http://www.gpo.gov/fdsys/pkg/FR-1996-05-29/pdf/96-13597.pdf>. For more information on Executive Order 13175, see <http://www.gpo.gov/fdsys/pkg/FR-2000-11-09/pdf/00-29003.pdf>. For more information on the Presidential Memorandum, see <http://www.gpo.gov/fdsys/pkg/WCPD-1994-05-02/pdf/WCPD-1994-05-02-Pg936.pdf>.