

## CHAPTER 14. HISTORIC PROPERTIES

### 1. INTRODUCTION AND DEFINITIONS.

a. **General.** This chapter summarizes the requirements of Section 106 of the National Historic Preservation Act (NHPA) for ease of reference. In case of doubt concerning the proper interpretation of Section 106 as implemented by 36 CFR Part 800, the responsible FAA official should contact the Planning and Environmental Division, APP-400, the Airports & Environmental Law Division in the Office of Chief Counsel (AGC-600), or Regional Counsel.<sup>1</sup>

b. **Historic property.** A historic property is, "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in the National Register of Historic Places (NRHP) maintained by the Secretary of the Interior" (36 CFR Section 800.16(l)). Properties or sites having traditional religious or cultural importance to Native American Tribes and Hawaiian organizations may qualify. To qualify, a property must meet the criteria for eligibility under 36 CFR Section 60.4.

c. **Consultation.** Section 106 of the NHPA, as implemented through 36 CFR Part 800, is intended to require Federal agencies to consider the effects of their undertakings on historic properties. In doing so, FAA must consult with the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) if one exists.<sup>2</sup> The regulations protecting historic and cultural properties also require consultation and information exchanges with interested parties. As a result, the identification of historic resources, analysis of potential effects, and consultation is often a "critical path" element in managing the environmental review project. Starting consultation early in the environmental review process is a best management practice for an airport action that may affect historic properties.

d. **Undertaking.** This is a project or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency (36 CFR Section 800.16(y)). An undertaking is an activity that:

- (1) the agency carries out;

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<sup>1</sup> Notably, the regulations have been amended three times in the past several years (1999, 2001, and 2004), with the current regulations having taken effect on August 5, 2004. The Advisory Council on Historic Preservation (AHP) amended the regulations due to both changes in the underlying law (1992) and court challenges to the validity of the regulations. For instance, in *National Mining Ass'n v. Slater*, 167 F. Supp. 2d (D.D.C. 2001), the role of the AHP was challenged. This resulted in a determination that AHP's role is only advisory. The current regulations reflect the court's decision; however, there may be other new provisions that require legal interpretation. For more information on Section 106 case law, please see the *Federal Historic Preservation Case Law, 1966-2000* at [www.achp.gov/pubs-caselaw.html](http://www.achp.gov/pubs-caselaw.html).

<sup>2</sup> A THPO is the tribal officer who assumes the responsibility of the SHPO for purposes of Section 106 compliance on tribal lands per Section 101(d)(2) of the NHPA. The THPO is appointed by the tribe's chief governing authority or is designated by tribal ordinance or preservation program.

- (2) is carried out by or on behalf of a Federal agency;
- (3) is carried out with Federal assistance; or
- (4) requires a Federal permit, license, or approval.

For purposes of the Airports program, an undertaking is an action that constitutes a Federal action for purposes of NEPA as defined in FAA Order 5050.4B, paragraph 9.g. These actions include, but are not limited to, any airport development project funded under the Airport Improvement Program (AIP) or Passenger Facility Charge Program (PFC) or subject to unconditional FAA approval to be depicted on an airport layout plan (ALP).

**e. Integrating the Section 106 and NEPA processes.** Title 36 CFR Section 800.8 encourages Federal agencies to integrate the Section 106 and NEPA processes. This integration is intended to streamline these “procedurally rich” processes, reduce paperwork, avoid repeating information, and coordinate public input. Section 7 of this chapter provides more information on this.

## .2. APPLICABLE STATUTES AND IMPLEMENTING REGULATIONS.

**a. General.** The primary Federal law protecting nationally important historic properties is the National Historic Preservation Act of 1966, as amended (NHPA). NHPA establishes the Advisory Council on Historic Preservation (ACHP) and the NRHP. Sections 106 and 110 are two sections of this law having the greatest bearing on airport actions. The following table outlines these sections and other laws and regulations that apply to historic or archeological resources.

Note: Paragraphs 3.b.(1) and (2) of this chapter provide more information on Sections 106 and 110 of the NHPA. The chapter does not discuss other sections of the NRHP because airport actions do not normally involve those sections.

APPLICABLE STATUTES AND IMPLEMENTING REGULATIONS	SUMMARY DESCRIPTION	OVERSIGHT AGENCY
Section 106 of the NHPA	<p>Requires Federal agencies having direct or indirect jurisdiction over proposed undertakings to consider the undertakings' effects on properties listed in or eligible for listing in the NRHP. The agencies must consult with the SHPO or THPO when deciding if an undertaking has the potential to affect NRHP resources. If an undertaking has the potential to do so, further consultation is needed to determine if the effects would be adverse.</p> <p>When a Federal agency determines an undertaking has the potential to adversely affect NRHP resources, the agency must notify the ACHP of that finding.</p> <p>For Federal airport actions, FAA is responsible for meeting the requirements of Section 106 and 36 CFR, Part 800. The project sponsor or an environmental contractor acting on FAA's behalf may aid FAA during the Section 106 review process, but</p>	ACHP

APPLICABLE STATUTES AND IMPLEMENTING REGULATIONS	SUMMARY DESCRIPTION	OVERSIGHT AGENCY
	FAA is responsible for meeting Section 106 and the regulations implementing it.	
36 CFR, Part 800 implementing Section 106	The regulations implementing Section 106 are at 36 CFR, Part 800. Among other things, these regulations describe the procedures for consulting, analyzing effects, and documenting those effects.	ACHP
Sections 110(f) and 110(k) of the NHPA	<p><b>Section 110(f):</b> This section requires that Federal agencies plan and impose measures necessary to minimize the direct or indirect effects of undertakings on National Historic Landmarks (NHLs). NHLs are buildings, sites, districts, or structures that the Secretary of the Interior designates as historically significant.<sup>3</sup> When undertakings would adversely affect NHLs, agencies shall invite the ACHP to participate in consultation.</p> <p><b>Section 110(k):</b> Some applicants seeking Federal approval or funding have intentionally caused adverse effects on NHRP-listed or eligible properties to avoid Section 106 requirements in the past. Section 110(k) prevents Federal agencies from issuing grants or approving undertakings to parties who have intentionally harmed protected resources. Agencies facing such situations may approve or fund actions involving parties causing the damage <i>only if</i> the agencies, after consulting with the ACHP, determine circumstances justify the destructive actions.</p>	ACHP
Archaeological Resources Protection Act of 1979 (ARPA)	This Act requires Federal agencies to obtain a special permit to excavate or remove any archaeological resources that are located on U.S.-owned public lands or lands that Federally-recognized Native American tribes control. This Act protects all archaeological resources, including those that are not historic properties.	Individual Federal land management agencies
Archeological and Historic Preservation Act of 1974 (AHPA)	This Act requires the survey, recovery, and preservation of significant archaeological, historical, and scientific data when a Federally-approved or Federally-funded action may destroy or cause irreparable loss of such data.	Individual Federal land management agencies
Native American Graves Protection and Repatriation Act (NAGPRA)	The discovery of human remains or cultural items on Federal or tribal lands triggers this Act. The Act provides for the inventory, protection, and return of cultural items to affiliated Native American groups.	National Park Service (NPS)

<sup>3</sup> There are over 2500 NHLs in the nation. More than half are privately owned. See <http://www.cr.nps.gov/nhl/> and 36 CFR Part 65 for more information.

APPLICABLE STATUTES AND IMPLEMENTING REGULATIONS	SUMMARY DESCRIPTION	OVERSIGHT AGENCY
	Note that NAGPRA applies only to Native American human remains and cultural materials on Federal or Native American lands.	
49 U.S.C. Section 303.c, formerly Section 4(f) of the U.S. Department of Transportation Act.	<p>Though not a historic preservation law, Section 4(f) of the DOT Act (recodified as 49 USC Sections 303.c and d) may apply to FAA actions adversely affecting NRHP-listed or eligible properties. Section 4(f) does not allow the approving FAA official to approve a transportation program or project that would use a historic site of national, state, or local significance, unless:</p> <ul style="list-style-type: none"> <li>• the official finds there is no prudent or feasible alternative that avoids using the historic site; and</li> <li>• the project includes all possible planning to minimize harm to the site resulting from the use. (Chapter 7 of this Desk Reference provides information on Section 4(f)).</li> </ul>	FAA

### 3. APPLICABILITY TO AIRPORT DEVELOPMENT ACTIONS.

**a. General.** Typical airside actions that could affect NRHP-listed or eligible resources include building or expanding terminal and hangar facilities, runways and taxiways, and installing navigational aids (NAVAIDS). Landside actions that may affect these resources include building or moving access roadways, remote parking facilities, and rental car lots, or other types of activities requiring any other construction.

**b. Timing.** The responsible FAA official should start the Section 106 process as early as possible in the environmental review for major airport development projects. An *early* start of the 106 process is usually needed to effectively and efficiently complete Section 106's procedures, consultation, and analyses. Early knowledge about the presence of historic properties in an undertaking's area of potential effect (APE) (see paragraph 5.d of this chapter) and prompt consultation are critical. Doing so helps the sponsor and FAA identify and consider the widest range of alternatives or measures to avoid or lessen the undertaking's possible adverse effects on NRHP-listed or eligible properties. Most importantly, the responsible FAA official must ensure FAA has started and is well into completing the requirements of 36 CFR Part 800 when it issues a draft EA or EIS. The official must do so to ensure the final EA or EIS proves FAA has met Section 106 requirements.

**(1) Grant awards or ALP approvals.** FAA cannot award a grant for an airport action or unconditionally approve an ALP or an ALP revision until it *completes* the Section 106 process. However, FAA may authorize or issue funds for non-destructive planning activities related to an undertaking before completing the Section 106 process.

**(2) Leasing airport property.** Before an airport sponsor may convert land dedicated to airport use (i.e. aeronautical activities and airline services) to non-aeronautical, revenue producing use (e.g., concessions, providing public shelter, ground transportation,

food, or personal service businesses) under a long-term lease, the sponsor must obtain ARP approval. In addition, ARP must release the sponsor from its federal grant assurance obligations addressing the uses of the land. FAA may not approve leases for airport properties to a non-Federal party until FAA completes the Section 106 review process. This ensures leases protect or preserve historic properties that may be present on the property to be leased.

#### 4. PERMITS, CERTIFICATIONS, AND APPROVALS.

a. **Section 106.** This section does not require formal permits, certifications, or approvals. However, FAA documentation should demonstrate it has completed all of the following requirements.

- (1) FAA has consulted with the parties noted in 36 CFR Section 800.2;
- (2) FAA has notified or provided ACHP the opportunity to participate in consultation as appropriate under 36 CFR Part 800;<sup>4</sup> and
- (3) FAA has conducted the process in a reasonable and good faith manner.

b. **Archaeological concerns on Federal or Native American lands.** The Archaeological Resources Protection Act (16 USC Sections 470aa – 470mm) requires that a person wishing to exhume or remove archeological resources from Federal or Native American lands must first obtain a permit from the relevant land management agency or tribe. Therefore, a sponsor whose project requires removing buried archeological resources from units of the national park system, the national wildlife refuge system, or the national forest system must obtain a permit before removing or excavating those resources. See 43 CFR Part 7 for more details.

#### 5. ENVIRONMENTAL COMPLIANCE PROCEDURES - ENVIRONMENTAL ANALYSIS.

a. **Starting the process.** The first step in the Section 106 process requires the responsible FAA official to determine if the proposed action is an "undertaking" as defined in 36 CFR Section 800.16(y) (see Section 1.d. of this chapter). If the official determines the action is not an undertaking, then Section 106 does not apply. If the official determines an undertaking exists and that it may affect properties on or eligible for inclusion in the NRHP, the responsible FAA official must determine if an undertaking:

- (1) does not have the potential to affect protected historic properties;
- (2) would not adversely affect NRHP-listed or eligible historic properties; or
- (3) would adversely affect NRHP-listed or eligible historic properties.

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<sup>4</sup> The criteria ACHP uses to determine if it will become involved address undertakings that: a) have substantial impacts on important historic properties; b) present important questions of policy or interpretation; c) have the potential for presenting procedural problems; or d) present issues of concern to Indian tribes or organizations or Native Hawaiian organizations.

b. **Section 106 consultation.** If the responsible FAA official determines the undertaking has the potential to affect an NRHP-listed or eligible property, the official must begin consulting with various parties having critical roles in the Section 106 process. Agency consultation must include:

- (1) the State Historic Preservation Officer (SHPO);
- (2) Native Americans or Native Hawaiian organizations if resources important to them may be in the project area. Contact with a Tribal Historic Preservation Officer (THPO) may be needed;
- (3) the airport sponsor;
- (4) representatives of local governments having jurisdiction over the area involved in the undertaking;
- (5) individuals and organizations having legal or economic interests in the historic properties the undertaking may affect; or
- (6) the public in the APE having an interest in historic properties (see section 5.d. of this chapter).

Section 106 requires the FAA to afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment on undertakings (36 CFR Section 800.1). FAA must take into account ACHP's opinions in reaching a final decision. Although FAA must present evidence that it considered ACHP's opinion, FAA is not bound to that opinion and may or may not revise its initial finding.

c. **Area of potential effect (APE).** If an undertaking has the potential to affect NRHP-listed or eligible historic properties, then FAA, in consultation with the SHPO (or THPO when appropriate), identifies the APE. The APE is the geographic area or areas in which an undertaking may directly or indirectly affect the character of historic resources. Note that it is *not* necessary to know if any historic properties occur in the APE to describe it.

d. **Identifying properties.** After defining the APE, FAA reviews the NRHP to determine if properties already listed in the NRHP occur in the APE. FAA must also determine if the APE contains any properties that may be eligible for NRHP listing. Historical research, archaeological or historic architectural surveys, and consultation with the SHPO, tribes, other traditional communities, and local historic groups are methods used to identify NRHP-eligible properties. Once FAA through this consultation identifies these properties, the responsible FAA official, through more consultation with the SHPO (or THPO when appropriate), evaluates the eligibility of properties using NRHP's criteria at 36 CFR Section 60.4. If any property meets one or more of these criteria, the responsible FAA official, in consultation with the SHPO (or THPO when appropriate), determines if the property is eligible for listing in the NRHP. If the SHPO or THPO do not concur with FAA's eligibility determination, FAA must seek a formal eligibility determination from the Keeper of the NRHP at the NPS. NPS Bulletin 15, *How to Apply National Register Eligibility Criteria*,

and 36 CFR Section 800.4(c) provide more guidance on how agency personnel evaluate NRHP eligibility.

e. **Tribal and Hawaiian consultation.** FAA must make a reasonable and good faith effort to consult with Native American tribes and Native Hawaiian organizations when defining the APE and identifying properties within it. This helps to identify historic properties in areas located off tribal lands that may have religious and cultural significance to tribal members. Due to the sovereignty of Federally-recognized tribes,<sup>5</sup> consultation with these tribes must occur in a "government-to-government" manner. That consultation is needed to comply with Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, and FAA Order 1210.20, *American Indian and Alaska Native Tribal Consultation Policy and Procedures*. FAA Order 5050.4B, paragraph 303, provides more information on this issue.

(1) **The APE.** The responsible FAA official must consult tribal or Hawaiian officials to determine if the APE contains resources important to Native American tribes or Native Hawaiian organizations. This is a critical step because an APE may contain religious or cultural resources important to these peoples, even if they do not live within APE.

(2) **Traditional Cultural Properties (TCPs).** TCPs are import to a community's history, cultural practices, and beliefs and help maintain the continual cultural identity of Native American tribes, Hawaiian organizations, and other traditional communities. TCPs are normally, but not always, eligible for inclusion in the NRHP. NPS Bulletin 38, *Identifying Traditional Cultural Places*, provides guidance on NRHP criteria to determine if a TCP qualifies as a Section 106-protected TCP. FAA must consider an undertaking's effects on NRHP-eligible or listed TCPs.

f. **No Properties Affected determination.** FAA is responsible for determining if the undertaking would or would not affect any historic properties. An effect would occur when an undertaking would change the characteristics qualifying a historic resource for inclusion in or its eligibility for the NRHP. To make a No Properties Affected Determination, the responsible FAA official, in consultation with the SHPO (or THPO, when appropriate), must determine the undertaking would not affect NRHP-listed or eligible historic resources properties in the APE. Here, FAA must notify the SHPO (or THPO, when appropriate) of that finding. To do so, the responsible FAA official must send to the SHPO (or THPO, when appropriate) the following documentation noted in 36 CFR Section 800.11 (d) and provided here for convenience.

- A description of the undertaking. Specify the Federal involvement and its APE. As necessary, include photographs, maps and drawings;
- a description of the steps taken to identify historic properties, including efforts to seek information as discussed in 36 CFR Section 800.4(b); and

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<sup>5</sup> See *Federal Register* Vol. 67, No. 134, pgs. 46327 – 46333, dated July 12, 2002 for a list of Federally-recognized tribes. The Bureau of Indian Affairs is responsible for revising the list.

- the basis for determining that there are no properties present or affected.

Note: National Park Service Bulletin 44, *Guidelines for Evaluating and Documenting Historic Aviation Properties*, may be helpful in assessing impacts on historic aviation facilities.

**(1) When the SHPO (or THPO) agrees with the finding.** If the responsible FAA official finds "no historic properties affected", the official must send the documentation noted above to the SHPO (or THPO, when appropriate). FAA must notify other consulting parties of the finding, including Native American tribes and Native Hawaiian organizations, when appropriate. The responsible FAA official must make the documentation it sent to the SHPO/THPO on the finding available to the public. The SHPO (or THPO, when appropriate) has 30 days to review the finding, provided FAA has provided the required documentation to them. If the SHPO (or THPO) does not object, or does not respond, FAA has fulfilled its Section 106 responsibilities. The environmental document prepared for the undertaking should contain the finding, proof of consultation, and the documentation supporting this finding.

**(2) When the SHPO (or THPO) objects to the finding.** If the SHPO (or THPO, when appropriate) objects to FAA's finding within 30 days of receiving it, FAA will consult with the SHPO (or THPO, when appropriate) to resolve the disagreement or send the finding's documentation (see 36 Section 800.11(d)) to the ACHP for its review and comment. The ACHP must respond within 30 days of receiving the documentation. If ACHP does not respond in 30 days after receiving the documentation, FAA has fulfilled its Section 106 responsibilities.

**(a)** If ACHP objects to FAA's finding, but FAA and the sponsor alter the undertaking to address ACHP's concerns, FAA has met its Section 106 responsibilities.

**(b)** If FAA does not alter its original finding, FAA can proceed with the project but *only* after sending the ACHP, the SHPO (or THPO) and the consulting parties documentation on FAA's final decision. This documentation shows how FAA considered the ACHP's opinion.

**(3)** To the fullest extent possible draft environmental assessments and impact statements should summarize the FAA's NHPA Section 106 finding and cross-reference the pages of the appendix containing the supporting evidence and documentation reflecting consultation. See 40 CFR section 1502.25.

**g. Assessing adverse effects.** The responsible FAA official applies the adverse effect criteria in 36 CFR Section 800.5 to the historic properties in the project's APE. The official must do this in consultation with the SHPO (or THPO) and other consulting parties, including Native American tribes and Native Hawaiian organizations, as appropriate. If FAA finds an undertaking would affect an NRHP-listed or eligible property, the responsible FAA official must notify the consulting parties.

**(1) Criteria of adverse effect.** An undertaking would adversely affect a property if it changes the characteristics of the historic property that qualify the property for inclusion in the NRHP. Diminishing the integrity of the historic property's location, setting, design,

workmanship, feeling, or association could cause these effects. Per 36 CFR Sections 800.5(a)(1) and (2), an undertaking causing any of the following would adversely affect a historic property.

- (a) Physical destruction or damage to all or part of the property;
- (b) Alteration of a property in ways that is not consistent with the Secretary of the Interior's standards for treating historic properties (see 36 CFR Part 68). This criterion applies to activities:
  - (1) involving restoring, rehabilitating, repairing, maintaining, or stabilizing the property;
  - (2) providing handicap access to the property; or
  - (3) remediating hazardous materials;
- (c) isolating the property from its surrounding settings or altering the characteristics of those settings, when those characteristics contribute to qualifying the property for the NRHP;
- (d) moving a property from its historic location;
- (e) introducing visual, audio, or atmospheric elements that are out of character with the property or that would diminish the integrity of the property's setting when the setting contributes to the property's historical significance.

Note: For noise-related impacts, a *quiet setting* (i.e., DNL below 60 dB) must be one of the **recognized** characteristics making the property eligible for or listed on the NRHP.

- (f) neglecting property to a level that destroys the property or allows it to deteriorate; or
- (g) approving the transfer, lease, or sale of a property without including contract assurances to preserve the property's historically significant features.

**(2) Results of applying the criteria of adverse effect.** After applying the criteria of adverse effect, the responsible FAA official, in consultation with the SHPO (or THPO, when appropriate) makes one of these determinations.

**(a) No Adverse Effect determination.** The responsible FAA official makes this determination when the analysis shows the undertaking would not trigger any of the adverse effect criterion noted in Sections 5.g(1)(a)–(g) of this chapter. The official may also determine that imposing certain conditions on the undertaking would avoid those effects.

**(1) SHPO/THPO agrees with the finding.** The responsible FAA official must send documentation on the determination as described in 36 CFR Section 800.11(e) (presented here for convenience) to the SHPO (or THPO, when appropriate). The official

must also send the information to consulting parties, unless the information must remain confidential (see Section 5.h of this chapter).

- a description of the undertaking by specifying the Federal undertaking. Include the APE and photographs, maps, and drawings as necessary;
- a description of steps taken to identify historic properties;
- a description of the affected historic properties, including information on the properties' characteristics that make them eligible for the NRHP;
- a description of the undertaking's effects on historic properties;
- an explanation of why the criteria of adverse effect did not apply to the undertaking, including any conditions or future actions to avoid, minimize, or mitigate adverse effects; and
- copies of summaries of views that the public and consulting parties provided.

**(2) Distributing the information to the SHPO (or THPO) and consulting parties.** These entities have 30 days from the date they receive the documentation to review FAA's determination. After the 30-day review period, FAA can proceed with the project if the SHPO (or THPO, when appropriate) agrees with the Determination or if no consulting party has objected to it.

**(3) When the SHPO (or THPO) or a consulting party object to a No Adverse Effect Determination.** If the SHPO (or THPO, when appropriate) or a consulting party disagrees with FAA's determination within the allotted period, FAA must either consult with the party to resolve the disagreement or ask the ACHP to review the finding. The ACHP has 15 days to respond. During this period ACHP may issue an opinion to FAA. That opinion is advisory in nature. FAA must consider the opinion and determine if it will include the opinion in the undertaking. If the ACHP does not respond within the 15-day review period, then FAA has fulfilled its Section 106 responsibilities.

**(4)** To the fullest extent possible, draft environmental documents should summarize the NHPA Section 106 finding and cross-reference supporting materials and evidence contained in an appendix to the environmental document. See 40 CFR Section 1502.25.

**(b) Adverse Effect Determination.** The responsible FAA official would make this Determination if information and consultation suggest the undertaking would trigger one of the adverse effect criterion in Sections 5.g(1)(a)–(g) of this chapter.

**(1) Notifying the SHPO/THPO and consulting parties.** The responsible FAA official must notify the SHPO/THPO and consulting parties of an Adverse Effect Determination. To do so, the official must send information described in 36 CFR

Section 800.11(e) (presented in Section 5.g(2)(a)(1) of this chapter for convenience) to those entities unless the information must remain confidential (see paragraph 5.h of this chapter).

**(2) Notifying the ACHP.** FAA must also notify the ACHP of an Adverse Effect Determination. To do so FAA must send documentation described in 36 CFR Section 800.11(e) to the ACHP (see Section 5.g(2)(a)(1) of this chapter). Failure to do so is a *serious procedural flaw* because it denies the ACHP an opportunity to take part in the resolution of adverse effects and forecloses ACHP participation in consultation (36 CFR Section 800.16(j)). Failure to complete this step may provide ACHP with good cause to annul the Memorandum of Agreement addressing the adverse effects.

**(3) Inviting or requesting ACHP consultation.** Besides providing the documentation 36 CFR Section 800.11(e) requires, the responsible FAA official must invite the ACHP to participate in the 106 process in the following circumstances (36 CFR Section 800.6(1)):

(a) when the agency official wishes the Council to participate (36 CFR Section 800.6(a)(1)(i)(A));

(b) when an undertaking would adversely affect a National Historic Landmark (36 CFR Section 800.6(a)(1)(i)(B));

(c) when FAA will prepare a Programmatic Agreement (36 CFR Section 800.6(a)(1)(i)(C)); or

Note: If any of the above scenarios occur, ACHP must tell FAA if it will take part in the 106 process within 15 days of receiving the FAA's documentation and invitation to participate (36 CFR Section 800.6(a)(1)(iii)).

(d) if the responsible FAA official and SHPO/THPO cannot agree on how to resolve adverse effects, the responsible FAA official shall request the ACHP to join the consultation (36 CFR Section 800.6(b)(v)). In this case, the responsible FAA official must provide the information noted in 36 CFR Section 800.11(g).

**(4) ACHP decision to enter consultation.** As noted above, the ACHP may choose to enter the consultation process. When the ACHP decides to do so, it must notify the responsible FAA official or the FAA Administrator, and consulting parties. Appendix A of 36 CFR Part 800 has more information about the ACHP's participation in the consultation process.

**(5) If FAA and the SHPO (or THPO), and/or ACHP fail to resolve adverse effects.** FAA, the SHPO (or THPO, when appropriate), and/or ACHP may decide further consultation will not be productive. In this case, consultation may be terminated (36 CFR Section 800.7(a)). This Desk Reference does not provide information on this rare situation. If termination is seriously being considered, the responsible FAA official should review carefully 36 CFR Section 800.7 for specific instructions. The official should also *immediately* notify APP-400 and Regional Counsel if the approving FAA official is considering this procedure.

**h. Confidentiality.** Section 304 of the NHPA, as amended, allows the FAA Administrator to withhold information from the public, if the Secretary of the Interior and the Administrator decide disclosing the information would cause any of the following events. Review 36 CFR Section 800.11(c) for more details on this special procedure.

- (1) cause a significant invasion of privacy.
- (2) risk harm to the historic resource. or
- (3) impede use of a traditional religious site.

**i. Memorandum of Agreement (MOA).** If FAA and the SHPO (or THPO, when appropriate) agree on how to resolve adverse effects, FAA and SHPO (or THPO, when appropriate) will prepare and sign an MOA. The MOA clearly specifies the conditions that will allow the proposed action to proceed. The MOA describes ways to avoid, minimize, or mitigate the undertaking's adverse effects on NRHP properties (Table 1 of this chapter provides helpful information on MOA content). The MOA becomes effective when the signatories discussed below sign it. However, the sponsor (or another party listed in the MOA) who is responsible for implementing any of the measures in the MOA need not begin carrying out those measures until the approving FAA official issues a decision on the undertaking. This is because FAA cannot unconditionally approve an ALP depicting an undertaking or approve a grant to construct the undertaking until FAA completes the Section 106 process (36 CFR 800.1(c)).<sup>6</sup> It is only then that the sponsor has received FAA authorization to begin the undertaking the ALP depicts. Per FAA Order 5050.4B, paragraph 202.c(2), the sponsor may begin the project after those approvals occur. The sponsor may not begin any undertaking that would adversely affect historic resources until FAA unconditionally approves a new or revised ALP or it approves a grant to construct the undertaking.

Note: Table 1 of this chapter provides information on preparing the MOA.

**(1) Signatories.** As signatories, FAA, the SHPO (or THPO, when appropriate), and ACHP (when it participates) have sole authority to execute, amend, or terminate an MOA (36 CFR Section 800.6(c)(1)).

**(a)** The approving FAA official and the SHPO (or THPO) must sign the MOA for the MOA to meet 106 requirements;

**(b)** If a SHPO terminates consultation, ACHP may enter into an MOA with FAA (36 CFR 800.7(a)(2));

**(c)** If the undertaking is on tribal land, the THPO must sign the MOA in lieu of the SHPO. However the SHPO will sign the MOA if a tribe does not have a THPO and the undertaking would affect tribal land; and/or

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<sup>6</sup> FAA may issue those approvals only after it completes the environmental review process (issuing an EA and its Finding of No Significant Impact or an EIS and its Record of Decision).

(d) ACHP, if it is participating in the process.

**(2) Invited signatories.** The approving FAA official may invite other parties to sign the MOA. Typically, these parties would be representatives of Native American tribes or Native Hawaiian organization who attach religious or cultural significance to the affected historic resources off tribal lands. An invited signatory may also be a party having a role in carrying out the MOA's terms and conditions (i.e., airport sponsor). Invited signatories have the same rights as the signatories (may amend or terminate the MOA). However, their refusal to sign the MOA does not prevent the MOA from being finalized (36 CFR Section 800.6(c)(2)(iv)).

**(3) Concurred parties.** The approving FAA official may invite any of the consulting parties to sign the MOA. These parties do not have any of the signatories' rights, and their refusal to sign the MOA does not prevent the MOA from being finalized.

j. **ACHP must receive a copy of the MOA or final EIS.** FAA *must* send to the ACHP a copy of the signed MOA or final EIS, if FAA is using the procedures in 36 CFR Section 800.8 (see Section 7 of this chapter). It must also send any substantive changes or additions to the documentation noted in 36 CFR Section 800.11(e) if needed. FAA must do so *before* it approves a proposed undertaking having an adverse effect on historic properties (36 CFR Section 800.6(b)(1)(iv)). *Failure to do so could prompt the ACHP to determine FAA has foreclosed ACHP's opportunity to comment on an undertaking.* A determination that foreclosure has occurred is significant because that signifies the ACHP has concluded the agency failed to comply with Section 106 (36 CFR Section 800.16(j)).

k. **Programmatic Agreement (PA).** A PA is a special type of agreement. It presents the terms and condition FAA and the ACHP have agreed upon to resolve adverse effects due to complex situations or multiple undertakings. Sections 5.k(1)(a)-(c) of this chapter identify situations where a PA may be useful.<sup>7</sup>

(1) Consider using a PA when:

(a) an undertaking's effects would be similar and repetitive;

(b) an undertaking is complex, wide in scope, and FAA is unable to fully determine an undertaking's effects before approving it; or

(c) other circumstances warrant a departure from the normal Section 106 process.

**(2) Preparing the PA.** For airport undertakings having characteristics noted in Sections 5.k(1)(a)–(c) of this chapter, FAA may develop and negotiate a PA with the ACHP (36 CFR Section 800.4(b)). When preparing the PA, the responsible FAA official must consult with the SHPO (or THPO, when appropriate), responsible for protecting historic

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<sup>7</sup> Other situations not associated with typical airport actions may be suitable for a PA. See 36 CFR 800.14(b)(iii) or (iv)

resources in the state where the undertaking would occur. FAA and the ACHP may agree to invite other parties to be consulting parties because a PA uses the same consultation process noted earlier for an MOA. Those parties may sign the PA as consulting parties. If an agency cannot develop a PA for complex or multiple undertakings, follow the provisions in 36 CFR Part 800 subpart B for each individual undertaking.<sup>8</sup>

**I. FAA's post-approval Section 106 responsibilities.** An MOA is a legally binding document. It commits an agency by statute and regulation to carry out an undertaking according to the terms and conditions set forth in the MOA (36 CFR Section 800.6(c)). Therefore, FAA must ensure the airport sponsor (or any other party the MOA or PA specifically names) fulfills the measures in the MOA (36 CFR 800.6(c)). Failure to do so means FAA has not met its Section 106 responsibilities for the undertaking.

**m. Phasing the Section 106 process.** FAA may phase the identification of historic properties in some instances. Normally, phasing would occur when a project includes reasonable alternatives encompassing large land areas or where property access is restricted (see 36 CFR Part 800.4(b)(2)). FAA may also phase identification of historic properties if it does not have adequate information to evaluate the potential effects of project alternatives on historic properties.

**(1) Undertakings encompassing large areas.** Here, the responsible FAA official evaluates each reasonable alternative's potential to affect NRHP-listed or eligible properties. The official does this based on background research, consultation with the SHPO/THPO and other parties, or results of field investigations. FAA must identify NRHP-listed or eligible properties, evaluate the proposed project's effects on them, and resolve any adverse effects on those properties. FAA should complete this part of the Section 106 review process *before* issuing an EA and its Finding of No Significant Impact, or an EIS and its Record of Decision.

**(2) Undertakings involving restricted access.** Sometimes, owners of land where project-affected resources occur deny access to their land. In this instance, FAA may delay final identification of historic properties and project effects on them until after the EA or EIS is completed. In these cases, the MOA or PA must clearly stipulate the delay in final identification and impact evaluation. The MOA or PA must describe how FAA will complete its identification of NRHP properties and how it will evaluate project effects on those properties. FAA or the SHPO/THPO must sign the MOA (or PA), *before* issuing a Finding of No Significant Impact or a Record of Decision.

**6. DETERMINING IMPACT SIGNIFICANCE.** After considering the analysis of effects on historic properties, including intensity and context, FAA will determine if an EIS is appropriate. Advice from the SHPO (or THPO, when appropriate) and ACHP may help the

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<sup>8</sup> This Desk Reference does not discuss preparing PAs for national or regional agency programs because airport projects rarely involve these programs. Consultation for national or regional agency programs involves the National Conference of State Historic Preservation Officers, Indian tribes, or Hawaiian organizations. See 36 CFR Section 800.14(b)(2) for more information.

responsible FAA official make this determination, but the ultimate decision to prepare an EIS is FAA's responsibility.

ORDER 1050.1E THRESHOLD	FACTORS TO CONSIDER
Regulations at 36 CFR Section 800.8(a) state that an adverse effect determination does not automatically trigger a finding of significant impact. Therefore, an EIS is not always required.	When an action adversely affects a protected property, the responsible FAA official should consult with and seek more input from the SHPO (or THPO). Consider alternatives that would avoid adverse effects on NRHP listed or eligible property. Also, consider mitigation that will lessen the adverse effects.

From: Table 7-1, FAA Order 5050.4B.

**7. INTEGRATING SECTION 106 and NEPA.** Title 36 CFR Section 800.8 encourages Federal agencies to integrate Section 106 and NEPA. This is intended to: streamline requirements; reduce paperwork; avoid redundant information; and coordinate public input. To integrate the processes, the responsible FAA official *must closely follow* the instructions at 36 CFR Section 800.8. In addition, FAA consultation with the SHPO, (or THPO, when appropriate), consulting parties, the public, and perhaps the ACHP is critical. The steps below summarize the steps for integrating Section 106 and NEPA.

**a. Environmental assessment content.** An EA prepared for an undertaking must contain specific information to verify that FAA has completed the Section 106 process. Depending on the level of effect, the EA must contain the documentation noted in Sections 5.f, 5.g(2)(a)(1), and 5.g(2)(b) of this chapter. Besides that documentation, the EA must contain the following information, as appropriate. If needed, follow the steps in 36 CFR Sections 800.8(c)(2) and (3) addressing review of the EA and resolution of objections, if any.

(1) Correspondence showing the responsible FAA official consulted with the SHPO (or THPO when appropriate) to define the APE. The EA must include information showing that FAA conferred with consulting parties or members of the public having knowledge of resources in the APE or concerns about the undertaking's effects.

(2) Correspondence from the SHPO (or THPO when appropriate) addressing FAA's finding that no properties are in the APE, or the undertaking would not affect existing properties in the APE. Include proof that FAA notified the consulting parties of this finding.

(3) Correspondence from the SHPO (or THPO when appropriate) and other consulting parties on the FAA's No Effect or No Adverse Effect Determination. Provide input from consulting parties and ACHP, if it is participating.

(4) Correspondence from the SHPO, (or THPO when appropriate), other consulting parties, and the ACHP, if it is taking part in project consultation, showing their concurrence on FAA's efforts to resolve the undertaking's adverse effects on historic properties.

(5) A copy of the signed MOA or PA clearly describing how FAA will resolve the adverse effects on historic properties.

b. **Finding of No Significant Impact (FONSI) content for Section 106 purposes.** The FONSI prepared for the undertaking should include the MOA or PA as an attachment. The FONSI should summarize the measures noted in the MOA or PA to avoid, minimize, or mitigate the effects.

**8. ENVIRONMENTAL IMPACT STATEMENT CONTENT.** FAA makes the final decision to prepare an EIS for airport actions. When FAA prepares an EIS to address significant impacts on historic properties, the responsible FAA official should consider inviting ACHP to be a cooperating agency. Information developed for and during the Section 106 consultation process should be sufficient for EIS purposes. During the EIS process, FAA may determine the undertaking would adversely affect Section 106-protected properties. After consulting the SHPO (or THPO when appropriate) and agreeing on ways to resolve the adverse effects, FAA may or may not need to prepare an MOA (see sections 8.a and b of this chapter). In addition, follow the steps in 36 CFR Sections 800.8(c)(2) and (3) addressing review of draft or final EISs and resolution of objections, if any.

a. **An MOA is needed.** If FAA is *not* using the NEPA process as described in 36 CFR Section 800.8, the final EIS should contain a copy of the signed MOA to meet Section 106 requirements.

b. **An MOA is not needed.** If FAA *is* using the process described in 36 CFR Section 800.8, FAA's EIS and its Record of Decision must contain measures to avoid, minimize or mitigate the adverse effects the undertaking would cause. FAA need not prepare a MOA (36 CFR Section 800.8.c.(4)(i)(A) in this case.

**TABLE 1. SOME USEFUL INFORMATION FOR PREPARING AN MOA.**

1.	Think ahead to ensure the MOA addresses all of the undertaking's foreseeable impacts.
2.	Describe the undertaking's physical location and clearly state where it will physically disturb existing conditions. Make sure the MOA addresses the entire undertaking.
3.	A resource's noise or visual setting may be one of the <i>recognized</i> characteristics making the resource eligible for the NRHP. An undertaking may alter that setting. Therefore, when appropriate, the Area of Potential Effect may extend beyond an undertaking's area of physical disturbance.
4.	For most airport projects, identify FAA as the lead agency responsible for ensuring the MOA's provisions are met.
5.	Assign duties to signatories and invited signatories.
6.	Use active voice. Passive voice does not clearly convey the party responsible for completing the MOA's requirements.

7.	Include provisions to which the signatories have agreed.
8.	Structure the MOA logically.
9.	Write the MOA so any reader may understand it.
10.	Provide complete citations for all laws, regulations or references. Include all statutory authorities.
11.	Use consistent terminology. Use terms consistent with statutory or regulatory definitions. Define terms specific to the undertaking that the applicable statutes or regulations do not define.
12.	Provide the date the MOA would become effective.

Adapted from the Advisory Council on Historic Preservation and the Univ. of Nevada, Reno, *Introduction to Section 106, Participants Handbook*, March 2001, page. 67.