

Title: Section 106 Process
Date: June 28, 2019
SOP No.: 21
Issued by the Office of Planning and Environment (TPE)

1. Purpose

Section 106 of the National Historic Preservation Act (NHPA) (54 U.S.C. § 306108) and its implementing regulations (36 CFR part 800) require Federal agencies to consider the effects of their undertakings on historic properties and provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment on such undertakings prior to the expenditure of any Federal funds or prior to the issuance of any license. This SOP clarifies FTA’s roles, responsibilities, and consultation procedures in the Section 106 process.

2. Applicability/Scope

FTA actions that trigger National Environmental Policy Act (NEPA) review are also subject to the Section 106 process, unless the project meets a Section 106 exemption or the project has no potential to cause effects to historic properties. Section 106 is required when a project involves the use of Federal financial assistance and/or when a Federal permit, license, or approval is needed.

The Section 106 process applies when FTA determines a project or activity is an *undertaking* that has the potential to cause effects to historic properties. An undertaking can occur on all FTA projects regardless of the NEPA class of action determination (i.e., categorical exclusion—CE, environmental assessment—EA, or environmental impact statement—EIS). FTA’s legal obligation is to ensure that full consideration is given to the effect on the historic properties of the *undertaking* being funded, in whole or in part, by FTA, and to complete the Section 106 process prior to making a CE determination, issuing a finding of no significant impact (FONSI), a combined final EIS (FEIS)/record of decision (ROD), or ROD.

3. Responsibilities

The FTA Regional Administrator is legally responsible for making Section 106 findings and determinations; and, signing agreement documents, when applicable (36 CFR § 800.2(a)). FTA does not delegate these responsibilities to project sponsors.

FTA Regional staff is responsible for fulfilling the requirements of the Section 106 process, including conducting government-to-government consultation with federally-recognized Indian tribes (tribes). FTA Regional staff provide direction to project sponsors regarding the preparation of information, analyses, and recommendations of historic property identification and effects in order to assist FTA in making findings and determinations. FTA Regional staff should work with the project sponsor to ensure that professionals preparing Section 106 supporting materials meet ACHP requirements for professionals.¹ FTA Regional staff, in coordination with project sponsors, will ensure the requirements of the Section 106 consultation process are conducted and that documentation is included as part of the environmental project file and adequately summarized in the NEPA document. Lastly, the FTA Regional

¹ Professional qualification standards usually referenced are a combination of the Secretary of the Interior’s Professional Qualification Standards as defined and officially adopted in 1983 (48 FR 44716; 54 U.S.C. § 306131, 36 CFR § 800.2(a)(1) and (3)) and the Secretary of the Interior’s Historic Preservation Professional Qualification Standards as expanded and revised in 1997 (62 FR 33708), but not formally adopted.

staff should coordinate with the FTA Federal Preservation Officer (FPO) when it becomes apparent or seems likely that there may be ACHP involvement on a project (e.g., potential adverse effect or likely need for an agreement document pursuant to Section 106).

The Office of Chief Counsel is responsible for reviewing Section 106 agreement documents (e.g., Memorandum of Agreement, Programmatic Agreement) for legal sufficiency, which is usually assigned to the FTA Regional Counsel.

The FTA FPO is based out of the Office of Environmental Programs. The FPO is responsible for coordinating the Section 106 activities of the agency (54 U.S.C. § 306104) and provides technical assistance to the FTA Regional offices. The FTA FPO should be included on all projects with (or likely) ACHP involvement.

4. Standard Procedures

4.1. Initiate Section 106 Process

4.1.1. Establish the undertaking. An *undertaking* is any project, activity, or program funded in whole or in part by FTA (36 CFR § 800.16(y)). FTA Regional staff is responsible for determining whether the undertaking is a type of activity that has the potential to affect historic properties. This determination should be based on the type of project or activity (e.g., ground disturbance, demolition, modification of buildings or structures) and not whether historic properties are present in the project area or part of the project activity (36 CFR § 800.3(a)). If the undertaking is a type of activity that does not have the potential to affect historic properties, FTA has no further obligations under Section 106 (36 CFR § 800.3(a)(1)). FTA Regional staff should document the determination that the undertaking has “no potential to cause effects” with a memo to the project file or via FTA’s online grant management system.

Examples of projects or activities using FTA funds (undertakings) that have “no potential to cause effects” and thus do not require further Section 106 review include:

- Planning studies or activities, training, administrative functions;
- Procurement of replacement vehicles;
- Maintenance of vehicles (e.g., bus, van, light rail vehicles);
- Purchase of equipment or materials that do not lead to, or are part of, a construction activity.

If the undertaking has the potential to cause effects on historic properties, FTA Regional staff should consider whether a program alternative, as listed below, may be applicable to the undertaking. ACHP maintains the catalog of program alternatives.²

- Program Comment to Avoid Duplicative Reviews for Wireless Communications Facilities Construction and Modification (80 FR 58744);
- Program Comment for Actions Affecting Post-1945 Concrete and Steel Bridges (77 FR 68790);
- Program Comment for Positive Train Control (79 FR 30861);
- Program Comment to Exempt Consideration of Effects to Rail Properties within Rail Rights-of-Way (83 FR 42920).

If the undertaking has the potential to cause effects to historic properties, FTA should formally initiate the Section 106 review process with the SHPO/THPO, and coordinate with other reviews (36 CFR §

² https://www.achp.gov/program_alternatives.

800.3(b)) or provide the SHPO/THPO notification pursuant to a Section 106 program alternative, when required. Depending on the nature and complexity of the undertaking, FTA Regional staff may combine or conduct the Section 106 steps, described in this section, concurrently. For example, the initiation/notification, description of the undertaking, Area of Potential Effect (APE), and identification of historic properties may be included in one consultation letter (with supporting documentation) to the SHPO/THPO and other consulting parties, as appropriate, but other combinations may be pursued, as well.

If the State has a statewide Programmatic Agreement (PA) that contains procedures and stipulations for complying with the Section 106 process, that PA would supersede this SOP.

4.1.2. Notify State Historic Preservation Officer (SHPO) and/or Tribal Historic Preservation Officer (THPO) - Section 106 Initiation Letter. Section 106 requires FTA to identify and initiate consultation with the appropriate SHPO and/or THPO (36 § CFR 800.3(c)). For most undertakings, the SHPO for the State in which the undertaking is located in will be a consulting party. If an undertaking involves more than one State, the SHPOs may agree to designate a lead SHPO (36 CFR § 800.3(c)(2)). The THPO is the official representative for consultation (instead of the SHPO) if the undertaking is located on tribal lands and the tribe has assumed the responsibilities of the SHPO for Section 106 (36 CFR § 800.2(c)(2)(i)(A)). If the undertaking is located on tribal lands or effects of the undertaking may occur on tribal lands, but the tribe has not assumed Section 106 responsibilities, the SHPO will be a consulting party, but the tribe may also designate a representative who will have the same rights of consultation and concurrence as the SHPO (36 CFR § 800.2(c)(2)(i)(B); 800.3(d)).

FTA Regional staff should notify the appropriate SHPO and/or THPO as soon as a determination has been made by FTA that an undertaking has the potential to effect historic properties. This can be accomplished by sending the SHPO/THPO(s) a letter initiating Section 106 consultation on FTA letterhead. The content of the letter may include: a description of the undertaking, the proposed APE (described in Section 4.2.1), a request for input on consulting parties and the APE, next steps, and the FTA project contact person. Project maps should be part of the initiation letter.

4.1.3. Identify additional consulting parties. Throughout the Section 106 review process, FTA Regional staff must consult with States, tribes, local governments and individuals who may have specialized expertise or an interest in the area affected by the undertaking (36 CFR § 800.2(a)(4)) in order to seek their input when making findings and determinations. In addition to the SHPO and THPOs, other potential consulting parties may include: representatives of local governments with jurisdiction over the area in which the effects of an undertaking may occur; individuals and organizations with demonstrated interest in the undertaking (e.g., they are the property owner for one of the historic properties affected); and, the project sponsor (36 CFR § 800.2(c)(3) - (5), 800.3(f)). On occasion, an individual or organization may request in writing to be a consulting party. FTA, after consulting with the SHPO/THPO, determines whether the requester should be given consulting party status (36 CFR § 800.3(f)(3)).

FTA must also make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian Organizations (NHOs) that might attach religious and cultural significance to historic properties and invite them to participate as consulting parties (36 CFR § 800.2(c)(2)(ii)(D), 800.3(f)(2)). (See Section 4.2.1 for further information on tribal consultation).

4.1.4. Plan to involve the public. FTA must provide the public with an opportunity to comment on the undertaking and its effect on historic properties (36 CFR § 800.2(d), § 800.3(e)). FTA Regional staff

should provide input to the project sponsor on the type and level of public involvement required based on the nature and complexity of the undertaking, its effects, and the likely interest of the public in those effects (36 CFR § 800.2(d)(1)). The plan should identify points in the consultation process where public notification is needed and mechanisms for soliciting public comments. The NEPA process can be used to satisfy Section 106 if it provides adequate opportunities for public involvement. For example, the public notice and outreach for the Section 106 process can be combined with the public involvement plan established for an EA or an EIS. For a CE, FTA Regional staff, in coordination with the project sponsor, will need to make other arrangements to provide the public with sufficient time and information to gather meaningful comments (e.g., posting Section 106 related information on the project sponsor's website for 30 days) because there is not a NEPA public involvement requirement for CEs. FTA, in coordination with the project sponsor, can use web sites, newspapers, or electronic newsletters and other methods to inform the public of the undertaking and to solicit input, regardless of the NEPA class of action.

4.2. Identify historic properties.

Historic properties mean districts, sites, buildings, structures, or objects that are included in, or eligible for inclusion in, the National Register of Historic Places (NRHP). This includes prehistoric archeological sites and associated artifacts, records, and remains, as well as properties of traditional religious and cultural importance to Indian tribes and Native Hawaiian organizations (36 CFR § 800.16 (l)(1)). FTA Regional staff must make a reasonable and good faith effort to identify historic properties (36 CFR § 800.4(b)(1)).

4.2.1. Determine the scope of identification efforts.

- **Define the Area of Potential Effects (APE).** FTA Regional staff is responsible for defining the APE in consultation with the SHPO/THPO (36 CFR § 800.4(a)(1)). SHPO/THPO concurrence on the APE is not required, but their input should be considered when determining the final APE. The APE does not need to be one contiguous area, and different APEs can be defined for different types of effects, direct and indirect (36 CFR § 800.16(d)). Direct effects occur as a result of the proposed undertaking, e.g., physical intrusion, changes in the view of or from a property, noise or vibration impacts. If the effect comes from the undertaking at the same time and place with no intervening cause, it is considered direct regardless of its specific type (e.g., visual, physical, auditory, etc.). Indirect effects to historic properties are those caused by the undertaking that are later in time or farther removed in distance but are still reasonably foreseeable.³ The APE needs to be sufficient to account for both direct and indirect effects and can be refined as the undertaking or analysis progresses. FTA Regional staff should seek SHPO/THPO input on the adequacy of the APE via email or a letter.
- **Review existing documentation and seek information from other parties.** Prior to any cultural survey or field work, FTA Regional staff and/or project sponsors should review available records of historic properties and information about possible historic properties. SHPO/THPO staff can be the best source of advice for locating relevant information. FTA Regional staff and/or project sponsors may also seek information from organizations or individuals that may have knowledge of historic properties regardless of whether they are a consulting party (36 CFR § 800.4(a)(2) - (3)).

³ <https://www.achp.gov/news/court-rules-definitions-informs-agencies-determining-effects>

- Consult Indian Tribes and Native Hawaiian organizations.** Indian tribes and Native Hawaiian organizations should be identified and consulted for information about properties that may have religious or cultural significance (36 CFR § 800.4(a)(4)). Identifying federally-recognized tribes can be achieved through various means, such as by consulting with the SHPO/THPO, reviewing Federal agency databases or resource documents (e.g., ACHP’s Office of Native American Affairs,⁴ Bureau of Indian Affairs’ Tribal Directory Dataset,⁵ U.S. Department of Housing & Urban Development’s Tribal Directory Assessment Tool—TDAT⁶), and the tribe’s website. Consultation between FTA and Indian tribes is considered a government-to-government relationship as set forth in the Constitution of the United States, treaties, statutes, and court decisions (36 CFR § 800.2(c)(2)(ii)(B)-(C)). Any outreach and/or consultation with Indian tribes must be conducted by FTA Regional staff as the lead Federal agency (36 CFR § 800.2(c)(2)(ii)(B)-(C)). Initial communication (i.e., letter) with tribes should be made by the Regional Administrator in a sensitive manner respectful of tribal sovereignty and addressed to the tribal leader. Additional guidance regarding tribal consultation is provided in SOP No. 20 *Agency Roles and Government-to-Government Coordination* and on ACHP’s website.⁷ Section 106 only requires consultation with federally-recognized tribes, but some States (e.g., California) have State laws that also require consultation with non-federally recognized tribes for compliance with State regulation. FTA may consult with non-federally-recognized tribes as consulting parties on a case-by-case basis.

4.2.2. Identify properties listed in or eligible for the NRHP. Based on the information gathered from existing records and input from other parties, FTA Regional staff identify those properties already listed in the NRHP, or formally determined eligible for listing, and evaluate other potential historic properties (e.g., “historic-age” properties) for eligibility within the APE (36 CFR § 800.4(b)). Previously-evaluated properties should be reviewed because their eligibility status may change due to the passage of time, changing perceptions of historic significance, or incomplete prior evaluations (36 CFR § 800.4(c)(1)). The NRHP eligibility evaluation should be conducted for any properties that are of “historic-age” (generally 50 years of age⁸). If a portion of a historic district is within the APE, FTA Regional staff would need to determine the scope of the survey and documentation for the affected district; FTA’s Office of Environmental Programs is available to assist the Regional Office with those unique situations. Resources of exceptional significance do not need to be over 50 years of age and may also be present in the APE.

Guidance on how to apply the National Register criteria for evaluation can be found on the National Park Service website.⁹ Properties should be identified in a historic architectural survey report or a cultural resources report as either listed in the NRHP or eligible for listing in the NRHP, and the Criteria of Eligibility should be noted for each property. The identification and evaluation of historic resources must be done by professionals meeting the qualifications identified in Footnote 1 of this SOP, in

⁴ <https://www.achp.gov/about/offices/onaa>.

⁵ <https://www.bia.gov/tribal-leaders-directory>.

⁶ <https://egis.hud.gov/TDAT/>.

⁷ <https://www.achp.gov/>.

⁸ The National Register’s standards for evaluating the significance of properties specify the 50 years of age as a general criterion, however, a project may take several years to implement so it may be appropriate to adjust the 50-year timeframe in certain circumstances. For example, it may be appropriate to subtract “50” from the construction year or the opening year to account for the project’s “historic-age” year. FTA Regional staff can contact the Office of Environmental Programs to discuss specific projects.

⁹ https://www.nps.gov/nr/publications/bulletins/nrb15/nrb15_2.htm.

accordance with each States' SHPO/THPO published procedures, if applicable, and with input from consulting parties, including Indian tribes and Native Hawaiian organizations.

FTA Regional staff should review the documentation and reports prepared by the project sponsors or their consultants to ensure the methodology, preliminary determinations of eligibility, and application of the NRHP criteria are reasonable. The documentation should include: a) description of the undertaking, specifying FTA involvement; b) a map of the APE; c) description of steps taken to identify historic properties; d) the results of the survey, including properties that are listed or have been previously determined eligible and newly identified properties that FTA deems eligible; e) an explanation of loss of integrity for any resources that may have been previously listed or determined eligible; and f) survey forms and documentation required by the SHPO's office. For recommended eligible properties, FTA Regional staff needs to identify the NRHP criterion or criteria that each property is eligible under and specify the resources that are contributing and non-contributing resources in historic districts.

FTA must provide the documentation to the SHPO/THPO, and request concurrence with FTA's determinations of eligibility (36 CFR § 800.11). The documentation must also be provided to consulting parties (same level of information for all consulting parties), and they should be asked to provide their input to FTA and to the SHPO/THPO. The SHPO/THPO has 30 calendar days (from receipt) to respond to FTA's request for concurrence on FTA's eligibility determinations; if the SHPO/THPO does not respond, FTA's duties to consult are fulfilled. If there is a disagreement about eligibility, FTA can request a formal determination of eligibility from the Keeper of the National Register (36 CFR § 800.4(c)(2)).

4.2.3. Determine if any historic properties are affected.

- **No Historic Properties Affected.** If there are no historic properties in the APE or there are historic properties present but they would not be affected by the undertaking, FTA may make a finding of "no historic properties affected" and conclude the Section 106 process after completing the following:
 - Provide documentation of the "no historic properties affected" finding to the SHPO/THPO. Documentation needs to include: a description of the undertaking; the APE, including maps; the steps taken to identify historic properties; and the basis for determining that no historic properties are present or affected (36 CFR § 800.11(d)).
 - Notify all consulting parties of the finding.
 - Make the documentation available for public inspection prior to approving the undertaking (i.e., when making the Section 106 determination in the environmental decision document) (36 CFR § 800.4(d)(1)).

If there are no objections from SHPO/THPO (or ACHP, if participating) within 30 days of receiving an adequate documented finding, FTA has no further obligations under Section 106 (36 CFR § 800.4(d)(1)). There is no requirement to notify ACHP of a "no historic properties affected" finding unless ACHP was previously invited and agreed to participate in the Section 106 process.

- **Objection to a Finding of No Historic Properties Affected.** If the SHPO/THPO objects within 30 days of receipt of FTA's documented finding, FTA must either consult to resolve the disagreement or request the ACHP's review (36 CFR § 800.4(d)(1)(ii)). FTA Regional staff should consult with the FTA FPO for further guidance if disagreement with SHPO/THPO cannot be resolved.

- **Properties Affected.** If there are historic properties that would be affected in the APE, follow the steps in Sec. 4.3—Assess Adverse Effects.

4.3. Assess Adverse Effects. FTA Regional staff is responsible for making effect determinations on the historic properties identified within the APE based on the adverse effect criteria found at 36 CFR § 800.5(a) and in considering the views concerning such effects provided by consulting parties and the public. Adverse effects occur if the undertaking directly or indirectly alters characteristics that qualify the property for inclusion in the NRHP (36 CFR § 800.5(a)(1)) in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Examples of adverse effects on historic properties include:

- Physically destroys or damages the property;
- Alters the property in a way that is inconsistent with the Secretary of the Interior's Standards for Treatment of Historic Properties (see 36 CFR part 68);
- Removes the property from its historic location;
- Changes the character of the property's use, or of physical features within the property's setting, that contribute to its historic significance;
- Introduces an atmospheric, audible, or visual feature to the area that would diminish the integrity of the property's significant historic features; or,
- Neglects 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 (36 CFR § 800.5(a)(2)).

4.3.1. No Adverse Effect. If the undertaking does not meet the criteria for adverse effect, FTA can make a finding of "no adverse effect" (36 CFR § 800.5(d)(1)). FTA Regional staff must provide documentation of the proposed finding to the SHPO/THPO and other consulting parties and provide a 30-day review period (36 CFR § 800.5(c)). The documentation should include: a) description of the undertaking, specifying FTA involvement, APE, photographs, maps and drawings, as necessary; b) description of steps taken to identify historic properties; c) description of the affected historic properties, including the characteristics qualifying them for the NRHP; d) description of the undertaking's effects on historic properties; e) explanation of why the adverse effect criteria were found applicable or inapplicable, including any conditions or future actions to avoid, minimize or mitigate adverse effects; and f) copies or summaries of any views provided by consulting parties and the public. FTA Regional staff should include consideration of Indian Tribes or Native Hawaiian interests, and whether this is applicable.

If the SHPO/THPO agrees with a finding of "no adverse effect" in writing or does not respond, and there is no objection from a consulting party or ACHP, if participating, within 30-days from receipt of FTA's finding and supporting documentation, FTA may proceed with the undertaking (36 CFR § 800.5(c)(1)).

If the SHPO/THPO or any consulting party notifies FTA within the 30-day review period that it disagrees with the finding, FTA Regional staff must either continue consultation to resolve any disagreement, or request ACHP to review the finding (36 CFR § 800.5(c)(2)). If FTA requests the ACHP's review a finding, FTA must concurrently notify all consulting parties of this request (36 CFR § 800.5(c)(2)(i)). FTA Regional staff should notify FTA FPO prior to requesting ACHP's review of a finding of "no adverse effect" and copy the FPO on any correspondence to the ACHP.

4.3.2. Adverse Effect. If the undertaking may have an “adverse effect” on historic properties, FTA Regional staff should consult with SHPO/THPO and other consulting parties to identify alternatives or modifications to the undertaking or impose conditions (e.g., design in keeping with the Secretary of Interior’s Standards for Treatment of Historic Properties) that could avoid adverse effects. If the undertaking can be modified or conditions can be imposed to avoid adverse effects, FTA may make a new finding of “no adverse effect” (36 CFR § 800.5(b)). If adverse effects cannot be avoided, FTA Regional staff must proceed to resolving adverse effects, pursuant to 36 CFR § 800.6 (see Sec. 4.4 below). Documentation to support an adverse effect finding would be similar to documentation for a no adverse effect, as described in Section 4.3.1.

4.4. Resolve Adverse Effects.

4.4.1. Continue consultation. If FTA finds the undertaking will have adverse effect on one or more historic properties, consultation must continue between FTA, the project sponsor, SHPO/THPO, and the consulting parties to resolve those effects. Consultation may include developing and evaluating alternatives or design modifications to the undertaking to avoid or minimize adverse effects. Consultation does not require face-to-face meeting(s); electronic/email exchanges of documents or teleconferences are acceptable methods to consult. As applicable, FTA, SHPO/THPO, and ACHP (if participating) may invite others to become consulting parties at this phase (36 CFR § 800.6(a)(2)). FTA Regional staff must provide the consulting parties with all relevant documentation related to the adverse effect finding and provide the public with an opportunity to express their views on resolving adverse effects of the undertaking (36 CFR § 800.6(a)(3)-(4)). (See Sec. 4.1 pertaining to the plan to involve the public in the Section 106 process).

4.4.2. Notify the ACHP of Adverse Effects and Invite ACHP participation. FTA Regional staff must notify the ACHP of its adverse effect finding in writing electronically¹⁰ and provide the following information in the formal notification letter: a) description of the undertaking and APE; b) identification of historic properties; c) description of the undertaking’s effects on historic properties and explanation for adverse effect determination; and d) an invitation to ACHP to participate in the process. The ACHP will inform FTA of its decision within 15 days of receiving FTA’s request to participate in Section 106 consultation (36 CFR § 800.6(a)(1)). The FTA FPO should be copied on all correspondence with the ACHP.

If the undertaking may have an adverse effect on a National Historic Landmark, FTA must invite (in addition to the ACHP) the Secretary of the Interior to participate in consultation (36 CFR § 800.6(a)(1)(i)(B), 800.10(b) - (c)). The FTA FPO should be copied on such invitations.

4.4.3. Develop a Memoranda of Agreement (MOA) or Programmatic Agreement (PA).¹¹ An MOA is used on projects where an adverse effect has been identified and a specific resolution to those effects has been agreed upon. A PA is generally used for a program of undertakings or a complex project where the effects of an undertaking are unknown during the environmental review phase. To resolve adverse effects, FTA Regional staff will negotiate terms and conditions that will be implemented in a MOA or PA with SHPO/THPO and other consulting parties (and ACHP, if participating) (36 CFR § 800.14(b)).

¹⁰ <https://www.achp.gov/digital-library-section-106-landing/achp-electronic-section-106-documentation-submittal-system>

¹¹ See ACHP’s guidance on Section 106 agreement documents for more information: <https://www.achp.gov/initiatives/guidance-agreement-documents>.

4.4.4. Execute the MOA or PA. Once the terms and conditions of an MOA or PA have been negotiated, signatories and consulting parties (discussed below) can execute the MOA or PA. An executed and implemented MOA or PA is evidence of FTA’s compliance with Section 106 (36 CFR § 800.6(c)).

As the signatories of the agreement documents, FTA, SHPO/THPO, and ACHP, if participating, have sole authority to execute, amend, or terminate the agreement, and can execute the MOA or PA to resolve adverse effects without the need for other signatories (36 CFR § 800.6(c)(1)). FTA may invite additional parties (e.g., project sponsor) to be signatories to the MOA or PA (36 CFR § 800.6(c)(2)) and FTA may invite consulting parties to concur in the MOA or PA. Concurring parties do not have the same right to seek amendment or termination of the MOA or PA as signatories (36 CFR § 800.6(c)(3)). Rather, concurring parties signature on the agreement document expresses agreement with or support for the outcome of the Section 106 process. FTA Regional staff, in coordination with project sponsor, is responsible for ensuring that the undertaking is carried out in accordance with the executed MOA or PA.

4.4.5. Distribution and filing the executed MOA or PA. FTA must provide all consulting parties with a copy of the executed MOA or PA (36 CFR § 800.6(c)(9)). FTA must submit a copy of the executed MOA or PA to ACHP prior to approving the undertaking (i.e., issuing the environmental decision document) (36 CFR § 800.6(b)(1)(iv)). Filing the executed agreements with ACHP concludes the Section 106 process.

4.5. Failure to Resolve Adverse Effects. After consultation and extensive efforts have been made to resolve the adverse effect, FTA, SHPO/THPO, and/or the ACHP may determine that further consultation will not be productive and terminate consultation. If FTA terminates consultation, the FTA Administrator must notify the other consulting parties and provide a reason(s) for termination (36 CFR § 800.7(a)(1)). Terminating consultation should be considered as a last resort after all options, including seeking ACHP assistance, have failed. FTA Regional staff should consult with the FTA FPO prior to terminating consultation.

4.6. Post-Review Discoveries. For undertakings that result in an MOA or PA, the agreement document should include provisions for subsequent (i.e., Post-Review) discovery, including the notification process for any discovery or identification of additional potential historic properties during construction. For undertakings in which potential historic resources are discovered during construction without a defined process to treat or resolve unanticipated discoveries of resources, FTA Regional staff must follow procedures as outlined in 36 CFR § 800.13(b)(3). FTA Regional staff and/or the project sponsor (as delegated) must notify the SHPO/THPO, applicable Indian tribes or Native Hawaiian organizations, and ACHP within 48 hours of the discovery (36 CFR § 800.13(b)(3)). FTA may not have all the necessary information about the resources and potential effects within 48 hours, however, the notification must still occur within 48 hours along with preliminary information about the discovery and next steps (e.g., continued consultation). The Regional staff should coordinate with the FTA FPO if an unanticipated discovery occurs, and when ACHP needs to be notified of the discovery.

5. Permitting Dashboard. FTA Regional staff is responsible for entering Section 106 consultation dates onto the Federal Permitting Dashboard¹² for undertakings involved with either an FTA EA or EIS. Section 106 is an “action” under the EA or EIS and the corresponding consultation dates are “milestone” dates.

6. Other Statutes


¹² <https://www.permits.performance.gov/>.

6.1. Section 4(f) Requirements (49 U.S.C. § 303; 23 U.S.C. § 138; 23 CFR part 774). The identification of historic properties under Section 106 also identifies historic sites that may qualify for Section 4(f) protection. The outcome of the Section 106 review process, FTA’s determination of effect, is used to support the Section 4(f) analysis or evaluation and FTA’s Section 4(f) finding. If FTA intends to make a *de minimis* impact finding to a historic property, the Section 4(f) regulations at 23 CFR 774.5(b)(2) require that the SHPO and/or THPO (the official with jurisdiction) be notified of FTA’s intention based on their concurrence with a finding of “no adverse effect” or “no historic properties affected” in accordance with 36 CFR part 800. This is usually done in the effect determination letter sent to the official with jurisdiction for their concurrence as described in Sec. 4.3. For more information concerning Section 4(f), see SOP No. 18 – *Section 4(f) Evaluations*.

6.2. Cultural Resources-Related Statutes. At the time of initiating the Section 106 process, FTA Regional staff should consider the requirements of other statutes, such as Native American Graves Protection and Repatriation Act (25 U.S.C. § 3001, *et seq.*), the American Indian Religious Freedom Act (42 U.S.C. § 1996), the Archeological Resources Protection Act (16 U.S.C. § 470aa-470mm), and agency-specific or State requirements that may apply to the undertaking and may require coordination during the Section 106 process. FTA Regional staff should consult with the Office of Environmental Programs to determine whether other cultural resource requirements apply to the undertaking.

7. References

- Section 106 Regulations, [36 CFR part 800- Protection of Historic Properties](#)
- [Section 106 Program Alternatives](#)
- [National Park Service Bulletin 15: How to Apply the Criteria for Evaluation](#)
- [ACHP’s Guidance on Meeting the “Reasonable and Good Faith” Identification Standards](#)
- [ACHP Guidance on Agreement Documents](#)
- [NEPA and NHPA: A Handbook for Integrating NEPA and Section 106](#)
- Section 4(f) Regulations, [23 CFR part 774](#); Preservation of Parklands, [23 U.S.C. § 138](#); Policy on Lands, Wildlife and Waterfowl Refuges and Historic Sites, [49 U.S.C. § 303](#))
- American Indian Religious Freedom Act, [42 U.S.C. § 1996](#)
- Native American Graves Protection Act and Repatriation Act, [25 U.S.C. § 3001 et seq.](#)
- Archeological Resources Protection Act, [16 U.S.C. § 470aa-470mm](#)

APPROVAL: 
Megan W. Blum
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DATE: 6/28/2019