

Involving Local Governments in Section 106 Reviews For Transportation Projects

What is Section 106 review?

In the National Historic Preservation Act (NHPA), Congress established a comprehensive program to preserve the historical and cultural foundations of the Nation as a living part of community life. Section 106 of the NHPA, a crucial part of that program, requires the consideration of historic preservation in Federal actions that take place nationwide. Section 106 requires Federal agencies to consider the effects of their actions on historic properties and to provide the Advisory Council on Historic Preservation (ACHP) an opportunity to comment prior to project implementation.

Section 106 encourages, but does not mandate, preservation. Regulations issued by the ACHP guide Section 106 review, specifying the actions Federal agencies must take to meet their statutory obligations, including consulting with other who may have an interest in the outcome of the project or its effects on historic properties. These regulations, 36 CFR Part 800, establish four steps to follow to complete the Section 106 review process. For more information on these steps, visit www.achp.gov/regs.html.

Who is the ACHP?

The Advisory Council on Historic Preservation (ACHP) is an independent Federal agency that advises the President and Congress about historic preservation matters, advocates preservation policy, protects historic properties, and educates stakeholders and the public. The Federal agency official must notify the ACHP when he/she determines that an undertaking may cause adverse effects to historic properties.

How do local governments get involved in Section 106?

There are three different ways in which local governments participate in Section 106 consultation: as an applicant for federal assistance; as a consulting party; and, in some cases, through responsibilities delegated to them by a Federal agency.

- (1) Applicants for Federal assistance, permits, licenses and other approvals are entitled to participate as consulting parties. When a local government applies for Federal funding (e.g., Federal Aid Highway funds or a Transportation Enhancement grant), it may be asked by the federal agency to provide assistance in completing the requirements of Section 106; including funding necessary studies and mitigation measures. Under the Section 106 regulations, an agency official may authorize an applicant or group of applicants to initiate consultation with the State Historic Preservation Officer and/or Tribal Historic Preservation Officer (SHPO/THPO) and others, but remains legally responsible for all findings and determinations charged to the agency official. **36 CFR 800.2(c)(4)**

- (2) Local governments with jurisdiction: Federal agency officials responsible for carrying out Section 106 review **must** invite local government representatives to participate in consultation to resolve the effects of its actions on historic properties. A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party. **36 CFR 800.2(c)(3)**.
- (3) A local government may be authorized to act as the agency official for purposes of Section 106. This provision is currently limited to programs that have been legislatively delegated to the recipients of certain Federal funds from the Department of Housing and Urban Development (HUD), such as Community Development Block Grants. Local agencies that are recipients of Federal Highway Administration (FHWA) funds are not authorized to act on behalf of FHWA for purposes of Section 106.

Who represents local governments in Section 106 review?

Depending on its interests and its role in Section 106 review, a local government may be represented by the governing body, an elected official, or staff with responsibilities for planning, recreation, or historic preservation. Historic Preservation Commissions, appointed by the governing board, may participate to provide expertise on local ordinances protecting historic districts, design review, and the identification of properties of local or regional significance. Elected officials may also wish to participate directly in consultation, particularly if the project and the Section 106 review process are of high public interest.

What does it mean to participate in consultation?

The Federal agency official involves consulting parties in identifying historic properties that may be affected by a project; evaluating the project's effects, and considering options to resolve any effects determined to be adverse. Consultation in this case means the process of seeking, discussing, and considering the views of other participants, and where feasible, seeking agreement with them regarding matters arising in the section 106 process. **36 CFR 800.16(f)**.

Representatives of local governments with jurisdiction should be notified early in the Section 106 review process and invited to participate by the Federal agency official. Although certain documents revealing the confidential information may be withheld as provided by law, the agency official is required to provide all consulting parties with adequate documentation to explain its findings and determinations. **36 CFR 800.11**.

What are the benefits of becoming a consulting party?

Participation by local governments informs the Federal agency official about the importance of historic places to the local community. Local government participation can also ensure that the results of Section 106 review fully take into account the local government's preservation priorities; local planning efforts, and local historic preservation ordinances. In addition, local government representatives can actively

pursue avoidance, minimization, and mitigation measures that most benefit their community; develop partnerships; and/or promote heritage tourism and future preservation efforts in areas under their jurisdiction. The result of consultation is a Memorandum of Agreement (MOA) detailing the agreement among the parties on measures to resolve adverse effects.

How can the ACHP assist local governments in this review process?

State Historic Preservation Officers (SHPOs) are a great source of information about the Section 106 review process, and local governments are encouraged to use them as a resource. 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 also offers training courses in Section 106 review (<http://www.achp.gov/106select.html>.)

The ACHP can provide local governments and other participants with assistance in understanding the steps of the review process and their rights and responsibilities. The ACHP's website includes valuable information on Section 106 and other federal requirements. In addition, a local government or historic preservation commission may contact the ACHP and request advice regarding the substance of any finding, determination or decision or regarding the adequacy of the agency official's compliance with the regulations implementing Section 106. **36 CFR 800.9(a)**.

For more information: visit www.achp.gov/fhwa.html

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