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# Historic Properties and Federal Responsibilities: An Introduction to Section 106 Reviews

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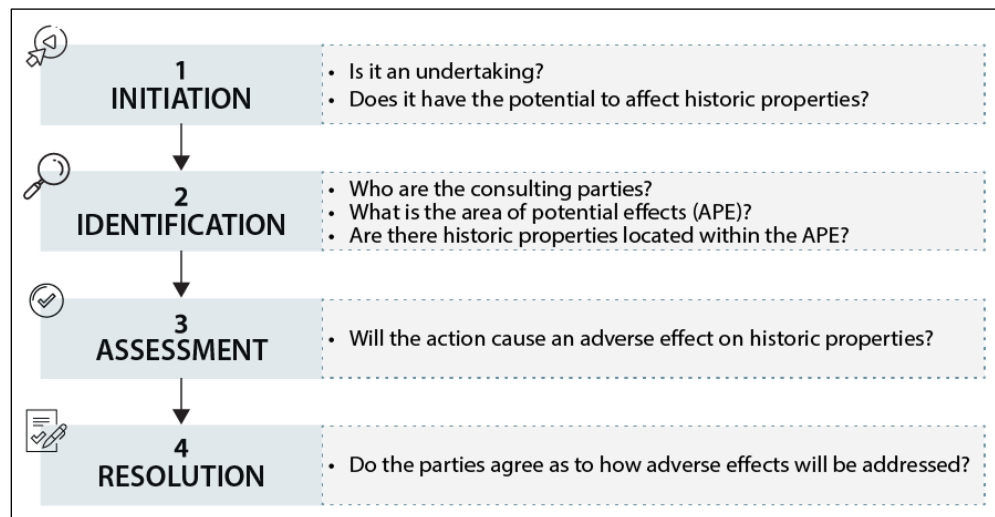
May 5, 2023

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The National Historic Preservation Act (NHPA; 54 U.S.C. §§300101 et seq.), as amended, created a process for federal agencies to follow when projects may affect certain historic resources. Among its various provisions, Section 106 of the NHPA requires federal agencies to “take into account” the effects their actions may have on *historic properties*. Such properties include any prehistoric or historic districts, sites, buildings, structures, or objects that are listed or are eligible for listing on the National Register of Historic Places. Actions subject to review under the NHPA, referred to as federal *undertakings*, include actions directly undertaken, funded, or permitted by a federal agency, as well as actions administered by state or local governments pursuant to a delegation or approval by a federal agency. The process of evaluating the effects of federal undertakings on historic properties is referred to as a *Section 106 review*.

Section 106 reviews generally follow a four-step process: (1) initiation, in which the agency determines whether the action is an undertaking subject to review; (2) identification of historic properties in the *area of potential effects*; (3) assessment of whether the action would cause adverse effects to historic properties; and (4) resolution between parties on steps to address any adverse effects. Throughout the Section 106 process, federal agencies must consult with various entities—such as the relevant state historic preservation officer (SHPO) or tribal historic preservation officer (THPO)—to determine whether historic properties have been identified and to craft potential solutions to avoid, minimize, or mitigate adverse effects on historic properties.

Overview of Section 106 Review Steps



**Source:** Congressional Research Service, using 36 C.F.R. Part 800.

The NHPA does not require an agency to select the option that best avoids adverse effects. Instead, the implementing regulations for Section 106, promulgated by the Advisory Council on Historic Preservation, outline potential ways to address situations in which adverse effects may occur. For example, the agency and the SHPO and/or THPO may enter into a memorandum of agreement (MOA) that details a plan to minimize damage to the historic property. In practice, the majority of Section 106 reviews for undertakings that adversely affect historic properties result in an MOA. If the parties cannot reach an agreement, regulations provide for the agency or other parties involved to formally terminate the consultation process. Formal termination also may fulfill an agency’s responsibilities under Section 106.

Not every federal undertaking will require an agency to go through every step of this process. For example, agencies may use alternative methods—known as *program alternatives*—to meet their obligations under Section 106. As a result, the time and resources required to comply with Section 106 vary depending on the scale and complexity of the project in question.

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The National Historic Preservation Act (NHPA; 54 U.S.C. §§300101 et seq.), as amended, created a process for federal agencies to follow when projects may affect a historic property.<sup>1</sup> This process is found in Section 106 of the NHPA and thus is known as a *Section 106 review*.<sup>2</sup> Section 106 and its implementing regulations require federal agencies to review the potential impacts of their actions on historic sites and consult with interested parties to seek ways to avoid, minimize, or mitigate any adverse effects. Although the NHPA does not require an agency to select the option that best avoids adverse effects, the regulations outline potential ways to resolve situations in which adverse effects may occur, such as through a memorandum of agreement among the agency and other stakeholders on a plan to minimize damage to the historic property.

Issues related to Section 106 of the NHPA are of regular interest to Members of Congress and other stakeholders. These questions may include whether or to what degree the process has been effective in protecting or mitigating damage to historic properties, the adequacy of federal agency consultation procedures, and perceived inefficiencies in the process that some view as delaying certain projects. In addition, at times, Congress has considered legislation that would exempt or reduce agency obligations under Section 106 for certain actions.<sup>3</sup>

This report addresses procedural questions that legislators have posed regarding Section 106, particularly in the context of congressional oversight of agency compliance actions. Specifically, the report provides an overview of the standard procedures for complying with Section 106 as outlined in federal regulations found at 36 C.F.R. Part 800.<sup>4</sup> Some Members also have expressed interest in better understanding the roles and responsibilities of the various parties involved in the Section 106 process. As such, the report describes the various steps required of federal agencies and other parties throughout the Section 106 process. It also highlights key terms defined in statute, agency regulations, and guidance to help in understanding compliance with Section 106 requirements. This report does not address proposals or options to amend or alter the Section 106 requirements.

## Key Definitions

The NHPA and implementing regulations promulgated by the Advisory Council on Historic Preservation (ACHP; see definition below) use various terms specific to the Section 106 review process. Familiarity with these terms is helpful in understanding Section 106 review and the roles and responsibilities of the various parties throughout the process. Selected key terms used throughout this report are highlighted below:

- *Advisory Council on Historic Preservation.* The NHPA authorized the ACHP to oversee federal agencies' implementation of Section 106. Created by NHPA, the ACHP is an independent agency comprising federal, state, and tribal government members, as well as experts in historic preservation and members of the public.<sup>5</sup> Through its authority under the NHPA, the ACHP promulgated regulations for the Section 106 process.

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<sup>1</sup> National Historic Preservation Act (NHPA; 54 U.S.C. §§300101 et seq.). For more information on the NHPA, see CRS Report R45800, *The Federal Role in Historic Preservation: An Overview*, by Mark K. DeSantis.

<sup>2</sup> 54 U.S.C. §306108.

<sup>3</sup> For example, see H.R. 8168 and H.R. 940 in the 117<sup>th</sup> Congress, both of which would have exempted certain forest management activities from review under Section 106.

<sup>4</sup> These regulations are promulgated by the Advisory Council on Historic Preservation (ACHP).

<sup>5</sup> 54 U.S.C. §§304101 et seq.

- *Agency/Lead Agency.* The federal agency, or lead agency if more than one agency is involved, is the entity with designated responsibility for compliance with Section 106. When multiple federal agencies are involved in a proposed federal action subject to Section 106, some or all of the agencies may designate a lead agency to act on their behalf, fulfilling their collective responsibilities under the law.<sup>6</sup> Although there are instances in which certain nonfederal entities (see below regarding an *applicant* for federal assistance, permits, or licenses) may be asked to carry out some of the tasks for completing a Section 106 review, the federal agency remains responsible for all findings and determinations under the law.
- *Applicant.* The applicant is the entity applying for federal funding or for a federal permit, license, or other approval subject to Section 106 review. Regulations allow federal agencies to authorize an applicant (or group of applicants) to carry out certain Section 106 requirements. Under such an authorization, an applicant may be allowed to consult with the state or tribal historic preservation officer (SHPO/THPO; see below) in identifying and evaluating historic properties and in assessing effects of the proposed undertaking. The agency has discretion in determining what activities an applicant may be authorized to conduct. The agency remains responsible for all findings and determinations made throughout the review process, as well as for any government-to-government relationships with tribes.<sup>7</sup>
- *Area of Potential Effects (APE).* 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.<sup>8</sup> 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.
- *Historic Property.* A historic property is any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register of Historic Places (National Register), including artifacts, records, and material remains relating to the district, site, building, structure, or object.<sup>9</sup> The NHPA was amended in 1976 to include the phrase “or eligible for inclusion on” the National Register.<sup>10</sup> Prior to that, Section 106 covered only properties already listed on the National Register.
- *State/Tribal Historic Preservation Officer.* The SHPO is the state’s lead authority for historic preservation and “reflects the interests of the State and its citizens in the preservation of their cultural heritage.”<sup>11</sup> When tribal properties are at stake, federal agencies must consult with the THPO. The main responsibilities of the SHPO/THPO in the Section 106 process are to “advise and assist” federal agencies in carrying out their responsibilities and to review agency findings regarding the identification and assessment of an undertaking’s impacts on historic properties.

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<sup>6</sup> 36 C.F.R. §§800.2(a)(2) and 800.16(b).

<sup>7</sup> 36 C.F.R. §800.2(c)(4).

<sup>8</sup> 36 C.F.R. §800.16(d).

<sup>9</sup> 54 U.S.C. §300308.

<sup>10</sup> P.L. 94-422.

<sup>11</sup> 36 C.F.R. §800.2(c)(1).

- *Undertaking.* An undertaking is a “project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency.”<sup>12</sup> Undertakings include both actions directly undertaken, funded, or permitted by a federal agency and actions administered by state or local governments pursuant to a delegation or approval by a federal agency.

## Overview of Section 106

Similar to other federal laws intended to preserve or protect natural or cultural resources, the NHPA’s directives apply to federal agency actions. In particular, Section 106 requires federal agencies to “take into account” the effect their actions may have on historic properties. Pursuant to the NHPA, the Section 106 process is to be concluded before the expenditure of any federal funds or issuance of any federal license.<sup>13</sup>

Federal regulations outline a four-step process for agencies to comply with Section 106 requirements:

1. **Initiation.** The agency determines whether a proposed action is an undertaking and, if so, whether the undertaking is a type of activity that has the potential to cause effects on historic properties.
2. **Identification.** The agency identifies the appropriate consulting parties, the project’s APE, and whether any historic properties are located within the project area.
3. **Assessment.** The agency determines whether the proposed action would adversely affect the historic properties in question.
4. **Resolution.** If possible, the agency and stakeholders enter into an agreement detailing how the agency plans to address any adverse effects to historic properties.

The following sections describe standard procedures for complying with these steps. Not every federal undertaking necessarily requires an agency to complete every step. The majority of federal actions reviewed annually either do not involve historic properties or are actions that would not adversely affect historic properties.<sup>14</sup> In these instances, agency compliance with Section 106 may be satisfied in one or two steps. In addition, agencies often coordinate Section 106 compliance with other federal review processes, such as those required by the National Environmental Policy Act (NEPA), the Archaeological Resource Protection Act, and the Native American Graves Protection and Repatriation Act.<sup>15</sup> In particular, regulations encourage federal agencies to use their broad environmental review process, carried out under NEPA, as an

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<sup>12</sup> 54 U.S.C. §300320.

<sup>13</sup> 54 U.S.C. §306108.

<sup>14</sup> A study commissioned by the National Trust for Historic Preservation in 2010 indicated that of the 114,000 eligibility actions reviewed annually, approximately 85% were found not to involve historic properties. According to the report, this number represents the number of *properties* reviewed for eligibility during a project’s Section 106 review and not the number of federal *undertakings* reviewed. Information is based on data provided by the National Park Service. Leslie E. Barras, “Summary,” in *Section 106 of the National Historic Preservation Act: Back to Basics*, 2010, p. 5.

<sup>15</sup> These laws are codified as follows: National Environmental Policy Act (NEPA; 42 U.S.C. §§4321 et seq.); Archaeological Resource Protection Act (16 U.S.C. §§470aa et seq.); and Native American Graves Protection and Repatriation Act (5 U.S.C. §§3001 et seq.).

“umbrella” compliance process.<sup>16</sup> However, compliance with reviews required under one or more other statutes does not substitute for an agency’s compliance with the requirements under Section 106.

Certain scenarios or types of actions also may result in agencies taking alternate procedural steps to comply with NHPA requirements, not all of which are reflected in this report. For example, federal regulations allow agencies, with agreement from relevant parties, to compress or expedite multiple steps of the process in certain instances (see text box entitled “Section 106 Program Alternatives”).<sup>17</sup> The NHPA also provides an exception to the Section 106 requirements in certain emergency situations, authorizing the Secretary of the Interior to issue regulations waiving all or part of the process “in the event of a major natural disaster or an imminent threat to the national security.”<sup>18</sup> Finally, the NHPA applies different standards of protection when the undertaking has the potential to affect a property designated as a national historic landmark (NHL).

In general, the time needed—and the analysis required—to comply with Section 106 is contingent on the scale and complexity of the project in question. As a result, it is difficult to determine the length of time required for an agency to comply with Section 106 for a proposed undertaking. Although each scenario may be unique, this report is intended to provide Members and stakeholders with a basic understanding of the procedural requirements of Section 106.

### **Understanding Consultation: The Basics**

Consultation is the backbone of the Section 106 process. It is an interactive process that may occur at various points during a Section 106 review and requires an agency (or authorized applicant) to consider input from identified consulting parties. Specifically, consultation is defined as 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 C.F.R. §800.16(f)).

Consultation can involve both informal and formal communication, and the Advisory Council on Historic Preservation (ACHP) encourages agencies to begin consultation early in the project planning process. Although agencies may collaborate with and seek informal input from consulting parties throughout the Section 106 process, federal regulations specifically require agencies to consult with state and/or tribal historic preservation officers at certain points. These consultations are required when the agencies are identifying historic properties potentially affected by the undertaking, assessing whether effects may be adverse in nature, and seeking ways to avoid, minimize, or mitigate any adverse effects on identified historic properties.

Section 106 regulations do not prescribe exactly how the consultation process must proceed, nor do they set an expected timeline for resolution of consultative interactions. As a result, the specific consultation process may differ from project to project. The general process involves parties sharing information so the agency may make a well-informed decision regarding how to proceed with the project. Section 106 review does not require a federal agency to take a prescribed action or meet a specific preservation outcome.

## **Step 1: Initiation**

Agencies must determine whether or when a particular action triggers Section 106 review. Not every action involving a federal agency or federal funds must undergo review and consultation under Section 106. In addition, some federal agencies may have agreements that allow for deviations from the standard compliance procedures outlined below (see “Section 106 Program Alternatives” text box, below). Agencies typically make these step 1 determinations without

<sup>16</sup> Regulations for the coordination of the Section 106 Process with NEPA can be found at 36 C.F.R. §800.8. Discussion of NEPA as an “umbrella” compliance process can be found at ACHP, “Integrating NEPA and Section 106,” at [https://www.achp.gov/integrating\\_nepa\\_106](https://www.achp.gov/integrating_nepa_106).

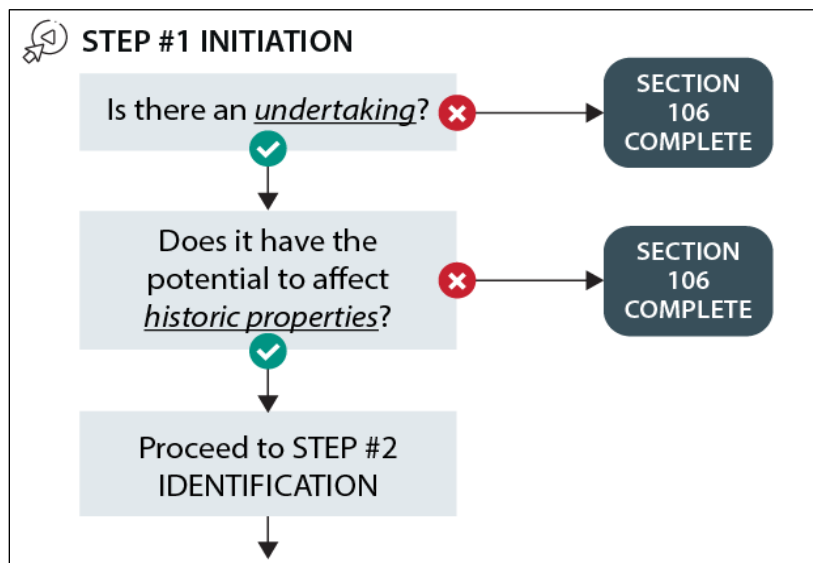
<sup>17</sup> 36 C.F.R. §800.3(g).

<sup>18</sup> 54 U.S.C. §306112.



consultation from outside parties. **Figure 1** illustrates the process of how such determinations may be made at this stage.

**Figure 1. Initiation**



**Source:** Congressional Research Service (CRS), using 36 C.F.R. §800.3.

### Is the Proposed Action an *Undertaking*?

The Section 106 process is triggered by a federal *undertaking*. Under the act, an undertaking is defined as “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency” (see “Key Definitions”).<sup>19</sup> In 1992, Congress amended the definition to include the following examples of types of projects that constitute undertakings:

- Those carried out by or on behalf of an agency
- Those carried out with federal financial assistance
- Those requiring a federal permit, license, or approval
- Those subject to state or local regulation administered pursuant to a delegation or approval by a federal agency<sup>20</sup>

In general, Section 106 does not apply to actions taken entirely by state, local, or private entities (i.e., actions taken without the use of federal funding, federal permits, or some other federal nexus).

### Does the Undertaking Have the Potential to Affect *Historic Properties*?

Once an agency determines a proposed federal action is an undertaking, the agency determines whether the action is a type of activity that has the potential to cause effects on historic properties.<sup>21</sup> At this stage, the agency is not required to determine whether such effects may be adverse (i.e., alter the characteristics of a property in a way that would diminish its historical

<sup>19</sup> 54 U.S.C. §300320.

<sup>20</sup> P.L. 102-575, §4019. Amendments codified at 54 U.S.C. §300320.

<sup>21</sup> 36 C.F.R. §800.3(a)(1).



integrity) or whether the undertaking is likely to affect any specific historic properties. Instead, the agency makes a determination as to the nature of the federal action and whether additional Section 106 requirements might apply.<sup>22</sup> If an agency determines the proposed undertaking does not have the potential to affect historic properties, the agency has no further obligations under Section 106.

### Section 106 Program Alternatives

During the initiation stage of the Section 106 process, regulations direct agencies to determine whether the proposed undertaking is subject to a *program alternative* established under 36 C.F.R. §800.14. Program alternatives are alternative methods available to federal agencies to meet their obligations under Section 106. These program alternatives allow federal agencies to work with the Advisory Council on Historic Preservation (ACHP) to tailor the Section 106 process to meet their needs. The program alternatives vary in the extent to which they may substitute for the standard compliance procedures, which are found in 36 C.F.R. Subpart B.

The available program alternatives include (1) alternate procedures, (2) programmatic agreements, (3) exempted categories, (4) standard treatments, and (5) program comments.

The first option—development of *alternate procedures*—allows an agency to wholly or partially replace the ACHP’s standard regulations with its own procedures, whereas some other alternatives apply to specific aspects of the standard procedures or to specific agency programs or categories of actions. *Programmatic agreements* allow agencies to negotiate agreements with the ACHP to govern Section 106 compliance for an individual agency program, complex project, or group of related undertakings (36 C.F.R. §800.14(b)). According to the ACHP, programmatic agreements are the most commonly used of the five program alternatives. Requirements applicable to *exempted categories* allow the ACHP or an affected agency to propose a program or category of activities that will be exempted from Section 106 review, if such actions have foreseeable effects on historic properties that are likely to be minimal and not adverse (36 C.F.R. §800.14(c)). Provisions for *standard treatments* allow the ACHP, on its own initiative or at another party’s request, to establish a standard method for treating a category of historic properties, a category of undertakings, or a category of effects on historic properties (36 C.F.R. §800.14(d)). Finally, *program comments* allow the ACHP, at an agency’s request or on its own initiative, to comment on a category of undertakings in lieu of conducting individual reviews of undertakings as outlined in this report (36 C.F.R. §800.14(e)).

When an agency determines a proposed action is an undertaking and is subject to Section 106, the appropriate agency official also will determine whether the action is covered by any program alternative. Regulations require agencies to follow the program alternative if it applies. For further discussion of the program alternatives, see ACHP, “Program Alternatives,” at [https://www.achp.gov/program\\_alternatives](https://www.achp.gov/program_alternatives).

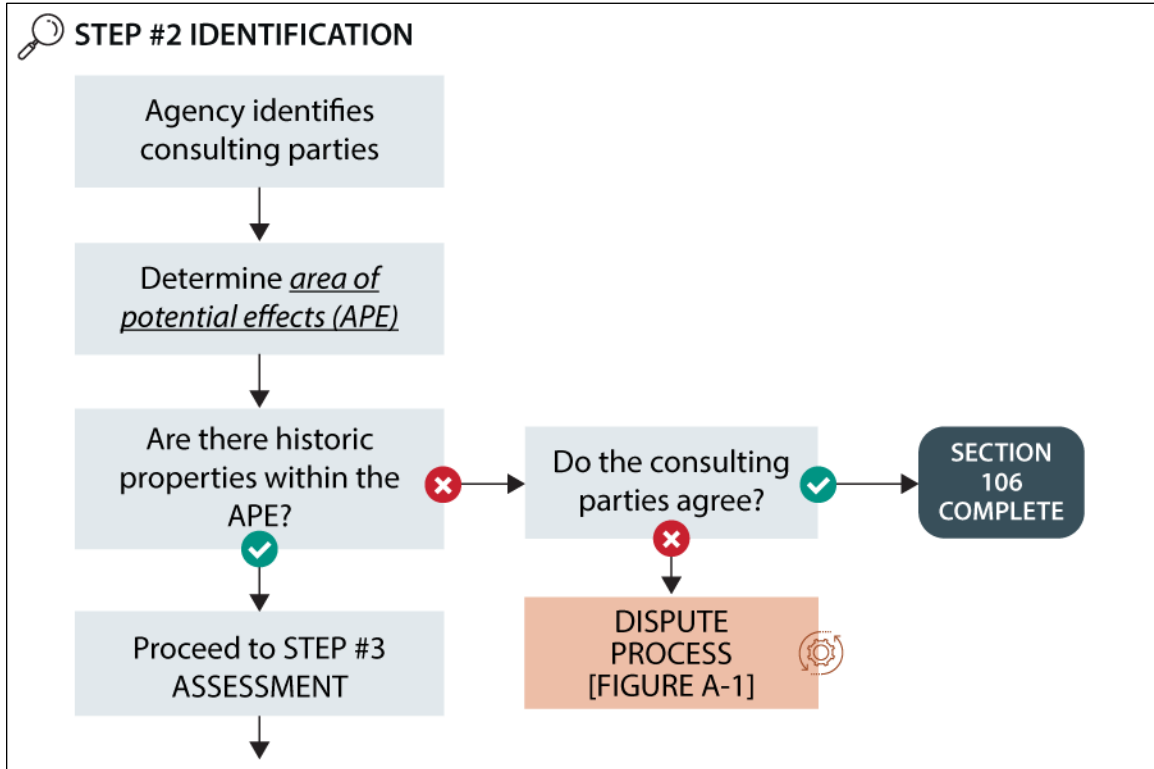
**Source:** 36 C.F.R. §800.14.

## Step 2: Identification

If an agency determines an undertaking has the potential to affect historic properties, the agency enters the second phase of the Section 106 process. At this stage, the agency (or authorized applicant) is responsible for identifying and contacting the consulting parties, determining and defining the project’s APE, and identifying which historic properties located within the APE the project might affect (see **Figure 2**).

<sup>22</sup> The ACHP provides examples of the types of federal undertakings that would not affect historic properties, including Social Security payments, student loans, or grants for libraries to acquire books. See ACHP, “Section 106 Regulations Section-by-Section Questions and Answers Synopsis,” at <https://www.achp.gov/digital-library-section-106-landing/section-106-regulations-section-section-questions-and-answers>.

**Figure 2. Identification**



**Source:** CRS, using 36 C.F.R. §§800.2(c), 800.3(c)-(f) and §800.4.

**Notes:** Although not indicated separately in this figure, authorized applicants may undertake some of an agency’s identification and consultation requirements listed here (see definition of *applicant* in “Key Definitions”). For more information on the dispute process, see **Figure A-1**.

### Who Are the Consulting Parties?

If an agency’s undertaking may affect historic properties, the next step in the Section 106 process is to identify the appropriate *consulting parties*. Under the NHPA, Section 106 consultation is an interactive process in which an agency evaluates an undertaking’s effects on a historic property with input from relevant stakeholders. These stakeholders—referred to as *consulting parties* in regulations—are the SHPO and/or THPO and can include applicants for a relevant license or permit, representatives of local government, affected Indian tribes or Native Hawaiian organizations, or other parties with a demonstrated interest in the undertaking.<sup>23</sup>

### What Is the Area of Potential Effects?

The next step is to identify the area that the project may affect, known as the *area of potential effects* (see “Key Definitions”). Agencies identify the APE in consultation with the SHPO or

<sup>23</sup> 36 C.F.R. §800.2(c). The regulations require that the agency “shall invite any local governments” (36 C.F.R. §800.3(f)(1)) and “make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations” (36 C.F.R. §800.3(f)(1)). The NHPA defines *Indian tribe* to include Alaska Native Villages and Corporations). Not all tribes or Native Hawaiian organizations have a designated tribal historic preservation officer. Regulations still require agencies to consult with a representative designated by any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that an undertaking may affect.

THPO.<sup>24</sup> The APE determination may affect the contents of a Section 106 review, as it determines the review's scope. Only those properties within the APE are evaluated for project impacts.

The APE is not synonymous with the geographic footprint of the project in question. Instead, the APE is intended to reflect the area where a project could affect historic properties, both directly and indirectly. Although regulations do not define what constitutes an *indirect* effect, the criteria for assessing *adverse effects* (see section, “Will the Undertaking Potentially Cause an Adverse Effect on Historic Properties?”) include “reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance, or be cumulative.”<sup>25</sup> As a result, an APE may include areas that are not contiguous with the project area and agencies may define different APEs for different kinds of effects.<sup>26</sup> In addition, the APE(s) can be refined or altered as planning and analysis progress.

### **Are There Historic Properties Located Within the APE?**

After identifying the APE for a particular undertaking, the agency identifies any *historic properties* in the APE in consultation with the SHPO and/or THPO. Historic properties include those listed on the National Register and those eligible to be listed on the National Register (see “Key Definitions”). Eligible properties may be harder to identify than listed properties, as there may be more limited documentation of eligible properties' location, significance, or association.

Regulations state that federal agency officials shall make a “reasonable and good faith effort” to identify historic properties.<sup>27</sup> Although some level of effort is required to demonstrate that the “reasonable and good faith” identification standard is met, regulations do not prescribe any one methodology.<sup>28</sup> The regulations direct agencies to consider factors such as “past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects.”<sup>29</sup> The identification process also may include cultural resource surveys within the APE, primary research, consultations, and other activities.<sup>30</sup> Typically, agencies ask the SHPO/THPO to help identify such properties. The agency also may consult other parties for assistance with identifying such properties.

If the agency concludes there are *no historic properties* within the APE, the agency notifies the relevant consulting parties and provides documentation for the finding. As noted above (see *agency/lead agency* in “Key Definitions”), even in instances when nonfederal entities conduct identification activities, the federal agency is ultimately responsible for issuing all findings and determinations. Upon receipt of the finding and associated documentation, the consulting parties

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<sup>24</sup> 36 C.F.R. §800.4(a)(1).

<sup>25</sup> 36 C.F.R. §800.5(a)(1).

<sup>26</sup> For example, if a project were to involve excavation or construction, there may be one area of potential effects (APE) for direct disturbances to qualified archaeological resources located on the construction site and a different APE for indirect impacts to aboveground resources subject to visual, audible, vibratory, or atmospheric effects (e.g., if vibrations from excavation cause the foundations of nearby historic buildings to crack).

<sup>27</sup> 36 C.F.R. §800.4(b)(1).

<sup>28</sup> The ACHP has issued guidance for understanding the “reasonable and good faith” standard. See ACHP, *Meeting the “Reasonable and Good Faith” Identification Standard in Section 106 Review*, May 2018, at [https://www.achp.gov/sites/default/files/guidance/2018-05/reasonable\\_good\\_faith\\_identification.pdf](https://www.achp.gov/sites/default/files/guidance/2018-05/reasonable_good_faith_identification.pdf).

<sup>29</sup> *Ibid.*

<sup>30</sup> For undertakings primarily initiated by nonfederal entities (e.g., authorized applicants), these tasks are typically completed by private consultants with permits to conduct surveys on federal and state lands. For undertakings initiated by a federal agency, the agency in question typically completes such tasks.

have 30 calendar days to object to the agency’s finding. If the consulting parties agree with the agency finding or do not respond within the 30-day window, the Section 106 process is complete and the agency’s obligations have been fulfilled.<sup>31</sup>

If the agency determines there *are* historic properties that may be affected by the undertaking, the agency issues a formal finding indicating as such, notifies all consulting parties, and proceeds to “Step 3: Assessment.”<sup>32</sup>

### **Does a Consulting Party Disagree with the Agency Finding of No Historic Properties?**

Disagreements between the agency and consulting parties at this stage often pertain to questions of eligibility for properties that are not listed on the National Register. In such instances, one or more of the consulting parties may take the position that a specific property within the APE meets the eligibility criteria of a historic property and therefore requires the agency to consider potential effects of the proposed undertaking.<sup>33</sup> Reasonable parties may disagree as to how the eligibility criteria should be applied. Parties have debated what constitutes a “reasonable and good faith effort” by federal agencies (or the applicable entity conducting such activities) to identify historic properties. Questions of whether sufficient efforts were made to identify eligible properties frequently arise, particularly within the context of identifying cultural resources of Indian tribes due to tribal concerns about revealing sacred sites.<sup>34</sup>

If a consulting party objects to the agency’s finding of no historic properties, the agency has two options: (1) continue consultation with the SHPO/THPO or other relevant parties or (2) submit findings directly to the ACHP for an opinion.<sup>35</sup> For an overview of how agencies and consulting parties address disagreements, see the **Appendix**.

If the agency—through consultation with the SHPO/THPO or pursuant to an opinion from the ACHP—reverses an initial finding of no historic properties, the agency proceeds to “Step 3: Assessment.”

### **Step 3: Assessment**

The third step in the Section 106 process requires the agency (or authorized applicant) to determine whether the project might affect identified historic properties and if any such effects would be *adverse* in nature. The agency does so in consultation with other participants (see **Figure 3**).

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<sup>31</sup> 36 C.F.R. §800.4(c)(1).

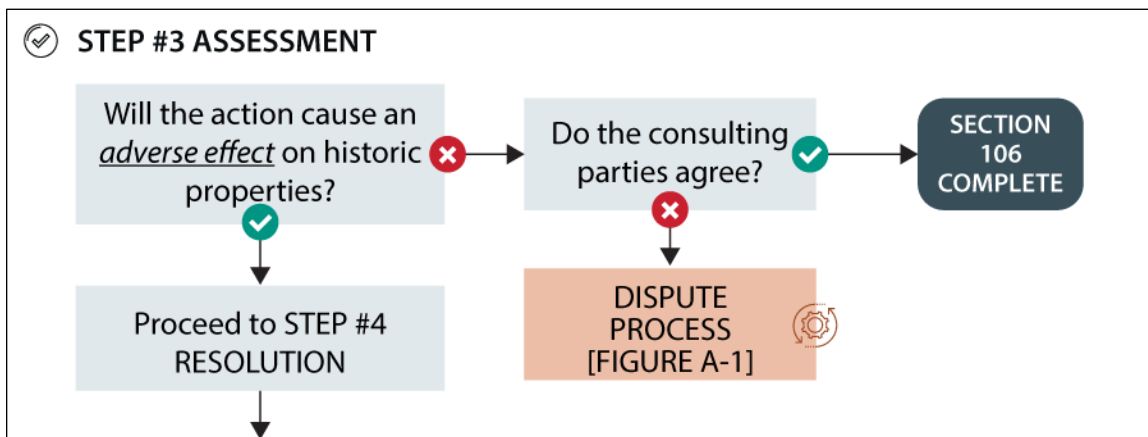
<sup>32</sup> 36 C.F.R. §800.4(d)(2).

<sup>33</sup> The criteria applied to evaluate properties for the National Register of Historic Places are located at 36 C.F.R. §60.4. To be eligible for listing on the register, and thus identified as a historic property under NHPA, a property must be linked to history by association to significant events or persons; by possessing distinct characteristics of an era; or by having integrity of location, materials, workmanship, or association.

<sup>34</sup> Section 106 regulations caution agencies regarding this potential problem, advising that “an Indian tribe or Native Hawaiian organization may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites” (36 C.F.R. §800.4(a)(4)).

<sup>35</sup> 36 C.F.R. §800.5(c)(2).

Figure 3. Assessment



**Source:** CRS, using 36 C.F.R. §800.5.

**Notes:** Although not indicated separately in this figure, authorized applicants may undertake some of an agency's identification and consultation requirements listed here (see definition of *applicant* in "Key Definitions").

### Will the Undertaking Potentially Cause an *Adverse Effect* on Historic Properties?

Once the agency (or applicable entity) identifies any historic properties located within the APE, it determines whether the undertaking may have an *adverse effect* on those properties. It is possible for an action to have an effect on a historic property that is not considered adverse in nature.<sup>36</sup> Only actions expected to have an adverse effect on historic properties require additional review under Section 106.

The Section 106 regulations provide guidance as to which effects are considered adverse. For example, alterations in "any of the characteristics of a historic property that qualify the property for inclusion in the National Register" constitute adverse effects.<sup>37</sup> Specifically, agencies must consider impacts to the "integrity" of the property's location, design, setting, materials, workmanship, feeling, or association.<sup>38</sup> The regulations further clarify that both direct and indirect effects of the project must be considered, as well as reasonably foreseeable effects that may occur later in time, may occur at some distance, or are cumulative.<sup>39</sup> If an agency, through consultation with the SHPO/THPO, determines the potential undertaking may result in adverse effects to a historic property (or properties), the agency issues a finding to that effect and formally notifies the ACHP. The agency then proceeds to "Step 4: Resolution."<sup>40</sup>

If the agency finds that the undertaking will not adversely affect any historic properties, it issues a proposed finding of "no adverse effect." Regulations require the agency to document its finding to the SHPO/THPO, notify all consulting parties, and provide information on the finding to the

<sup>36</sup> For example, routine repainting of a historic structure may have an effect on the historic property, but that effect usually is not considered adverse under Section 106.

<sup>37</sup> 36 C.F.R. §800.5(a)(1).

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Notification of an adverse effect finding is a procedural requirement under Section 106. Failure to notify the ACHP and provide it with the opportunity to join the resolution process under 36 C.F.R. §800.6 could result in the ACHP finding invalid any memorandum of agreement (MOA) entered into.

public on request.<sup>41</sup> If the SHPO/THPO does not comment within 30 days, the agency's responsibilities under Section 106 are fulfilled.<sup>42</sup>

### **Does a Consulting Party Disagree with the Agency's Finding of No Adverse Effects?**

During the review period, a consulting party or the ACHP may disagree with or dispute an agency's finding of no adverse effects. If a consulting party objects to such a finding, the agency has two options: (1) continue consultation with the SHPO/THPO or other relevant parties or (2) submit the finding directly to the ACHP for an opinion.<sup>43</sup> For an overview of how agencies and consulting parties address disagreements, see the **Appendix**.

If the agency—through consultation with the SHPO/THPO or following an opinion from the ACHP—reverses an initial finding of no adverse impacts, the agency then proceeds to “Step 4: Resolution.”

### **Step 4: Resolution**

In the final step of the Section 106 process, the agency explores measures to avoid, minimize, or mitigate any adverse effects on historic properties. Through this process, agencies work to reach agreement with the consulting parties (and, in some cases, the ACHP) on measures to address such adverse effects (see **Figure 4**). Whereas regulations are clear about the process agencies must adhere to under Section 106, there are few requirements as to what measures may be considered or agreed to through such agreements. Instead, various solutions are usually available for consideration by consulting parties and the agency, and the ACHP often encourages creative or innovative mitigation measures.<sup>44</sup>

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<sup>41</sup> 36 C.F.R. §800.5(c). Regulations at 36 C.F.R. 800.11(e) establish the documentation requirements for an agency when issuing a finding for review at this stage. The requirements include an explanation of why the agency found the criteria of adverse effect applicable or inapplicable, including any conditions or future actions to avoid, minimize, or mitigate adverse effects.

<sup>42</sup> 36 C.F.R. §800.5(c)(1).

<sup>43</sup> 36 C.F.R. §800.5(c)(2).

<sup>44</sup> ACHP, “Guidance on Agreement Documents,” at <https://www.achp.gov/initiatives/guidance-agreement-documents>.

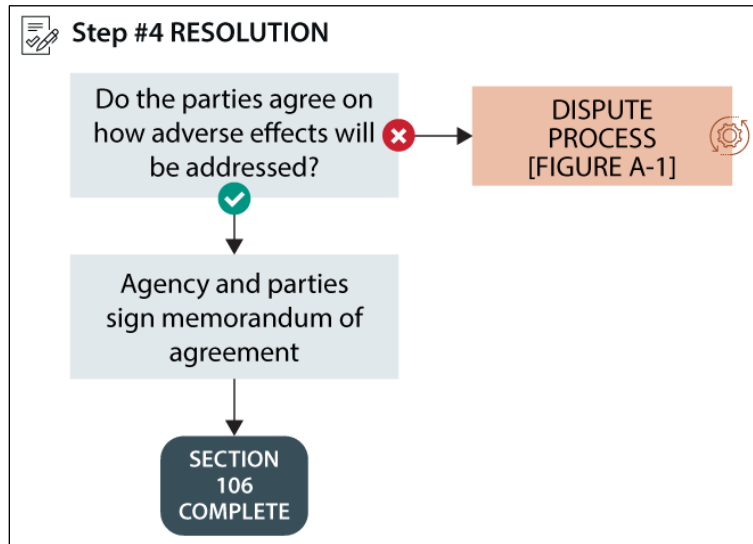
### Effects on National Historic Landmarks

The National Historic Landmarks (NHL) program—like the National Register of Historic Places—is a federal recognition program administered by the National Park Service (NPS). Whereas National Register properties are considered historic primarily due to their state and/or local significance, NHLs are considered places of national significance to the history of the United States. As of 2023, there were more than 2,600 NHLs located across the country (compared with nearly 100,000 properties listed on the National Register).

For undertakings with the potential to affect properties designated as NHLs, federal agencies are required to follow the Section 106 process established for other historic properties. However, when considering measures to avoid, minimize, or mitigate potential adverse effects, the National Historic Preservation Act (NHPA) establishes a higher standard of protection for NHLs than for other historic properties. Whereas the NHPA only requires agencies to “take into account” an undertaking’s effect on a historic property, Section 110 of the NHPA requires agencies, “to the maximum extent possible, [to] undertake such planning and actions as may be necessary to minimize harm” to an NHL (54 U.S.C. §306107). Additionally, when adverse effects to an NHL are found, the agency is required to request the participation of the Advisory Council on Historic Preservation and the Secretary of the Interior in the consultation process (36 C.F.R. §§800.10(b)-(c)).

Source: 36 C.F.R. §800.10.

Figure 4. Resolution



Source: CRS, using 36 C.F.R. §800.5 and 36 C.F.R. §800.6.

### Do the Agency and Consulting Parties Agree on How to Address Potential Adverse Effects?

If an agency determines a proposed undertaking may result in adverse effects to one or more historic properties, the agency is directed to consult with the SHPO/THPO, the ACHP, and/or other relevant consulting parties to reach a formal agreement as to how to proceed with the undertaking. If the relevant parties agree on a solution, they are directed to enter into a legally binding agreement known as a *memorandum of agreement* (MOA).<sup>45</sup> The MOA “govern[s] the

<sup>45</sup> Regulations allow agencies to enter into types of agreements other than an MOA. For example, programmatic/project agreements are often used for large, complex projects or projects wherein the agency cannot fully determine how a particular undertaking may affect historic properties due to the scale of the project. In addition, agencies may incorporate measures to avoid, minimize, or mitigate adverse effects to historic properties in a record of decision, which is established through the NEPA process.



undertaking and all of its parts,” including how the agency plans to address adverse effects.<sup>46</sup> In general, MOAs contain information detailing each of the avoidance, minimization, or mitigation measures the federal agency has agreed to implement, as well as provisions outlining what happens when the expected effects from the undertaking change or when the undertaking is modified, when disputes arise, and when new historic properties are discovered. The agency provides the MOA and associated documentation to the ACHP.<sup>47</sup>

### **What Happens If the Parties Do Not Enter into an Agreement?**

According to the ACHP, the “vast majority” of federal undertakings that affect a historic property are resolved through an MOA or other agreement between the agency and the consulting parties.<sup>48</sup> In the instances where the parties are unable to reach agreement, the alternative is terminating consultation. Failure to reach an agreement may occur for any number of reasons. For example, an agency may determine—despite the objections of the SHPO/THPO, ACHP, or other consulting parties—that the nature of a specific undertaking makes avoidance of potential adverse effects impossible or impractical. This could be due to the scale of the undertaking, its proximity to the historic property, or technical constraints that may not, in the agency’s view, allow for direct mitigation or avoidance measures. Alternatively, failure to reach an agreement could result from disagreement on whether particular mitigation or avoidance measures are appropriate and/or sufficient. Regardless of the scenario, any party, including the agency, the SHPO/THPO, or the ACHP, may terminate consultation.<sup>49</sup>

If any party other than the agency (e.g., SHPO/THPO, certain consulting parties, ACHP) terminates consultation, the agency is authorized to enter into an agreement with any remaining consulting parties, if appropriate. If the agency ends the consultation process, it must make its termination decision and supporting documents available to the public and all consulting parties.<sup>50</sup> The agency also must submit its findings for termination to the ACHP for comment. The ACHP has 45 days to respond to the decision; however, the agency is not required to revise its initial decision based on ACHP comments. Instead, the agency is required to “take into account the Council’s comments in reaching a final decision on the undertaking.”<sup>51</sup> If the agency’s final decision affirms the initial finding, the agency is required to formally document that decision and provide evidence of consideration of the ACHP opinion (see **Appendix**). Once this documentation is complete, the agency has fulfilled its Section 106 requirements.

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<sup>46</sup> 36 C.F.R. §800.6(c)(1).

<sup>47</sup> 36 C.F.R. §800.6(b)(1)(iv).

<sup>48</sup> ACHP, “Guidance on Agreement Documents: Failure to Agree,” at [https://www.achp.gov/failure\\_to\\_agree](https://www.achp.gov/failure_to_agree). Other agreements could include a programmatic agreement (see “Section 106 Program Alternatives” text box), which may be appropriate in certain situations (e.g., multiple or complex undertakings where effects to historic properties may not be fully determined in advance).

<sup>49</sup> 36 C.F.R. §800.7(a).

<sup>50</sup> 36 C.F.R. §800.7(c)(4).

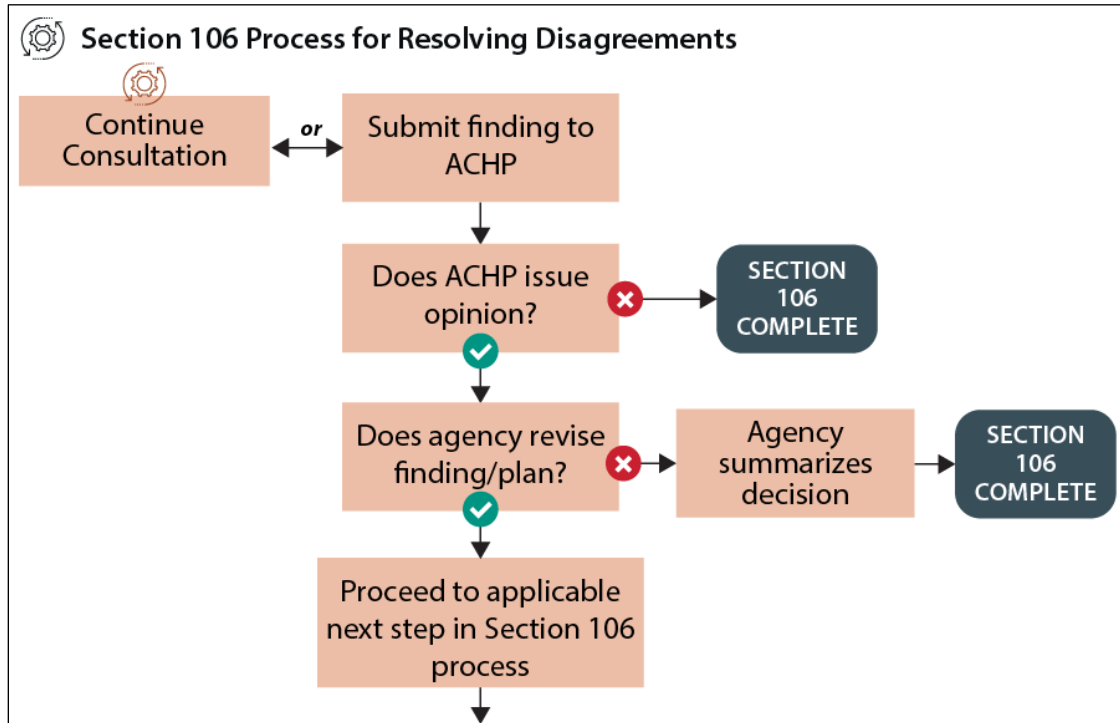
<sup>51</sup> 36 C.F.R. §800.7(c)(4).

## Appendix. Dispute Process

At various points throughout the Section 106 process, consulting parties may disagree with an agency’s finding or determination. Regulations require the agency to issue formal findings at two separate stages: (1) findings of *no historic properties* within a project’s area of potential effects or (2) findings of *no adverse effects* on historic properties. In both instances, regulations provide a process and timeline for how to resolve or document consulting parties’ objections to these findings.

In general, the state or tribal historic preservation officer (SHPO/THPO) must respond within 30 days of receiving an agency finding or determination. If the SHPO/THPO does not comment within 30 days, the agency’s responsibilities under Section 106 are fulfilled and the undertaking may proceed. If the SHPO/THPO objects to the agency finding within the 30-day window, the agency has two options: (1) continue consultation with the SHPO/THPO or other relevant parties or (2) submit findings directly to the ACHP for an opinion.

**Figure A-1. Section 106 Dispute Process**



**Source:** Congressional Research Service. For disagreements regarding a finding of no historic properties, see 36 C.F.R. §800.4(d); for findings of no adverse effects, see 36 C.F.R. §800.5(c); for the documentation process in the event of a failure to reach an agreement, see 36 C.F.R. §800.7; for general documentation requirements, see 36 C.F.R. §800.11.

**Note:** ACHP = Advisory Council on Historic Preservation.

If the agency opts to forgo further consultation and involve the ACHP, the ACHP has 30 days to issue an opinion on the agency’s finding at its discretion.<sup>52</sup> The ACHP’s opinion is not binding on

<sup>52</sup> 36 C.F.R. §800.4(d)(1)(iv). The timeline for ACHP response may differ for an opinion on an agency’s finding of no adverse impacts. Regulations in this scenario specify that the ACHP has 15 days to issue an opinion at its discretion, although regulations permit an extension of an addition 15 days, if needed (36 C.F.R. §800.5(c)(3)).

the agency; however, the agency must “take into account the Council’s opinion in reaching a final decision on the finding.”<sup>53</sup> If the ACHP does not respond within 30 days of receiving the request, the agency’s responsibilities under Section 106 are fulfilled.

If the agency—through further consultation with the SHPO/THPO or following an opinion from the ACHP—reverses its initial finding, the agency proceeds with the Section 106 process. If the final decision of the agency affirms the initial finding, the agency is required to prepare a summary of the decision that documents the agency’s rationale for the decision and evidence of consideration of the ACHP opinion. This summary is provided to the ACHP, the SHPO/THPO, and the consulting parties and is made available to the public. At this point, the agency has fulfilled its requirements under Section 106.

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<sup>53</sup> 36 C.F.R. §800.5(c)(3)(ii)(A).