

SECTION 106 ARCHAEOLOGY GUIDANCE

(available online at www.achp.gov/archguide)

I. INTRODUCTION

A. Purpose of the guidance. The Advisory Council on Historic Preservation’s Section 106 Archaeology Guidance is designed to assist federal agencies in making effective management decisions about archaeological resources in completing the requirements of Section 106 of the National Historic Preservation Act (NHPA) (www.achp.gov/nhpa.html) [16 U.S.C. § 470f] and its implementing regulations, “Protection of Historic Properties” [36 CFR part 800] (www.achp.gov/regs-rev04.pdf). To encourage both effective and efficient consideration of archaeology in planning, this guidance highlights the decision-making role of the federal agency in the Section 106 process. This document is also designed for use by State and Tribal Historic Preservation Officers (SHPOs/THPOs), Indian tribes, Native Hawaiian organizations (NHOs), and cultural resource management professionals when assisting federal agencies to meet their responsibilities under Section 106.

This document presents non-binding guidance.

B. Web-based presentation and long-term vision of assistance. This guidance is presented in an interactive, Web-based format as a series of questions and answers. It is designed to be a dynamic document, with examples used to illustrate the points and perspectives made here.

Each question has a unique answer. However, the answers complement each other in such a way that, when considering a specific question or topic, the user is strongly encouraged to access links to other answers and their questions, as suggested. Also, links to pertinent federal law, regulation, standards, and guidance are provided. Accessing this additional information offers the user a more thorough explanation.

We invite you to send your feedback on this guidance, your recommendations on additional archaeology topics that should be considered, and examples of successful Section 106 outcomes to archaeology@achp.gov.

C. Topics covered. The questions and answers are grouped under five main categories that mirror the steps in the Section 106 process (a complete list of questions can be found in the index at the end of this document):

- Getting started in the Section 106 process
- Section 106 consultation about archaeology
- Determining which archaeological sites are significant

- Reaching agreement on appropriate treatment
- Completing the Section 106 process

D. Terms used in the guidance. A *historic property* (or *historic resource*) is defined in the NHPA [16 U.S.C. § 470w(5)] as any “prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on, the National Register of Historic Places, including artifacts, records, and material remains related to such a property or resource.” Following National Register Bulletin No. 36, “Guidelines for Evaluating and Registering Archaeological Properties” (www.cr.nps.gov/nr/publications/bulletins/arch/), an *archaeological site* is “a location that contains the physical evidence of past human behavior that allows for its interpretation.” The term *archaeological site* refers to those that are eligible for or are listed on the National Register (historic properties) as well as those that do not qualify for the National Register. The commonly used term *cultural resource* does not have a consistent or legal definition.

The *significance* of a property refers to its ability to meet one of the four National Register criteria (A-D) (www.achp.gov/nrcriteria.html). According to National Register Bulletin No. 15, “How to Apply the National Register Criteria for Evaluation” (www.cr.nps.gov/nr/publications/bulletins/nrb15/), “[t]he quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association” and that meet one or more of the four criteria (A-D). *Integrity* is the ability of the property to convey this significance through physical features and context. Historic properties are significant because they do meet these criteria and have integrity. Pursuant to Section 101(d)(6)(A) of the NHPA, properties of traditional religious and cultural significance to an Indian tribe or NHO may be deemed eligible for listing on the National Register (See “Consulting with Indian Tribes in the Section 106 Review Process” at www.achp.gov/regs-tribes.html).

Indian tribes, NHOs, ethnic or religious groups, communities, professional and other organizations, or the public may ascribe a cultural, historical, or religious *value* to an archaeological site. The term *value* here refers to the site’s worth and importance to them and their experience, regardless of whether the site possesses National Register *significance*. For example, an archaeological site may be of historical or cultural value to the Mormons, or to an African-American community (See the description of the African Burial Ground at www.achp.gov/casearchive/casessum03NY1.html), or to the Order Sons of Italy in America, with or without its meeting the criteria for listing in the National Register.

Mitigation is a way to remedy or offset an adverse effect or a change in a historic property’s qualifying characteristics in such a way as to diminish its *integrity*. *Treatment* is the act of mitigating those effects, or how one goes about implementing the mitigation measure(s) agreed upon in consultation. Thus, a mitigation plan for the undertaking may contain several treatment plans, one for each property being adversely affected. Data recovery is a common mitigation measure that, through implementation of a treatment plan, retrieves the important information present within an archaeological site that makes it eligible before the site’s integrity is compromised or destroyed.

II. BACKGROUND

A. Archaeology under Section 106. The Advisory Council on Historic Preservation’s (ACHP) primary involvement with archaeology is through Section 106 review. It has been estimated that more than 90 percent of the archaeological excavations conducted in the United States are done so pursuant to Section 106 of the NHPA.

Responsibilities for archaeology under Section 106 extend to undertakings such as construction projects and land and resource planning efforts occurring on federal lands, as well as those where federal agencies provide funding or issue licenses, permits, or approvals for actions on non-federal lands, including tribal, state, municipal, and private property.

Archaeological sites are identified and evaluated under Section 106 by federal agencies for their eligibility for listing in the National Register. Through consultation with stakeholders, such as State and Tribal Historic Preservation Officers, Indian tribes, and Native Hawaiian organizations, federal agencies take into account the effects of their undertakings on eligible or listed archaeological sites. Together, the agency and the consulting parties specified in the ACHP's regulations consider ways to avoid, minimize, or mitigate adverse effects, and it is in this consultation process that the finite and non-renewable nature of listed or eligible archaeological sites is considered, as well as the *value* these sites may have to different parties.

B. Origins of ACHP archaeology guidance. The extraordinary diversity of our nation's archaeological heritage is only one of the many national historic preservation issues that fall within the ACHP's broad agenda. The identification, analysis, and treatment of archaeological resources have always been a mainstay of the Section 106 process. Over the years, the ACHP has prepared several guidance documents that address archaeology in Section 106 review, including:

- Treatment of Archeological Properties: A Handbook (1980)
- Identification of Historic Properties: A Decision-making Guide for Managers (1988, joint ACHP-NPS publication)
- Consulting About Archeology Under Section 106 (1990)
- Recommended Approach for Consultation on Recovery of Significant Information from Archeological Sites (1999) (www.achp.gov/archguide.html)
- Policy Statement Regarding Treatment of Burial Sites, Human Remains, and Funerary Objects (2007) (www.achp.gov/docs/hrpolicy0207.pdf)

Although the ACHP's "Treatment of Archeological Properties: A Handbook" (1980) is still cited, it has become dated. This current guidance does not replace this handbook but rather is designed to build on the foundation it established.

As with the *Treatment Handbook*, the current guidance has been developed under the direction of an Archaeology Task Force (www.achp.gov/atf.html) established by the chairman of the ACHP in 2003 to identify those new and recurring issues that should receive priority consideration and action by the ACHP. Following outreach to federal agencies, SHPOs/THPOs, Indian tribes and NHOs, and the professional archaeological community (Society for American Archaeology, the Society for Historical Archaeology, the American Cultural Resources Association, and the Register of Professional Archaeologists), the task force determined new Section 106 archaeology guidance was needed.

III. QUESTIONS AND ANSWERS ABOUT SECTION 106 ARCHAEOLOGY

A. GETTING STARTED IN THE SECTION 106 PROCESS

1. What are a federal agency's responsibilities under Section 106 of the NHPA?

Section 106 of the National Historic Preservation Act (www.achp.gov/nhpa.html) requires federal agencies to "take into account" the effects of their undertakings on historic properties and to provide the ACHP a "reasonable" opportunity to comment. Federal agencies meet these two requirements

through the process set out in the ACHP's regulations, "Protection of Historic Properties" (36 CFR part 800) (www.achp.gov/regs-rev04.pdf). (added 5/30/07)

[Related questions:

- (2) What is the role of the federal agency official in the Section 106 process?
- (3) What is the ACHP's policy on dealing with burial sites, human remains, and funerary objects?]

2. What is the role of the federal agency official in the Section 106 process?

The federal agency official is the individual who has "approval authority for the undertaking and can commit the federal agency to take appropriate action for a specific undertaking as a result of Section 106 compliance" [36 CFR § 800.2(a)], and who makes the decisions in each step of the Section 106 review process, following consultation with the parties specified in the ACHP's regulations. The ACHP, State Historic Preservation Officer/Tribal Historic Preservation Officer (SHPO/THPO) and other consulting parties advise and assist the federal agency official in this effort. In reaching decisions, a federal agency should seek to reconcile historic preservation with other important public values, such as its mission, objectives, costs and public benefits. The impact on archaeological resources is one of many considerations for an agency as it weighs its decisions. (added 5/30/07)

[Related questions:

- (5) Why should federal agencies consult with other parties about archaeology?
- (6) Who consults with whom, and how?
- (9) What is the role of applicants and their consultants/contractors in archaeology conducted under Section 106?
- (36) What information is needed to decide on treatment options?]

3. What is the ACHP's policy on dealing with burial sites, human remains, and funerary objects?

On February 23, 2007, the ACHP adopted a new "Policy Statement Regarding Burial Sites, Human Remains, and Funerary Objects" (www.achp.gov/docs/hrpolicy0207.pdf) that, among other things, calls for federal agencies to avoid impacts to burial sites, human remains, and funerary objects unless absolutely necessary. When the federal agency determines that avoidance of impact is not appropriate, the agency first should consider active steps it may take to preserve the burial site in place. When the federal agency decides human remains or funerary objects must be disturbed, they should be removed respectfully and dealt with according to the plan developed by the federal agency, in consultation with others as specified in the regulations. The ACHP's policy does not prescribe an outcome or endorse any specific treatment. Rather, the level of documentation and analysis should be decided through consultation on a case-by-case basis. Implementation of this policy and its principles does not in any way change, modify, detract, or add to the Native American Graves Protection and Repatriation Act or other applicable laws. (added 5/30/07)

[Related questions:

- (13) Who consults with whom, and how?
- (28) What special role do Indian tribes and Native Hawaiian organizations have in evaluating properties?
- (38) What issues should be considered when consulting about mitigation?]

B. SECTION 106 CONSULTATION ABOUT ARCHAEOLOGY

4. What is Section 106 consultation?

The ACHP's regulations define consultation 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 CFR § 800.16(f)]. By definition, then, consultation is an active exchange of ideas and information between a federal agency and other Section 106 participants that seeks consensus about what eligible or listed archaeological sites may be affected by an undertaking; why those properties are significant and of value, and to whom; and how any adverse effect to them might be avoided, minimized, or mitigated (See “Protecting Historic Properties: A Citizen’s Guide to Section 106 Review” at www.achp.gov/citizensguide.html).

Federal agencies are encouraged to use, to the extent possible, existing agency procedures and mechanisms to fulfill the consultation requirements of the ACHP’s regulations [36 CFR § 800.2(a)(4)]. For example, an agency may use its National Environmental Policy Act (NEPA) procedures to identify additional consulting parties. Usually, however, reliance on NEPA efforts alone will not meet the regulatory standard for consultation essential to Section 106 review because consultation requires interaction between the agency and consulting parties. (added 5/30/07)

[Related questions:

(5) Why should federal agencies consult with other parties about archaeology?

(7) When does consultation begin?

(12) How can federal agencies foster more informed participation by stakeholders in consultation about archaeology?]

5. Why should federal agencies consult with other parties about archaeology?

The National Historic Preservation Act [16 U.S.C. 470h-2(a)(2)(E)(ii)] and the Section 106 implementing regulations require federal agencies to consult with other parties in the course of the Section 106 process. The active exchange of views and information among the federal agency and other parties with an interest in the effects of the undertaking on historic properties should begin in the early stages of project planning [36 CFR § 800.1(a)] and continue through all of the findings and determinations made during the Section 106 process [36 CFR § 800.2(a)(4)]. However, it is critical to recognize that, while consultation is required in each step of Section 106 review, final decision-making rests solely with the federal agency (See “Protecting Historic Properties: A Citizen’s Guide to Section 106 Review” at www.achp.gov/citizensguide.html).

There are practical reasons why a federal agency should consult about archaeology. It is a way for the federal agency to gain information about the likely location and nature of historic properties that might be present in the area of potential effects prior to conducting any fieldwork. Through consultation, such as with those who might possess oral or traditional knowledge about an archaeological site, a federal agency may acquire information that helps in making a National Register evaluation or leads to a better understanding of a property’s value to the community. In addition, consultation informs federal agencies about appropriate and culturally sensitive methods to use during any testing and excavation (See “Consulting with Indian Tribes in the Section 106 Review Process” at www.achp.gov/regs-tribes.html and “Native Hawaiian organizations and the Section 106 Review Process” at www.achp.gov/regs-nhos.html). (added 5/30/07)

[Related questions:

(1) What are a federal agency’s responsibilities under Section 106 of the NHPA?

(2) What is the role of the federal agency official in the Section 106 process?

(46) What information is needed to decide on treatment options?

(29) What kind of information is necessary to evaluate the eligibility of an archaeological site?]

6. Who consults with whom, and how?

Consulting parties fall into two broad groups:

a) Parties with a right to participate in consultation [see 36 CFR §800.2(c)(1)-(4)] are:

- The relevant SHPO and/or THPO, or the representative officially designated by the tribe for tribal lands;
- Indian tribes and NHOs that attach traditional religious and cultural significance to historic properties that may be affected by an undertaking. Indian tribes and NHOs determine what historic properties may be of traditional religious and cultural significance to them. Any tribe or NHO that makes such a determination must be invited by the federal agency to participate in consultation. A federal agency may also need to identify and consult with tribes that reside outside of the state or locality where the undertaking is to be located, because many tribes are now far removed from their ancestral lands (see “Consulting with Indian Tribes in the Section 106 Review Process” at www.achp.gov/regs-tribes.html and “Native Hawaiian organizations and the Section 106 Review Process” at www.achp.gov/regs-nhos.html).
- Applicants for federal assistance, permits, licenses, or other approvals;
- Representatives of local governments, and
- The ACHP, which also may enter consultation when it determines that any one of the criteria established in *Criteria for Council Involvement in Reviewing Individual Section 106 Cases* [36 CFR part 800, Appendix A] has been met. Even when not actively involved in consultation for a specific undertaking, the ACHP may provide federal agencies and other consulting parties with advice, assistance, and guidance regarding the conduct of Section 106 review, including help in resolving disputes [36 CFR § 800.2(b)(2)].

Consultation between federal agencies and Indian tribes should be conducted in a “sensitive manner respectful of tribal sovereignty,” and must recognize the government-to-government relationship between the federal government and Indian tribes [36 CFR § 800.2(c)(2)(ii)]. This means the federal agency is responsible for initiating consultation with Indian tribes. This responsibility cannot be delegated unless the Indian tribe agrees in advance.

b) Other parties who may participate in consultation include the following [see 36 CFR § 800.2(c)(5)]:

- Parties with legal or economic interest in the undertaking or affected historic properties;
- Those concerned with the undertaking’s effects on historic properties, such as individual tribal members with special knowledge or expertise in identifying properties of traditional religious and cultural significance to that tribe.

These parties may be identified by a federal agency and invited to participate in consultation, or such parties may submit a written request for consulting party status directly with the federal agency. However, the federal agency, following consultation with the SHPO/THPO, makes the final decision about which of these other parties will participate (See “Protecting Historic Properties: A Citizen’s Guide to Section 106 Review” at www.achp.gov/citizensguide.html).

According to “The Secretary of the Interior’s Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act”

(<http://fpi.historicpreservation.gov/TechnicalInfo/HistPres/FedAgencyGuidelines.aspx>), in conducting consultation, a federal agency should:

- make its interests and constraints clear at the outset;
- make clear any rules, processes, or schedules applicable to consultation;
- acknowledge the interests of others and seek to understand them;
- develop and consider a full range of options; and
- make an effort to identify solutions that will leave all parties satisfied.

(added 5/30/07)

[Related questions:

(7) When does consultation begin?

(8) Are federal agencies expected to pay consulting parties for Section 106 participation?

(10) How much consultation is enough?

(11) When does consultation end?

(13) What happens when a consulting party cannot or will not provide its views?]

7. When does consultation begin?

Federal agencies are advised to begin the Section 106 process early in project planning “so that a broad range of alternatives may be considered during the planning process for the undertaking” [36 CFR § 800.1(c)]. Early initiation of consultation helps agencies avoid delays later in review and head off potential conflicts.

In order to streamline environmental review, many agencies strive to coordinate Section 106 and National Environmental Policy Act (NEPA) requirements. When coordinating Section 106 and NEPA, federal agencies should be prepared to begin consultation early in the NEPA process, “when the purpose of and the need for the proposed action, as well as the widest possible range of alternatives, are under consideration” [36 CFR § 800.8(a)(1)].

It is important to note that the ACHP’s regulations [36 CFR § 800.4(a)(3)] require federal agencies to seek information from certain parties, such as the SHPO/THPO, Indian tribes, or NHOs, before conducting an archaeological survey. It is imperative, therefore, that the agency initiate consultation prior to conducting any such archaeological fieldwork. (added 5/30/07)

[Related question: (1) What are a federal agency’s responsibilities under Section 106 of the NHPA?]

8. Are federal agencies expected to pay consulting parties for Section 106 participation?

On April 26, 2002, the ACHP issued its official position on “Fees in the Section 106 Review Process,” a statement designed to assist federal agencies in determining when it is appropriate to compensate a party in the Section 106 process. The entire text can be viewed at www.achp.gov/regs-fees.html.

- In summary, the NHPA and ACHP’s regulations authorize federal agencies to contract with others to provide information for complying with Section 106. However, neither authority requires federal agencies to pay for any aspect of consulting party participation in the Section 106 process.
- For example, when the federal agency is seeking the views of an Indian tribe to fulfill the agency’s legal obligation to consult under a specific provision of ACHP’s regulations, the agency is not required to pay the tribe for providing its views. If the agency has made a reasonable and

good faith effort to consult with an Indian tribe and the tribe refuses to respond without receiving payment, the agency has met its obligation to consult and is free to move to the next step in the Section 106 process.

- When an agency seeks to identify historic properties that may be significant to an Indian tribe, however, it may ask for specific information and documentation regarding the location, nature, and condition of individual sites, or actually request that a survey be conducted by the tribe. In that case, the agency essentially is asking the tribe to fulfill the role of a consultant or contractor. In such cases, the tribe would seem to be justified in requiring payment for its services, just as any other contractor. The agency may refuse to do so, but is still obligated to gather information necessary to support Section 106 decision making.
- Whenever the line between the two is not clear, the agency is “encouraged to act in a manner that facilitates, rather than impedes, effective participation in the Section 106 process.” (added 5/30/07)

[Related questions:

(7) When does consultation begin?

(10) How much consultation is enough?]

9. What is the role of applicants and consultants/contractors in archaeology conducted under Section 106?

The ACHP’s regulations [36 CFR § 800.2(c)(4)] allow a federal agency to authorize an applicant (not consultants or contractors) for federal assistance, permits, licenses, or approvals to initiate Section 106 consultation. Under such an authorization, however, the federal agency maintains legal responsibility for all Section 106 findings and determinations, even though the applicant usually produces the documents and studies (including archaeological survey and testing reports) on which these decisions are based.

Federal agencies, as well as applicants, often rely on the services of consultants and contractors to prepare the information, analyses, recommendations, and studies needed during Section 106 review. Whenever a non-federal party prepares a Section 106 document or a study for review, the agency is responsible “for ensuring that its content meets applicable standards and guidelines” [36 CFR § 800.2(a)(3)]. The ACHP advises federal agencies to monitor its applicants and its consultants closely to ensure that the requirements of Section 106 are being followed.

A federal agency may not delegate to an applicant or any other non-federal party its responsibility to consult with federally recognized Indian tribes on a government-to-government basis. The federal government’s responsibility to consult on a government-to-government basis with Indian tribes as sovereign nations is established through Executive Orders, Presidential memoranda, and other authorities, and is explicitly recognized by the ACHP’s regulation [36 CFR § 800.2(c)(2)(ii)(B) and (C)]; see also “Consulting with Indian Tribes in the Section 106 Review Process” at www.achp.gov/regs-tribes.html].

While consultation with Indian tribes is a federal responsibility, federal agencies and tribes may mutually agree to allow applicants to initiate and carry out such consultation during the course of Section 106 review. To avoid any later misunderstanding, the ACHP recommends federal agencies and Indian tribes to document such agreements in writing. Any deviation from the government-to-government relationship between the federal government and Indian tribes should be agreed to as early as possible in the Section 106 process, particularly in advance of any survey and testing actions to identify National Register-eligible archaeological sites.

In the absence of such an agreement, a lack of response from the tribe to such a solicitation should not be interpreted as a lack of interest in consultation or in providing information. Rather, the tribe may choose not to respond to a query from an applicant (or its consultant or contractor) because this contact does not meet the requirement of government-to-government consultation. In those cases where a tribe has not responded to an applicant or its representative, the federal agency must contact the tribe to initiate consultation and ascertain its interest.

Before any steps are taken in Section 106 review, the federal agency first must notify the SHPO/THPO that it is authorizing an applicant (or group of applicants) to initiate consultation [36 CFR § 800.2(c)(4)]. By the time this notification is sent, the federal agency should have resolved how its government-to-government responsibilities will be fulfilled.

Following this notification, applicants and their authorized representatives may consult with the SHPO/THPO to initiate Section 106 review, identify and evaluate historic properties, and assess effects. The federal agency, however, remains responsible for participating in the consultation process when:

- initiating consultation with Indian tribes;
- it is determined that the Criteria of Adverse Effect apply to an undertaking;
- there is a disagreement between the applicant or their authorized representatives and the SHPO/THPO regarding identification and evaluation, and/or assessment of effects;
- there is an objection from a consulting party or the public regarding Section 106 findings and determinations, the implementation of agreed upon provisions, or their involvement in a Section 106 review; or
- there is the potential for a foreclosure situation or anticipatory demolition as specified in Section 110(k) of NHPA [36 CFR § 800.9(b) and (c)].

In determining the scope of work for archaeological fieldwork where listed or eligible archaeological sites of significance to Indian tribes may be involved, the applicant is advised that the federal agency has a responsibility to gather information from such tribes [36 CFR § 800.4(a)(3) and (4)]. Without this step, the identification effort might include measures an Indian tribe might consider inappropriate, insensitive, or insufficient. Therefore, the federal agency should ensure the applicant is aware of this requirement. (added 5/30/07)

[Related questions:

- (2) What is the role of the federal agency official in the Section 106 process?
- (16) How do federal agencies meet the “reasonable and good faith effort” standard?
- (26) How are eligibility determinations made in Section 106 review?
- (41) How can federal agencies find out about appropriate treatment options and alternatives?]

10. How much consultation is enough?

While consultation establishes the context within which a federal agency takes into account the effect of its undertaking on historic properties, there is no hard and fast rule about how much consultation is enough. The ACHP’s regulations call for consultation to be carried out in a manner “appropriate to the scale of the undertaking and the scope of the federal involvement” [36 CFR § 800.2(a)(4)], taking into account the nature of the undertaking and its effects on historic properties [36 CFR § 800.3(c)(3); (See “Consulting with Indian Tribes in the Section 106 Review Process” at www.achp.gov/regs-tribes.html and “Native Hawaiian organizations and the Section 106 Review Process” at www.achp.gov/regs-nhos.html)].

Where listed or eligible archaeological sites are likely to be involved, the federal agency should consider questions such as the following when planning for consultation:

- What is the significance of the site likely to be affected?
- What is the likely value of the site to living communities and cultural descendants?
- Is the nature of the undertaking the kind that may diminish the integrity of the site? For example, is the scale of the undertaking such that extensive ground disturbance, with the potential to destroy the site, anticipated? Or, if an Indian tribe or NHO attaches traditional religious and cultural significance to the site, will that association be damaged or destroyed?

(added 5/30/07)

[Related questions:

(12) How can federal agencies foster more informed participation by stakeholders in consultation about archaeology?

(29) What kind of information is necessary to evaluate the eligibility of an archaeological site?

(36) What information is needed to decide on treatment options?

(42) What are a federal agency's responsibilities to complete Section 106 review?]

11. When does consultation end?

Federal agency consultation responsibilities are met when the agency has completed the Section 106 process. If a Section 106 agreement has been executed, such completion includes implementation of those stipulations or provisions contained in the agreement. The federal agency should be able to demonstrate that it has:

- identified the appropriate consulting parties as early as practicable;
- provided them with adequate and timely documentation to participate effectively;
- involved them in Section 106 findings and determinations in a manner that is appropriate to the scale of the undertaking and its effects;
- allowed a reasonable opportunity for consulting parties to provide their views; and
- determined how to resolve adverse effects taking into account the views of consulting parties and the public or, failing to reach an agreement to resolve the adverse effects, requested, considered and responded to the ACHP's formal comments on the undertaking.

Often consultation about effects to eligible and listed archaeological sites is straightforward and non-controversial, but this is not always the case. For example, consultation on the fate of an eligible or listed archaeological site that was once a small campsite may not warrant any face-to-face meetings. In contrast, consultation regarding a property of national significance, such as the African Burial Ground in New York City, which is valued by many different communities and groups, may require a much more intensive and lengthy effort (See the African Burial Ground in the ACHP's Case Digest in Fall 2001 [link at www.achp.gov/casearchive/casesfall01NY1.html], Summer 2003 [link at www.achp.gov/casearchive/casessum03NY1.html] and Fall 2003 [link at www.achp.gov/casearchive/casesfall03NY.html]). (added 5/30/07)

[Related questions:

(6) Who consults with whom, and how?

(13) What happens when a consulting party cannot, or will not, provide its views?]

12. How can federal agencies foster more informed participation by stakeholders in consultation about archaeology?

To ensure consulting parties participate in an informed manner, federal agencies should present descriptions of archaeological investigations and recommendations using as little technical jargon as possible. Furthermore, it is in the interest of the federal agency to ensure that all recommendations and conclusions about the significance and treatment of listed and eligible archaeological sites are supported by clear and succinct statements showing the logical progression of decision-making. Experience has shown that sometimes what appears to be an objection raised by a consulting party about the treatment of an eligible or listed archaeological site may actually result from a misunderstanding caused by poorly presented technical information, or inadequately or incompletely described archaeological work (See “Protecting Historic Properties: A Citizen’s Guide to Section 106 Review “at www.achp.gov/citizensguide.html). (added 5/30/07)

[Related questions:

(1) What are a federal agency’s responsibilities under Section 106 of the NHPA?

(9) What is the role of applicants and their consultants/contractors in archaeology conducted under Section 106?]

13. What happens when a consulting party cannot, or will not, provide its views?

The ACHP’s regulations [36 CFR § 800.3(c)(4)] specify timeframes for consulting parties to respond to agency findings and determinations. When the regulations specify a timeframe for a response, the federal agency cannot proceed before that specified period has ended. Where no timeframe is given, agencies should expect a response within a reasonable time.

While consulting parties determine their level of participation in the Section 106 process, the refusal of a participant to consult or provide their views within a time frame specified in the regulations or a reasonable time frame does not stop the process. When a consulting party has been notified of a reasonable deadline for response but has exceeded that time limit, the federal agency may elect to extend the review period or may decide to proceed in the Section 106 process. In either case, the agency should ensure that it can document a reasonable and good faith effort to consult (See “Consulting with Indian Tribes in the Section 106 Review Process” at www.achp.gov/regs-tribes.html and “Native Hawaiian organizations and the Section 106 Review Process” at www.achp.gov/regs-nhos.html).

However, federal agencies and their contractors should be aware that there may be cultural prohibitions preventing or limiting information sharing, such as with archaeological sites that are properties of traditional religious and cultural significance to Indian tribes or NHOs. Where such a restriction exists, the agency should work closely with that consulting party to ensure sufficient information can be shared to support informed decision-making.

Section 304 of the National Historic Preservation Act provides protection from public disclosure of information about a historic property that might result in harm to the property, a significant invasion of privacy, or impediments to traditional religious practice at a site. For example, a tribe might be concerned that sharing information about the location of an archaeological site that contains human remains could make that site more vulnerable to the destructive activities of looters. The federal agency should inquire into the reasons behind an Indian tribe or other consulting party’s non-response since a concern protected by Section 304 may be involved.

The ACHP’s regulations require federal agencies to make a “reasonable and good faith effort” to identify Indian tribes or NHOs that should be consulted and provide them a “reasonable opportunity” to share their views in all steps of the Section 106 process. In practice, this does not mean an agency must put the progress of the undertaking on hold indefinitely until all tribes or NHOs respond. When

the designated tribal or NHO representative has been involved in consultation and received adequate information, the agency may proceed if no response is received within a reasonable time.

For tribal consultation, the ACHP strongly recommends the agency follow-up to ensure its request has reached the correct tribal representative and that the time provided for response took into account any tribal government procedures. For example, a federal agency may propose a response within 30 days. If the tribal council meets every 90 days, and must approve all tribal correspondence, the agency's time frame for response may not be reasonable. Federal agencies should take all reasonable measures to ensure a consulting party's views are considered as it moves forward through the Section 106 process. (added 5/30/07)

[Related questions:

(1) What are a federal agency's responsibilities under Section 106 of the NHPA?]

(8) Are federal agencies expected to pay consulting parties for Section 106 participation?

(9) What is the role of applicants and their consultants/contractors in archaeology conducted under Section 106?

(11) When does consultation end?]

C. DETERMINING WHICH ARCHAEOLOGICAL SITES ARE SIGNIFICANT: IDENTIFICATION

14. Does the federal agency have to identify or locate every archaeological site for Section 106 review?

No. The ACHP's regulations do not require the identification of all of the archaeological sites within the area of potential effects (APE). Rather, federal agencies are expected to make a "reasonable and good faith effort" to identify historic properties, including archaeological sites listed or eligible for listing on the National Register in the APE. An agency's identification effort can be considered reasonable and in good faith when it has appropriately taken into account the factors specified in 36 CFR § 800.4(b)(1) - 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.

One of the reasons the ACHP's regulation contains a post-review discovery provision [36 CFR § 800.13] is that the level of effort is reasonable and in good faith, not 100 percent or exhaustive. The costs attendant with work stoppage because of a discovery should be reason enough for a federal agency to put forth a competent professional effort at the identification stage. (added 5/30/07)

[Related questions:

(1) What are a federal agency's responsibilities under Section 106 of the NHPA?

(15) What is the "reasonable and good faith effort" regulatory standard?

(16) How do federal agencies meet the 'reasonable and good faith effort' standard?"

(31) Is every archaeological site eligible for the National Register?]

15. What is the "reasonable and good faith effort" regulatory standard?

In order to take effects into account as required under Section 106 of the National Historic Preservation Act, a federal agency must first "take the steps necessary to identify historic properties in the area of potential effects" [36 CFR § 800.4(b)]. To do this the federal agency:

...shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field

investigation, and field survey. The agency official shall take into account 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. *The Secretary's Standards and Guidelines for Identification* (www.cr.nps.gov/local-law/arch_stnds_2.htm) provide guidance on this subject. [36 CFR § 800.4(b)(1), emphasis added].

This section of the ACHP's regulations establishes the regulatory standard as well as those factors that must be considered in meeting it. (added 5/30/07)

[Related questions:

(1) What are a federal agency's responsibilities under Section 106 of the NHPA?

(2) With whom should a federal agency consult in determining how to meet the "reasonable and good faith effort" regulatory standard?]

16. How do federal agencies meet the "reasonable and good faith effort" standard?

While guidance on the scope of archaeological identification issued by SHPOs or other non-federal agencies often is helpful in determining the appropriate level of effort, it does not define the federal standard and must be considered guidance only.

Ultimately, it is up to the federal agency to thoughtfully consider and weigh the following factors in developing an effective and reasonable approach to the identification of archaeological properties in Section 106 review. The federal agency official makes a "reasonable and good faith effort" to identify historic properties by designing and implementing an identification plan that addresses the following factors [set out in the regulations at 36 CFR § 800.4(b)(1)]:

- "past planning, research and studies;"
- "magnitude and nature of the undertaking;"
- "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."

(added 5/30/07)

17. How should federal agencies consider the magnitude and nature of the undertaking, and the degree of federal involvement, in determining the appropriate level of effort for identification?

Undertakings with the potential for extensive ground disturbance generally will require a more involved effort to identify archaeological properties than those with less ground disturbance. For example, the proposed construction of a new multi-story federal complex with underground parking on a vacant city block may require an intensive survey and deep testing in order to identify eligible archaeological sites. On the other hand, construction of a surface parking lot may require investigations into only the top foot of the soil. Likewise, installation of a six-inch water pipe below the frost line with a Ditch Witch should warrant a significantly less intense effort and may not even involve any subsurface testing prior to laying the line, when compared to a large sewer main.

In determining the level of effort for identification, the regulations [36 CFR § 800.4(b)(1)] call for the federal agencies to consider the "degree of federal involvement" in the undertaking. Federal "involvement" as used here means the federal agency's degree of control or influence over the undertaking. Federal control and influence is highest when a federal agency proposes some ground-disturbing activity on federal land, such as an Army training area expansion.

Federal agencies that grant assistance or issue permits, licenses, or approvals may have a lesser degree of control or involvement over an undertaking. There are several reasons for this:

- Federal assistance and permitting agencies do not have the same degree of control as a land managing agency since they typically do not own the land.
- In most cases the applicant for the assistance or permit conducts the work needed for the federal agency to meet its Section 106 responsibilities, not the federal agency.
- Because these activities take place on non-federal lands (state, tribal, and private), federal agency influence on what the applicant does to help satisfy the Section 106 process is generally limited to conditioning the assistance, permit, or license with stipulations setting what the recipient will do, not necessarily how it will do it.

For example, for a gas pipeline project needing a certificate from the Federal Energy Regulatory Commission, it is reasonable to expect the applicant to apply professional tools, such as current and accepted predictive models, in order to identify eligible archaeological sites. It may not be reasonable, however, to expect the applicant to refine the predictive model by surveying all low and high probability areas. (added 5/30/07)

[Related questions:

(1) What are a federal agency's responsibilities under Section 106 of the NHPA?]

18. How should federal agencies consider the nature and extent of potential effects on historic properties in determining the appropriate level of effort for identification?

A federal agency is not expected to conduct a 100 percent survey of the area of potential effects. Rather, the identification effort should be conditioned by where effects are likely to occur and the likely impact of these effects on listed or eligible archaeological sites. For example, archaeological identification efforts for a license renewal from the Federal Energy Regulatory Commission likely would not involve the entire area of potential effects (APE). Rather it would be directed to those locations within the APE that are experiencing project related effects associated with operation, usually along the shoreline. Likewise, identification of listed and eligible archaeological sites for a new highway project would be conducted within the APE where direct effects, such as ground disturbance from road construction, are likely. Archaeological testing, however, also should occur within the APE wherever destructive impacts can be reasonably expected to occur later in time, be farther removed in distance or be cumulative. In this example, testing should not be limited to the confines of the new road alignment because experience has demonstrated that highway interchanges tend to attract future development associated with the transportation corridor. (added 5/30/07)

[Related questions:

(23) Why is the "area of potential effects" (APE) important in identifying eligible archaeological sites?

(24) How is the area of potential effects (APE) determined?

(25) Should the area of potential effects (APE) also be defined vertically?]

19. How should federal agencies consider the likely nature and location of historic properties within the area of potential effects in determining appropriate level of effort for identification?

The identification effort is based on what might be found and where it is likely to be located. In other words, the APE is the geographic area where identification occurs, but it doesn't necessarily follow that the entire APE must be subject to archaeological scrutiny. Generally, the level of effort would be expected to be more intensive if there is potential for the APE to contain an archaeological site of national significance or value to a living community. (added 5/30/07)

[Related questions:

(1) What are a federal agency's responsibilities under Section 106 of the NHPA?

(14) Does the federal agency have to identify or locate all archaeological sites for Section 106 review?

20. How should federal agencies consider past planning, research, and studies in determining the appropriate level of effort for identification?

A review of previous archaeological work done within or in the vicinity of the area of potential effects (APE) is essential in determining the scope of the identification effort. For example, where portions of the APE have been subjected to archaeological survey using methods that conform to current professional standards, it may not be necessary to conduct additional fieldwork on those areas. Conversely, a more intensive effort reasonably would be expected for an APE that has been the subject of little or no previous archaeological study.

Federal agencies should evaluate the reliability and accuracy of any past work because that factor, as well as changing perceptions of significance, may affect what is considered "reasonable." In conducting such an evaluation agencies should recognize that archaeological work done prior to the 1992 amendments to National Historic Preservation Act may not have benefited from consultation with Indian tribes or Native Hawaiian organizations (NHOs). Accordingly, even though the APE appears to be well studied, any archaeological sites that had been identified previously, both those determined eligible and those found not eligible, may need to be reevaluated in consultation with SHPOs/THPOs, Indian tribes, or NHOs in order to fully appreciate the site's significance and value.

Review of existing information also assists in determining the types of eligible archaeological sites that might be present and their possible location. The lack of published regional archaeological information does not necessarily mean no eligible archaeological sites are present in the APE. When planning to conduct identification studies it is essential to consult with the SHPO/THPO, Indian tribes, or NHOs that might ascribe traditional religious and cultural significance to listed or eligible archaeological sites in the APE and others knowledgeable about the region and its past before any survey and field testing begins. (added 5/30/07)

[Related questions:

(5) Why should federal agencies consult with other parties about archaeology?

(9) What is the role of applicants and their consultants/contractors in archaeology conducted under Section 106?

(28) What special role do Indian tribes and Native Hawaiian organizations have in evaluating properties?]

21. With whom should a federal agency consult in determining how to meet the "reasonable and good faith effort" regulatory standard?

In conducting its identification effort, federal agencies are required to consult with the SHPO/THPO to determine the scope of identification efforts, including the initial determination of the undertaking's area of potential effects, and to seek information from consulting parties and others about historic properties and effects to them. Federal agencies should also gather information from Indian tribes or NHOs to assist in identifying properties of traditional religious and cultural significance to them within the APE that may be eligible for the National Register.

However, federal agencies should be aware that "an Indian tribe or NHO may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites" [36 CFR § 800.4(a)(4)]. Accordingly, consultation with the SHPO/THPO, Indian tribes, NHOs, and other consulting parties should begin well before the archaeological survey is performed and continue until

identification has been completed. This also means, in some cases, consultation with only the SHPO may not be sufficient to develop an appropriate scope of work for the identification and evaluation of archaeological sites.

Because Indian tribes and NHOs determine what properties are of traditional religious and cultural significance to them, it is particularly important to reach out to Indian tribes and NHOs to determine their level of interest in the undertaking and its potential to affect any such properties before initiating any archaeological field work. Failure to do so could result in the agency taking what may be inappropriate actions, such as the removal of materials from, or insensitive treatment of, historic properties or could result in the agency having to conduct additional or supplementary identification studies later in Section 106 review. (added 5/30/07)

[Related questions:

(4) Who consults with whom, and how?

(9) What is the role of applicants and their consultants/contractors in archaeology conducted under Section 106?]

22. How are disputes about the “reasonable and good faith effort” standard resolved?

Federal agencies should seek the advice, guidance, and assistance of the ACHP in resolving disputes with other consulting parties on its level of effort to identify and evaluate historic properties [36 CFR § 800.2(b)(2)]. Since the ACHP established this standard, its views on what constitutes an appropriate level of effort to identify eligible archaeological sites deserves careful consideration in the Section 106 process. In the end, however, the ACHP’s views are advisory and the federal agency makes the final decision about how much work is enough. (added 5/30/07)

23. Why is the “area of potential effects” (APE) important in identifying eligible archaeological sites?

The APE is the geographic area(s) within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of the undertaking and may be different for different kinds of effects caused by the undertaking [36 CFR § 800.16(d)]. Because the APE defines the geographic limits of federal agency responsibility for purposes of Section 106 review, archaeological survey necessary to identify and evaluate historic properties is carried out within its boundaries. Within the APE, however, the level of effort may vary considerably depending on such factors as anticipated effects and prior ground disturbance. (added 5/30/07)

24. How is the area of potential effects (APE) determined?

The APE is defined by the federal agency, in consultation with the SHPO/THPO, prior to initiating identification efforts. It is therefore a good idea to start out with an APE that is reasonably broad enough to capture the full geographic extent of the undertaking’s effects, and reassess it as more information is gathered.

An effect to a historic property occurs when an undertaking will alter those characteristics of the property that qualify it for the National Register [36 CFR § 800.16(i)]. In developing the APE for an undertaking, consideration must be given to those effects that will occur immediately and directly as well as those that are reasonably foreseeable and may occur later in time, be farther removed in distance or be cumulative, but still result from the undertaking.

The APE is not static, but should be adjusted as a federal agency further develops the details of the undertaking and learns more about potential historic properties and how they may be affected. The

input of consulting parties is crucial to this informed revision and refinement of the APE throughout Section 106 review.

Most archaeological sites are considered eligible for the National Register principally under Criterion D, because of their potential to yield information “important in prehistory or history.” This important information lies in the site’s artifacts and features and their association (or context). Accordingly, any action that would alter a site’s context would have an effect on its ability to yield information and thus its eligibility for the National Register. The most easily envisioned effect occurs when potential information (the site context) is threatened with destruction; the site or parts of it are bulldozed or plowed away.

Federal agencies, however, should not confuse delineation of the APE with the project’s construction “footprint” since effects to archaeological properties are not restricted solely to direct physical impacts. By consulting with Indian tribes, NHOs, and others, the federal agency can ensure due consideration is given to all aspects of an archaeological site’s National Register significance. This is especially important when the APE may contain archaeological properties of traditional religious and cultural significance to Indian tribes or NHOs, and/or that may be eligible for National Register listing under criteria other than Criterion D. Such properties, for example, could be affected not only through direct physical impact but also from the introduction of visual or atmospheric elements that would alter the property’s setting and feeling. (added 5/30/07)

[Related question:

(15) How do federal agencies meet the “reasonable and good faith effort” standard?]

25. Should the area of potential effects (APE) also be defined vertically?

Yes. Since an undertaking’s effects are not restricted to the surface, in delineating the APE, a federal agency also should consider the potential for the undertaking’s effects to occur above and below ground. Because the APE is three dimensional, agencies should consider how the undertaking might impact historic properties on the surface, above it, and below it.

In setting the APE’s lower limits, the federal agency should rely on scientific and engineering analyses to define a depth beyond which alteration to any eligible or listed archaeological site, if present, is not reasonably expected to occur. This analysis should demonstrate that any such site, if present, would not be affected by the undertaking through changes in soil compaction or soil chemistry, for example. The challenge is to determine a vertical limit below which a knowledgeable person can reasonably say there will be no effect to the integrity of a site, should one be present.

The APE for construction of a surface parking lot, for example, might be quite shallow because its limited subsurface disturbance is unlikely to affect deeply buried archaeological properties. However, construction of an airport runway that is designed to support enormous weight, while still essentially a surface disturbance, could lead to compaction of buried archaeological properties, and thus would warrant testing to a greater depth.

In determining the geographic extent of the APE, the nature of the historic properties that might be present also should be considered to better understand the nature and magnitude of the effects that might apply. For example, a project that would construct over an eligible archaeological site deemed of religious and cultural significance to an Indian tribe may not cause physical damage to the property. However, depending on the property’s significance, the proposed construction might be expected to diminish the property’s integrity through loss of feeling or association. For this reason agencies are encouraged to consult early and be willing to refine the dimensions of the APE as more information is gathered during the course of Section 106 review. (added 5/30/07)

[Related questions:

(19) How should federal agencies consider the likely nature and location of historic properties within the area of potential effects in determining the appropriate level of effort for identification?

(29) What kind of information is necessary to evaluate the eligibility of an archaeological site?]

D. DETERMINING WHICH ARCHAEOLOGICAL SITES ARE SIGNIFICANT: EVALUATION

26. How are eligibility determinations made in Section 106 review?

The regulations require the federal agency to apply the National Register eligibility criteria in consultation with the SHPO/THPO and any Indian tribe or NHO that attaches traditional religious and cultural significance to the property [36 CFR § 800.4(c)(1)]. During such consultation, a federal agency may use in-house expertise or rely on information and recommendations provided by applicants or consultants/contractors. The federal agency, however, is legally responsible for decisions on National Register eligibility.

Most eligibility determinations made within the Section 106 process are called “consensus determinations” because agreement between the federal agency and the SHPO/THPO is all that is required; no formal nomination to or listing on the National Register is necessary. Consensus determinations that properties are not eligible should also be documented so that consulting parties and the public have an adequate basis upon which to evaluate the agency decision.

When the federal agency and the SHPO/THPO disagree about eligibility, the opinion of the Keeper of the National Register must be sought [36 CFR § 800.4(c)(2)]. (added 5/30/07)

[Related questions:

(5) Why should federal agencies consult with other parties about archaeology?

(28) What special role do Indian tribes and Native Hawaiian organizations have in evaluating properties?]

27. What are the consequences of eligibility determinations in the Section 106 process?

The determination that an archaeological site is eligible for the National Register subjects it to Section 106 review. This means the federal agency must then decide if the undertaking will alter that property’s qualifying characteristics, and if so, whether it will do so in a manner that will diminish the property’s integrity. If the agency determines there could be an adverse effect, then the agency consults further on appropriate measures to avoid, minimize, or mitigate that effect to the property.

In order to carry out these steps effectively, it is essential that the federal agency fully identify a property’s qualifying characteristics. To do so, the federal agency should explore the full range of National Register criteria that may apply to an archaeological site.

Frequently federal agencies just assume data recovery is the mitigation measure that should be automatically selected to resolve adverse effects to sites considered eligible solely under Criterion D. In fact, other measures, such as site burial, might be as appropriate. Given the inherent flexibility of the Section 106 process and its emphasis on resolution through consultation, a range of archaeological solutions usually should be considered. (added 5/30/07)

[Related questions:

(28) What special role do Indian tribes and Native Hawaiian organizations have in evaluating properties?]

- (36) What information is needed to decide on treatment options?
- (38) What issues should be considered when consulting about mitigation?]

28. What special role do Indian tribes and Native Hawaiian organizations have in evaluating properties?

The ACHP's regulations acknowledge the special expertise that Indian tribes and NHOs possess in assessing the National Register eligibility of properties that may be of traditional religious and cultural significance to them [see 36 CFR § 800.4(c)(1)]. This means that the tribe's or NHO's opinions about, or position on, the National Register significance of a particular archaeological site as a property of traditional religious and cultural significance to that tribe or NHO should be given due consideration by the federal agency in making a final determination on eligibility. (added 5/30/07)

[Related questions:

- (3) What is the ACHP's policy on dealing with burial sites, human remains, and funerary objects?
- (4) What is Section 106 consultation?
- (5) Why should federal agencies consult with other parties about archaeology?
- (13) What happens when a consulting party cannot or will not provide its views?]

29. What kind of information is necessary to evaluate the eligibility of an archaeological site?

Archaeological sites often, but not always, require some limited exploration to gather information needed to make an evaluation. However, there is a distinction between "testing" archaeological properties for identification and evaluation and "excavating" them for purposes of data recovery. Testing is aimed at determining if the site should be considered eligible for listing in the National Register. Generally, when testing an archaeological site, only a very small sample need be disturbed, but this varies on a case-by-case basis. While it is impossible to define a hard and fast standard, a rule of thumb is that testing is sufficient when enough is known about the nature, size, limits, and contents of the site to judge its significance and integrity against the National Register criteria.

Evaluation under each of the criteria should be done according to the professional standards of practice. The National Register Bulletin No. 36, "Guidelines for Evaluating and Registering Archeological Properties" (www.cr.nps.gov/nr/publications/bulletins/arch/), addresses the kinds of information needed to evaluate an archaeological site under the National Register criteria. (added 5/30/07)

[Related questions:

- (31) Is every archaeological site eligible for the National Register?
- (32) Can you evaluate archaeological sites under Criteria A-C in addition to D?
- (33) Does the presence of human remains make an archaeological site eligible for the National Register?]

30. Is a National Register nomination form required in a Section 106 evaluation of eligibility?

No. Section 106 eligibility determinations do not require filling out any National Register forms. However, the kinds of information called for in the forms, such as information on a property's boundaries, area(s) and period(s) of significance, integrity, deposits, and National Register criteria being considered are essential to making eligibility determinations under Section 106. (added 5/30/07)

31. Is every archaeological site eligible for the National Register?

No. Not every archaeological site is eligible for the National Register because not all archaeological sites possess both significance and sufficient integrity to be considered eligible. Sites may be deemed *important* to a group or community, or people may feel that, as a place of ancestral occupation or

activity these sites possess a *value* that should be recognized. However, in neither case does this automatically translate or equate to the requisite *significance* for National Register eligibility purposes.

To be eligible for listing on the National Register, archaeological sites must meet at least one of the four National Register criteria (A through D) established by the National Park Service and possess integrity. Significance relates to a historic property's ability to meet at least one of the criteria. As with any other kind of historic property, listed or eligible archaeological sites must be associated with significant events (Criterion A), or be identifiable with specific, important individuals (Criterion B), be of a distinctive type or period or have artistic value, or be a component of an identifiable historic district (Criterion C), or "have yielded or have the potential to yield, information important in prehistory or history" (Criterion D, as quoted from the regulations). When determining significance under criterion D, one must keep in mind that while all archaeological sites can yield some kind of information, the key is to determine if that information is *important*. Importance is best assessed when considered within a framework of a historic context.

Integrity is the ability of the property to convey significance through physical features and context. According to the National Register Bulletin No.36, "Guidelines for Evaluating and Registering Archeological Properties" (www.cr.nps.gov/nr/publications/bulletins/arch/),

Integrity of location, design, materials, and association are of primary importance [for sites being considered] under Criteria A and B. Design, materials, and workmanship are especially important under Criterion C. Under Criteria C and D, integrity of setting adds to the overall integrity of an individual site and ... district.

For example, context, or the association of artifacts, features, and other site characteristics, is considered essential for the archaeological site to convey information about the past (Criterion D). The context of an archaeological site subjected to regular plowing or looting may be sufficiently disrupted so that the site no longer possesses integrity of association. On the other hand, for an archaeological site where a significant event took place (for example, consideration under Criterion A) integrity of feeling and setting may be more critical than association.

Consequently, a site with excellent associative integrity still may not be eligible if several other similar sites have already been studied, because the kind of information it could provide is considered redundant, and/or not currently important to history or prehistory. [For more detailed information about, and examples of, integrity refer to National Register Bulletin No. 36, "Guidelines for Evaluating and Registering Archeological Properties" cited above]. (added 5/30/07)

[Related questions:

- (29) What kind of information is necessary to evaluate the eligibility of an archaeological site?
- (32) Can you evaluate archaeological sites under Criteria A-C in addition to D?]

32. Can you evaluate archaeological sites under Criteria A through C in addition to D?

Yes, it is possible for an archaeological site to be eligible under Criteria A, B, C, and D. The ACHP's Section 106 regulations call for the federal agency to consider how all of the National Register qualifying characteristics of a historic property may be affected by the undertaking [36 CFR § 800.5(a)(1)]. Accordingly, when conducting its evaluation, a federal agency should determine the full range of criteria that may apply to a property. National Register Bulletin No. 36, "Guidelines for Evaluating and Registering Archeological Properties"

(www.cr.nps.gov/nr/publications/bulletins/arch/), lays out a step-by-step process for evaluating sites under all of the criteria and provides useful examples. (added 5/30/07)

[Related question:

(28) What special role do Indian tribes and Native Hawaiian organizations have in evaluating properties?]

33. Does the presence of human remains make an archaeological site eligible for the National Register?

Human remains, associated funerary objects, and the sites where they are found possess *values* beyond their importance as sources of information about the past. National Register Bulletin No. 36, “Guidelines for Evaluating and Registering Archaeological Properties” (www.cr.nps.gov/nr/publications/bulletins/arch/), also notes this distinction between an archaeological site’s National Register *significance* and other *values* it may exhibit. Therefore, Section 106 users should be aware that even when a property has been determined eligible for the National Register only under Criterion D, the special nature of burials, which are widely recognized in law and practice as having special qualities, may also possess a value to living groups that extends beyond the interests of archaeological research. Burial sites may be considered properties of traditional religious and cultural significance to Indian tribes or NHOs, which could make the site eligible for the National Register under more than simply Criterion D. See National Register Bulletin No. 41, “Guidelines for Evaluating and Registering Cemeteries and Burial Places” (www.cr.nps.gov/nr/publications/bulletins/nrb41/) for further guidance.

For further direction in navigating the difficult and sensitive issues associated with the treatment of burial sites and human remains, see the ACHP’s “Policy Statement Regarding the treatment of Burial Sites, Human Remains, and Funerary Objects” (<http://www.achp.gov/news022307hr.html>). (added 5/30/07)

[Related questions:

(3) What is the ACHP’s policy on dealing with burial sites, human remains, and funerary objects?
(28) What special role do Indian tribes and Native Hawaiian organizations have in evaluating properties?]

34. When should an agency reevaluate the National Register status of archaeological sites?

According to the ACHP’s regulation, “[t]he passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency to reevaluate properties previously determined eligible or ineligible” [36 CFR § 800.4(c)(1)]. In deciding if reevaluation is warranted, a federal agency should consider the following questions, among others:

- How long ago was the determination made?
- Were Indian tribes or NHOs consulted about the eligibility of the archaeological site during the initial evaluation?
- Have Indian tribes or NHOs been consulted to determine if the archaeological site may be of traditional religious and cultural significance to them?
- What relevant physical changes to the archaeological site have occurred since the initial determination of eligibility was made?
- Does the archaeological site still possess integrity?

(added 5/30/07)

35. Is the loss of access by archaeologists to listed or eligible archaeological sites an adverse effect under the ACHP’s regulations?

Some Section 106 stakeholders take the position that indefinite loss of access by archaeologists to known listed or eligible archaeological sites resulting from burial of the site under a road, parking lot, building, or other relatively permanent feature constitutes an adverse effect. They argue that since these historic properties will be unavailable for study indefinitely, the loss of access by archaeologists prevents a site that is eligible under Criterion D from yielding its “information important in prehistory or history.” Some use this argument to support the notion that there is no limit to the depth of the area of potential effects. This argument concludes that federal agencies have an obligation under Section 106 to search for and evaluate deeply buried sites, even though such sites might lie below the depth of a particular undertaking’s APE.

Such a position is not consistent with the ACHP’s Section 106 regulations, which state that an adverse effect occurs when:

an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register of Historic Places in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association. [36 CFR § 800.5(a); emphasis added].

Accordingly, an action that will cause an adverse effect is one that will diminish an eligible or listed archaeological site’s integrity. Since loss of access by archaeologists for study is unlikely to alter the qualifying characteristics of a National Register listed or eligible archaeological site in such a way as to diminish that property’s integrity, it generally will not be considered an adverse effect by the ACHP. (added 5/30/07)

E. REACHING AGREEMENT ON APPROPRIATE TREATMENT

36. What information is needed to decide on treatment options?

Consulting about possible options to resolve adverse effects should begin with basic information about the eligible or listed archaeological site and the nature of the federal undertaking. At this point in consultation, the federal agency has already determined the property is eligible for listing or is listed on the National Register. This basic National Register information—the property’s boundaries, its integrity, all of its qualifying characteristics, and period(s) of significance—is critical to evaluate the appropriateness of measures proposed to avoid, minimize, or mitigate the adverse effects.

In many cases, federal agencies will be bound by other federal, tribal, state, or local laws, such as the Native American Graves Protection and Repatriation Act (NAGPRA—see www.cr.nps.gov/nagpra/) or state burial laws, that may dictate how the listed or eligible archaeological sites, especially those that contain human remains or funerary objects, are treated. The federal agency must identify and follow applicable laws and implement any prescribed provisions. (added 5/30/07)

[Related questions:

(9) What is the role of applicants and their consultants/contractors in archaeology conducted under Section 106?

(38) What issues should be considered when consulting about mitigation?]

37. When is data recovery the appropriate treatment?

One of the strengths of the Section 106 consultation process is that there is no predetermined outcome. This means that a range of solutions is usually available for consideration by consulting parties. Contrary to the view held by some Section 106 practitioners, data recovery is not required by law or regulation. It is, though, the most commonly agreed-upon measure to mitigate adverse effects

to archaeological sites eligible or listed under Criterion D, as it preserves important information that will otherwise be lost.

Under the ACHP's Section 106 regulations, an adverse effect occurs when:

an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association [36 CFR § 800.5(a)(1)].

When an undertaking will diminish the historic property's integrity by destroying all or part of it, information contained in the property will be lost. Data recovery preserves at least some of that information. Thus, if the site cannot be avoided and preserved in place, and the federal agency determines it is eligible for the important information it contains and should be retrieved, some agreed-upon level of data recovery, analysis, curation, and reporting is appropriate in order to preserve that important information for the benefit of future generations. (added 5/30/07)

38. What issues should be considered when consulting about mitigation?

An important goal of Section 106 consultation to resolve adverse effects is to identify an outcome that represents the broader public interest. Key issues in determining appropriate resolution of adverse effects include:

- What is in the public interest?
- What are the benefits to, or concerns of, the consulting parties, those they represent, and those who ascribe importance and value to the property?
- If the proposed mitigation is designed to advance our knowledge about the past, how will this knowledge be provided to the public, to schools, to tribes or NHOs, and to professional archaeologists?
- Will it enhance the preservation and management of listed or eligible archaeological sites in a region?

Related questions that should be considered by the federal agency and consulting parties include the following:

Why is the affected listed or eligible archaeological site important? Listed or eligible archaeological sites can be important for, among other reasons, their scientific or educational potential, their nature as traditional or sacred sites, or their potential as heritage tourism assets. Typically, archaeological sites are considered eligible for listing under Criterion D (they contain important information), but they are sometimes eligible under other criteria. Consideration of these various aspects of a site's importance in the consultation process creates opportunities for alternative treatments, in keeping with the concerns of the consulting parties.

How is the importance of one historic property judged relative to that of other properties? When making decisions about the value of one archaeological site versus another, it is important to consider relative potentials of each to yield important information; significant gaps in knowledge that each property can fill; the National Register criteria represented by each site; and whether one property embodies multiple significance, to several groups, thus perhaps giving it a higher preservation priority. Federal, tribal, and state management or preservation plans may provide information on priority lists of research questions, important information gaps, archaeological site types, and other information that can help with this comparative analysis.

Does the affected property have potential to contain human remains? The potential for an archaeological site to contain human remains or funerary objects that will be disturbed should be evaluated before alternative mitigation can be considered. It is the ACHP's policy that human remains should not be knowingly disturbed unless absolutely necessary. However, if they must be disturbed, the remains should be removed carefully, respectfully, and in a manner developed in consultation with others as specified in the ACHP's regulations (See ACHP's "Policy Statement Regarding Treatment of Burial Sites, Human Remains, and Funerary Objects" at www.achp.gov/docs/hrpolicy0207.pdf). (added 5/30/07)

[Related questions:

- (1) What are a federal agency's responsibilities under Section 106 of the NHPA?
- (3) What is the ACHP's policy on dealing with burial sites, human remains, and funerary objects?
- (27) What are the consequences of eligibility determinations in the Section 106 process?
- (28) What special role do Indian tribes and Native Hawaiian organizations have in evaluating properties?
- (41) How can federal agencies find out about appropriate treatment options and alternatives?]

39. What is "alternative" or "creative" mitigation?

These terms refer to alternatives to archaeological data recovery as mitigation for an undertaking's adverse effects. Such approaches can either be implemented alone or as part of a broader mitigation package. Examples of such alternatives may include:

- preserving selected eligible archaeological sites and incorporating them into heritage tourism plans while allowing others to be lost;
- burying sites under fill or incorporating them into the undertaking;
- using resources to develop syntheses of existing information on a region or area instead of, or in addition to, using them on data recovery;
- use of barriers to route traffic away from eligible archaeological sites;
- using resources to develop virtual or Web-based reports or educational media that otherwise would not be produced.

Another example of these alternatives is archaeological "mitigation banking." This term refers to the acquisition and preservation of archaeological sites away from the project area in return for doing little or no direct mitigation on sites within the area of potential effects.

This concept of "alternative" or "creative" mitigation is consistent with the definition of "mitigation" as used in the National Environmental Policy Act regulations of the Council on Environmental Quality [Section 1508.20(c)-(e)], where it includes:

- (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and
- (e) Compensating for the impact by replacing or providing substitute resources or environments (i.e., "off-site mitigation").

(added 5/30/07)

40. Are there advantages to considering alternative mitigation?

There is no prohibition against alternative treatments in the ACHP's Section 106 regulations, and the law does not prescribe any specific measures to resolve adverse effects. The regulations [36 CFR §

800.6(a)] leave development of these measures to the federal agency consulting with other parties, calling for them to “develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.”

Recovery of an eligible or listed archaeological site’s important information, and/or redirecting resources toward other preservation goals identified as more critical, is consistent with the purposes of the broader federal historic preservation program as set out in Sections 1 and 2 of the National Historic Preservation Act (NHPA). Other sections of the NHPA and guidance call for mitigation but are not specific. Section 110(b) of the NHPA calls for federal agencies to make “appropriate records ... for future use and reference.” This is reiterated in Standard 6 of the “Secretary of the Interior’s Standards and Guidelines for Federal Agency Historic Preservation Programs” (<http://fpi.historicpreservation.gov/TechnicalInfo/HistPres/FedAgencyGuidelines.aspx>), which calls for agencies to “provide for appropriate recording of the historic property.” Data recovery, however, is not the only way to construct a record when archaeological properties will be adversely affected by an undertaking.

The ACHP supports consideration of alternative mitigation and notes that:

Appropriate treatments for affected archaeological sites, or portions of archaeological sites, may include active preservation in place for future study or other use, recovery or partial recovery of archaeological data, public interpretive display, or any combination of these and other measures [From the ACHP’s “Recommended Approach for Consultation on Recovery of Significant Information from Archeological Sites” (www.achp.gov/archguide.html)].

In reaching decisions about appropriate treatment measures, federal agencies should weigh a variety of factors, including significance of the historic property, its value and to whom, and associated costs and project schedules. As mitigation decisions reached through consultation represent the broader public interest, they should be considered appropriate so long as they are legal, feasible, and practical.

By considering alternatives to data recovery, federal agencies can address how the community or the general public best benefits from the expenditure of public funds for preservation treatments. The public may derive greater benefit from a variety of data recovery alternatives or a combination of more limited data recovery and exhibits on excavation, brochures, site tours, public lectures, Web sites, documentary videos, and history modules for use in schools. Using these means to achieve broader public involvement can lead to increased appreciation of the past and a greater willingness to expend public funds in the pursuit of preservation goals. (added 5/30/07)

41. How can federal agencies find out about appropriate treatment options and alternatives?

The ACHP encourages federal agencies, SHPOs/THPOs, Indian tribes, and NHOs, to develop priority lists of preservation strategies, mitigation plans, or programs for ready consideration in the consultation process. Many land managing agencies have preservation or management plans that contain lists of priority activities that could be implemented with sufficient resources. SHPOs have state preservation plans that set forth what is known about the history of their state, provide historic contexts for making decisions about significance, and identify gaps in archaeological knowledge. Some THPOs and tribes have, or are developing, preservation plans for tribal lands that may be considered in consultation to resolve adverse effects. These kinds of plans, particularly those developed in consultation with other preservation stakeholders, are important to consider in providing a context for making site-specific treatment decisions. (added 5/30/07)

[Related questions:

(5) Why should federal agencies consult with other parties about archaeology?

(9) What is the role of applicants and their consultants/contractors in archaeology conducted under Section 106?

(12) How can federal agencies foster more informed participation by stakeholders in consultation about archaeology?]

F. COMPLETING THE SECTION 106 PROCESS

42. What are a federal agency's responsibilities to complete Section 106 review?

A federal agency's responsibilities are met when the agency has completed the Section 106 process. If a Section 106 agreement has been executed, such completion includes implementation of those stipulations or provisions contained in the agreement (e.g., completion of a data recovery plan, analysis and curation of retained materials, final reporting of results in professional and public formats). Procedurally, the federal agency must be able to demonstrate it identified the appropriate consulting parties, provided them with adequate documentation [36 CFR § 800.11] so they were able to participate in consultation effectively, and provided a reasonable opportunity for consulting parties to exchange views about the identification of historic properties, the assessment of effects to them, and the resolution of adverse effects, as required under the ACHP's Section 106 regulations. (added 5/30/07)

[Related question:

(1) What are a federal agency's responsibilities under Section 106 of the NHPA?]

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F. Completing the Section 106 process

42. What are a federal agency's responsibilities to complete Section 106 review?