



FEDERAL PRESERVATION PROGRAM NOTES

2005 BRAC and the National Historic Preservation Act: An Introduction to the Section 106 Process

Introduction. The following guidance is intended for those individuals and organizations that are unfamiliar with the requirements of Section 106 of the National Historic Preservation Act (NHPA) especially as they relate to the implementation of 2005 Base Realignment and Closure (2005 BRAC). This guide provides an important introduction for citizens and military personnel that desire to become involved, or will be involved, with historic properties affected by 2005 BRAC actions.

In 1966, Congress passed the NHPA to help stop the inadvertent loss of historic properties significant to our Nation's heritage. Section 106 of the Act requires Federal agencies to consider the effects of their actions on historic properties. It is an important tool that ensures private citizens and State, tribal, and local governments have a voice in Federal decisions that impact historic properties.

In planning and implementing 2005 BRAC, DoD must comply with the NHPA and other legal authorities that mandate consideration of effects on historic properties, such as the National Environmental Policy Act (NEPA). Military installations may seek efficiencies by integrating the requirements of NHPA and NEPA in planning 2005 BRAC actions, but compliance with NEPA may not necessarily ensure compliance with NHPA (see 36 CFR § 800.8(c) for how to comply with both Acts).

What is Section 106 Review? In the NHPA, Congress established a comprehensive program to preserve the historical and cultural foundations of the Nation as a living part of community life. Section 106 of NHPA is critical to that program, because it requires consideration of historic preservation in the multitude of Federal actions that take place nationwide. Section 106 requires DoD to consider the effects of 2005 BRAC actions on historic properties and provide the Advisory Council on Historic Preservation (ACHP) an opportunity to comment on projects prior to implementation. The ACHP is an independent Federal agency that promotes the preservation, enhancement, and productive use of our Nation's historic resources, and advises the President and Congress on national historic preservation policy.

Section 106 review encourages, but does not mandate, preservation. Sometimes there is no way for a needed project to proceed without harming historic properties. Section 106 review does, however, ensure that preservation values are factored into DoD's planning and decision making process for implementing 2005 BRAC. Under Section 106, DoD's Military Departments are responsible for the consequences of their actions on historic properties and may be held publicly accountable for their decisions.

Understanding Section 106 Review. Regulations issued by the ACHP implement the Section 106 review process and specify the procedural steps Military Departments must take to meet their legal obligations. These regulations are published in the Code of Federal Regulations at 36 CFR Part 800, "Protecting Historic Properties," and can be found on the ACHP Web site at www.achp.gov/regs.html.

Military Departments are responsible for initiating the Section 106 process, most of which takes place between them, State and tribal officials and the Local Redevelopment Authorities (LRA). A State Historic Preservation Officer (SHPO), appointed by the Governor, coordinates the historic preservation program in their state and consults with the Military Departments during the Section 106 review process. Military Departments also must consult with federally recognized Indian tribes and Native Hawaiian organizations, when tribal lands or historic properties of significance to these groups are involved. Some tribes have officially designated Tribal Historic Preservation Officers (THPO), while others designate representatives to consult with agency representatives. The Military Departments, in consultation with SHPOs/THPOs, must also plan on involving the public at appropriate points in the process.

There are five steps to successfully completing the Section 106 review process. Military Departments must:

- determine if Section 106 applies to a given project (i.e., whether it is an "undertaking"), and, if so, initiate the review process which includes identifying those to be consulted in the process;
- gather information to decide which properties that could be affected by the project are listed in or eligible for the National Register of Historic Places (historic properties);
- determine how historic properties might be affected;
- explore alternatives to avoid, minimize or mitigate harm to historic properties; and
- seek to reach agreement with SHPOs/THPOs, LRAs, or other consulting parties, and in some cases the ACHP on measures needed to deal with any adverse effect or obtain advisory comments from the ACHP.

When historic properties may be harmed, the Section 106 review process usually ends with a legally binding agreement that establishes how the agency will address the adverse effects to historic properties. In the few cases where this does not occur, the ACHP issues advisory comments, which the head of the Military Department must consider in making a final decision. For more detailed information on the Section 106 review process, see the ACHP Web site at www.achp.gov/work106.html.

The point of Section 106 review is to ensure that Military Departments fully consider historic preservation issues and the views of the public and attempt to resolve adverse effects to historic properties while implementing 2005 BRAC.

Is 2005 BRAC Implementation a Section 106 Undertaking? NHPA defines an undertaking as any activity, project or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency. ACHP's regulations provide that the activity, project or program must generically have the potential to affect historic properties in order to be subjected to Section 106 review. Realignment,

closure, disposal and reuse of military installations have the potential to affect historic properties and are undertakings subject to Section 106 review.

Realigned installations may see an influx of new military and civilian personnel with new missions. These changes may have an effect on historic buildings as renovation projects and facilities upgrades are undertaken. New construction may have an effect on existing historic districts on the installation and archeological sites and traditional religious and cultural sites may be affected by increased demand on training facilities or the need to expand training facilities to meet new training needs. These activities are the types of actions that may affect historic properties and are considered to be undertakings under Section 106.

Where installations lose personnel, historic buildings may be affected through the loss of programmed funding necessary to adequately repair and maintain them. Historic buildings may need to be mothballed if no personnel will occupy them for extended periods of time. Installations may also enter into enhanced use leasing arrangements for under utilized historic buildings. Cessation of maintenance and leasing are also considered to be undertakings under Section 106.

The closing of installations entails an established process for excessing surplus lands that eventually results in lands being turned over to other federal agencies, state or local communities, sold to private individuals or groups or turned over to the Local Redevelopment Authority as an Economic Development Conveyance. The transfer of Federal property between two Federal agencies is not viewed by the ACHP as an undertaking since the requirements of Section 106 do not change as a result of the transfer. However, actions necessary to complete a transfer between two Federal agencies, such as environmental cleanup, may be undertakings that require review under Section 106. Moreover, Section 106 review for actions on the part of the Federal agency receiving the federally transferred property is the responsibility of the receiving agency.

Establishing whether a Federal action is an undertaking is the responsibility of the agency official (that person with approval authority for the undertaking and the authority to commit the agency to take appropriate action for a specific undertaking as a result of Section 106 compliance). In most cases the installation or base commander acts as the agency official. Questions concerning undertakings can be directed to ACHP or to the headquarters of each of the Military Departments.

2005 BRAC and Section 106. Decisions to close or realign military installations are the outcome of a multi-step process that Congress approved and the President signed into law (P.L 101-510). Recommendations on closure and realignment were made by a nine member BRAC Commission and approved by the President and Congress. For more detailed information on the 2005 BRAC process see the DoD's BRAC Web site at www.defenselink.mil/brac/.

On November 9, 2005, base realignment and closure became Federal law. Those projects which implement 2005 BRAC are subject to Section 106 review. Participants in the Section 106 review process have an opportunity, through consultation, to influence decisions about how historic properties are treated as a result of realignment or closure.

What are historic properties and what is the National Register of Historic Places? The NHPA defines a historic property or a historic resource as:

any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register, including artifacts, records, and material remains related to such property or resource.

The National Register of Historic Places, maintained by the National Park Service, is the Nation's official list of properties recognized for their significance in American history, architecture, archeology, engineering and culture. National Register properties include districts, sites, buildings, structures, and objects. They may be significant to a local community, a State, an Indian tribe, or the Nation as a whole.

In order to be considered during the Section 106 review process, a property must either be already listed on the National Register or be eligible for listing. A property is considered eligible if it meets specific criteria established by the National Park Service, which administers the program.

During Section 106 review, Federal agencies evaluate properties against those criteria and seek the consensus of the relevant SHPO or Indian tribe regarding eligibility. For more information, visit the National Register Web site at www.cr.nps.gov/nr.

What is an adverse effect? In Section 106 review, a project is considered to adversely affect a historic property if it may alter the characteristics that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property. Integrity is the ability of a property to convey its significance based in its location, design, setting, materials, workmanship, feeling, and association.

Adverse effects can be direct or indirect. They include reasonably foreseeable impacts that may occur later in time, be farther removed in distance, or be cumulative. Typical examples of adverse effect are:

- physical destruction or damage
- alteration inconsistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties (see www.cr.nps.gov/hps/tps/standguide/ for more information)
- relocation of the property
- change in the character of the property's use or setting
- introduction of incompatible visual, atmospheric, or audible elements
- neglect or deterioration
- transfer, lease, or sale out of Federal control without adequate provisions that ensure long-term preservation.

Influencing Outcomes Through Consultation. In addition to seeking the views of the public, Military Departments must actively consult with certain organizations and individuals during the review process. Consultation must take place between the Military Departments and SHPOs, Indian tribes, Native Hawaiian organizations and local governments, including its LRAs (at closing installations). Each is entitled to actively participate as a consulting party during the Section 106 review process. The ACHP may join consultation at any point in the process on its own initiative. Other organizations interested in historic properties that may be affected by 2005 BRAC undertakings, such as neighborhood associations, other preservation organizations, and local historical societies may also be invited into the consultation process by the Military Departments; however, their participation is subject to the approval of the Military Department.

This interactive consultation is at the heart of the Section 106 review process. Consultation does not mandate a specific outcome. Rather, it is the process of seeking consensus about how project effects on historic properties should be handled. The organizations and individuals that the Military Departments must consult are called "consulting parties."

Prior Consultations and Their Effect on 2005 BRAC Undertakings. Previous Section 106 consultations may have resulted in agreements between DoD or its Military Departments concerning historic properties adversely effected by non-BRAC undertakings. These previous agreements may remain in effect, may be amended, or may be terminated, depending upon the requirements of the agreement and the nature of the 2005 BRAC undertaking.

Programmatic agreements (PA), which allow for management of a military program or routine maintenance at an installation, may need to be amended for those installations which are being realigned because changing missions and differing effects no longer are applicable to the realigned installation. For closing installations, similar programmatic agreements may be terminated and may be replaced by new ones as lands are either transferred out of Federal ownership or to new Federal owners. Memoranda of agreements (MOA) that were written prior to 2005 BRAC, to deal with adverse effects to specific properties, should continue in force. However, if changes in the original undertaking take place as a result of 2005 BRAC these MOAs may need to be amended or terminated.

Nationwide agreements and measures for addressing DoD-wide programs will remain in effect and may affect 2005 BRAC undertakings and the Section 106 review processes associated with them. In the 1980's, DoD, the National Conference of State Historic Preservation Officers (NCSHPO) and the ACHP entered into a nationwide PA that addressed the adverse effects of demolition of World War II wooden structures. While many of these structures remain in DoD's inventory today, further Section 106 consideration of these structures is not necessary, even for 2005 BRAC actions since the terms of the nationwide PA have been carried out already. The same programmatic approach was taken by DoD, through program comments from ACHP, for all of its inventory of Capehart and Wherry Era housing built between 1949-1962.

As 2005 BRAC is implemented by the Military Departments, previous installation agreement documents should be reviewed and the need for amendment or termination should be considered as part of the 2005 BRAC process.

Further Information. Further information about the Section 106 process and how it relates to the 2005 BRAC can be obtained from ACHP by email at: BRAC@achp.gov

or by writing to: The Advisory Council on Historic Preservation
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NATIONAL CONFERENCE OF STATE
HISTORIC PRESERVATION OFFICERS

