

Appendix A

National Historic Preservation Act (NHPA) Compliance and Habitat Conservation Plans (HCP) for the U.S. Fish and Wildlife Service (FWS)

Background

The U.S. Fish and Wildlife Service (FWS) decided in 1999 that the issuance of an incidental take permit (and/or enhancement of survival permit) under section 10 of the Endangered Species Act (ESA) is an undertaking subject to compliance with section 106 of the National Historic Preservation Act (NHPA) of 1966, as amended (see Assistant Director - Endangered Species (AES) memo dated 2000 in the [HCP Handbook Toolbox](#)). Because of the magnitude and complexity of the Habitat Conservation Planning (HCP) program, this guidance is intended to assist FWS staff to ensure NHPA compliance when issuing section 10(a)(1)(B) incidental take permits. Section 106 of the NHPA requires the FWS to take into account the effects of their undertakings on historic properties (i.e., significant cultural resources). In this regard, the key components of this guidance state that the FWS must consult with the State Historic Preservation Officer (SHPO), Tribal Historic Preservation Office (THPO), and federally recognized Native American tribes, Native Hawaiian organizations, and Native Alaskan Corporations (tribes) and consider their comments on the potential impacts to historic properties resulting from the undertaking, and endeavor to incorporate their comments into project planning.

Legal Context and Overview

Compliance with the NHPA, as amended, is required by law for all Federal undertakings. An *undertaking* is defined in 36 CFR 800.16(y) of the NHPA's implementing regulations as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal *permit*, license or approval." Under this definition, the issuance of section 10(a)(1)(B) incidental take permits for activities covered in an HCP constitutes an undertaking subject to review and compliance under section 106 of the NHPA.

The issuance of an incidental take permit and the permittee's covered activities described in the HCP under our direct jurisdiction constitute an undertaking under section 106 of NHPA. The covered activities and conservation measures stipulated as a condition of the permit and described in the HCP that have the potential to cause an adverse effect to historic properties are subject to further review under NHPA. The permit, however, as defined by the ESA, authorizes take of species that is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." The otherwise lawful activities are subject to approval under other Federal, State, or local regulations.

FWS staff should coordinate closely with their Regional Historic Preservation Officers (RHPO) early in the HCP development process so they can help establish the Area of Potential Effect (APE), consult with the SHPOs and THPOs (if necessary), and advise the applicant of any potential effects to historic properties. We should make a good faith effort to identify and

suggest, if feasible, avoidance measures on historic properties during project planning [36 CFR 800.13(b)]. We should inform the applicant of our section 106 responsibilities and concerns regarding how we should ameliorate impacts to historic properties. Section 106 and its implementing regulations at 36 CFR 800 provide the steps and requirements for complying with NHPA (see [HCP Handbook Toolbox](#)).

Policy addressing the management and protection of significant cultural resources (referred to as historic properties) can be found in the FWS Manual, under Part 614 (see [HCP Handbook Toolbox](#)). The purpose of this guidance is to clarify and interpret key elements of the regulations as they apply to the development of HCPs and issuance of section 10(a)(1)(B) ITPs.

Purpose and Compliance Goals

The purpose of section 106 of the NHPA is to integrate preservation concerns with the needs of Federal undertakings.

Helpful Hint:

- **The goal is to consult and plan to avoid destroying or damaging historic properties as a consequence of Federal actions or undertakings that have the potential to cause reasonably foreseeable effects.**
- **The compliance steps in 36 CFR 800 emphasize flexibility and early coordination to ensure that section 106 compliance is achieved with the minimum of disruption and costs to a Federal agency and its applicants. Voluntary adoption of substantive compliance provisions may decrease the needed NEPA analysis.**
- **Ensuring NHPA compliance does take time. In general, the larger and the more complex the project, the more the lead time will be needed.**
- **The regulations at 36 CFR 800 define “historic property” as “any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places maintained by the Secretary of the Interior.”**
- **The phrase “eligible for inclusion in the National Register of Historic Places” includes properties formally determined as such in accordance with regulations and all other properties that meet the National Register’s eligibility criteria.**

An applicant may not destroy a cultural resource as defined by NHPA in order to avoid the requirements of section 106 as per 54 U.S.C 470h-2(k). Should an applicant do so, the FWS generally will refer the violation to appropriate authorities, which may delay or imperil the permit.

Starting the Section 106 Compliance Process

Your RHPO or designated cultural resource staff may provide other procedures in your Region, but the following are basic steps for section 106 compliance. The FWS field biologist should contact the Regional HCP Coordinator as early as possible in the development and review process for proposed HCPs. This would generally be when the HCP plan area has been determined. The Regional HCP Coordinator or field biologist should then contact their RHPO or designated cultural resource staff.

The RHPO or designated cultural resource staff must assist the HCP Coordinator and/or field biologist to achieve compliance with NHPA, which involves consulting with the SHPO, THPO, Native American tribes, the applicant, and other interested parties that may be involved in the HCP planning process. Note: RHPO assistance is dependent upon support and availability.

The FWS may use information provided by applicants, consultants, or designees for completing documents associated with National Environmental Policy Act (NEPA) and NHPA for an HCP. However, the FWS drives consultation and remains legally responsible for all required findings and determinations associated with the NEPA and NHPA review and compliance process.

Helpful Hint:

- **The initial consultation letter with SHPO could present our determinations on items 1 through 5 in section A below and suggested resolution of adverse effects for the SHPO's concurrence. Voluntary adoption of suggested adverse effects resolution may decrease the needed NEPA analysis (e.g., allowing an EIS to meet the criteria for a mitigated EA/FONSI).**
- **Consultation with federally recognized tribes is part of the process. Consultation with the THPO or Regional Tribal Liaison is required for projects on tribal lands, but consultation with tribes that have a historical association with a project area is also required. Determining the appropriate tribes is part of the section 106 process.**
- **The intent of section 106 is not to stop or delay projects. It is to ensure that the FWS fully considers historic preservation issues and the views of the public during project planning.**

Sections A through F below provide information and serve as guidance for achieving compliance with section 106.

SECTION A: The Section 106 Process

Section 106 involves the following steps by a qualified archaeologist as defined in section 800.2 (a) (1) of the NHPA:

1. Define the Area of Potential Effects (APE)

A key step in the process is determination of the “area of potential effects” associated with a potential undertaking (i.e., proposed HCP). Section 800.16(d) of 36 CFR 800 defines the APE as “the geographic area or areas within which an undertaking **may directly or indirectly** cause changes in the character or use of historic properties, if any such properties exist. The APE is influenced by the scale and nature of the undertaking and may be different for different kinds of effects caused by the undertaking.” The APE includes the areas where the FWS has authorized take and influenced the project through negotiation of the avoidance, minimization, and mitigation measures, as well as the activities associated with their implementation. It may include reasonably foreseeable impacts outside areas associated with conservation measures if the permit causes such impact, but be sure that such impacts would not already occur without the permit.

Helpful Hint:

- The “scale and nature of the undertaking’ must be carefully considered, and limits the seemingly infinite possibility of effects for an undertaking.
- In some cases, an undertaking may have no potential to affect historic properties. 36 CFR 800.3 (a)(1) addresses this possible outcome of a determination of effect. This finding, in consultation with your RHPO or *designated cultural resource staff*, may be documented with a memo to the file.

2. Identifying Historic Properties

Section 800.4(1) of the regulations directs the FWS to make a “reasonable and good faith effort” to identify historic properties in consultation with the SHPO/THPO and tribes, taking into consideration the magnitude and nature of the undertaking and degree of Federal involvement. This effort includes, but is not limited to, reviewing scientific literature for the archaeological, historical, and historic structural resources for a given APE. It could also include field investigation and documentation of historic properties in the APE, and report preparation that describes the effort of identifying historic properties for the APE, and evaluation of historic properties for their eligibility to the National Register of Historic Places. This review is done in consultation with SHPO/THPO, tribes, and other interested parties. The goal is to help determine whether historic properties might be in the APE, and if so, how the proposed undertaking might affect those properties (see next section). These factors and components of an identification effort are found in regulations at 36 CFR 800.4(b)(1).

3. Evaluate Historic Properties

Not all historic properties in an APE are necessarily significant. All historic properties in an APE, which includes archaeological sites and historic structures, are evaluated against a specific set of criteria in 36 CFR 60. These regulations establish the criteria for eligibility to the National Register of Historic Places, which helps you determine if a property will need to be considered further in the Section 106 process.

The evaluation of historic properties is carried out in consultation with the FWS cultural resources staff, HCP staff, the SHPO/THPO, tribes, applicant, and any other interested parties that may be involved. The SHPO or THPO office reviews the FWS’s findings, and they may agree or disagree. Disagreements are usually resolved with additional information or clarification.

Determining eligibility takes time to complete and requires a detailed knowledge of the archaeology, history, and architectural history of a State and region, and it is one of the critical services provided by the SHPO or THPO, tribes, and the FWS’s cultural resources staff.

NOTE: An HCP planning area may include properties already listed or found potentially eligible for the National Register of Historic Places.

4. Assessment of Effects

The FWS's Regional HCP Coordinator or field biologist will work with the RHPO, and designated cultural resources staff to determine if any activities that are covered by the proposed HCP would have the potential to affect historic properties. Although FWS may use contractors to collect information, coordination with the RHPO remains necessary.

If listed or eligible properties to the National Register are identified, we must assess the potential effects of the proposed undertaking on the resource. Some of the actions that could result in an adverse effect on historic properties include, but are not limited to: (1) physical destruction of or damage to all or part of the property; (2) alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation, and provision of handicapped access, that is not consistent with the Secretary's Standards for the Treatment of Historic Properties (36 CFR 68) and applicable guidelines; (3) removal of the property from its historic location; (4) change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance; (5) introduction of visual, atmospheric, or audible elements that diminish the integrity of the property's significant historic features; (6) neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and (7) transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.

Again, in consultation with SHPO/THPO, tribes, and other interested parties, the Federal agency determines whether the proposed undertaking could affect the properties using the criteria of effect and adverse effect. There are several potential outcomes:

1. If a project results in **no historic properties affected**, the project can proceed. This outcome occurs when the nature and extent of the undertaking does not affect historic properties, or there are no properties in the area of potential effect.
2. If a project will have **no adverse effect** on historic properties, the Federal agency must submit project documentation to the SHPO/THPO for concurrence. This occurs when historic properties are located in the APE, but the actions will not adversely affect those properties either because of the nature of the undertaking or because they will be avoided.
3. If a project will have an **adverse effect** on historic properties, the Federal agency must begin consultation with the SHPO/THPO and the Advisory Council on Historic Preservation (ACHP) to minimize the adverse effect (see next section).

Helpful Hint:

- **Only properties identified as eligible or potentially eligible for inclusion on the Historic Register reach this step (see previous section). This is an important concept in making the section 106 process work. In practical terms, this means that not every artifact or building will meet the definition of a historic property under section 106, so those that fail to meet the definition do not need to be considered in an HCP, even for large areas.**
- **It may be possible to modify the undertaking activities in an HCP to avoid adverse effects. This is most efficiently accomplished at the early planning stages of the project. This also may streamline the needed NEPA analysis.**

The formal regulations for the assessment of adverse effects are found at 36 CFR 800.5.

5. Resolution of Adverse Effects

When an adverse effect to a historic property cannot be avoided, we consult with SHPO/THPO, tribes, and other interested parties to identify ways to mitigate the effects of the undertaking. This process usually results in the development of a Memorandum of Agreement (MOA) or Programmatic Agreement (PA), which identifies the steps we propose to the applicant to take to reduce, avoid, or mitigate the adverse effect. The MOA or PA is submitted to the ACHP for review and comment; the ACHP may or may not participate in the consultation. The voluntary adoption by the applicant of an MOA or PA can potentially streamline the NEPA analysis.

The FWS must document the resolution process and include it in the administrative record for the HCP. Details on the consultation process for resolution of adverse effects are found at 36 CFR 800.6.

NOTE: “Resolution of Adverse effects” involves mitigation to lessen or remove impacts to the qualities that make a historic property eligible for the National Register of Historic Places. This means that not every impact that may occur to eligible historic properties will end up with an MOA.

Failure to Resolve Adverse Effects

If resolution is not reached and the FWS, SHPO/THPO, or ACHP determines that further consultation will not be productive, consultation may be terminated. Any party that terminates consultation must notify the other consulting parties and provide reasons in writing. Following is a brief summary of the responsibilities of each party. Details on this process are found at 36 CFR 800.7.

- If the FWS terminates consultation, the Director, the Assistant Secretary, or other officer designated by the Assistant Secretary, will request that the ACHP comment as required by 36 CFR 800.7(c). The ACHP will provide the public with an opportunity to participate. The FWS will take into account the ACHP’s comments in reaching a final decision on the undertaking. We must document its final decision through a summary containing the rationale for the decision and evidence of consideration of the ACHP’s comments, and submit the summary to the ACHP before we issue an incidental take

permit. We must submit a copy of the summary to all consulting parties and notify the public, making the record available for public inspection.

- If the SHPO terminates consultation, the FWS and the ACHP may execute an MOA without the SHPO's involvement.
- If the responsibilities of the SHPO have been transferred to a THPO and the THPO terminates consultation regarding an undertaking occurring on or affecting historic properties on its tribal lands, the THPO will request that the ACHP comment as described in 36 CFR 800.7(c).
- If the ACHP terminates consultation, it will notify the FWS and all consulting parties and comment as required by 36 CFR 800.7(c).

The ACHP may also comment and sign on an undertaking for which an MOA will be executed.

SECTION B: The Roles of the Section 106 Participants

1. Federal Agency

It is the Federal agency's responsibility to initiate, manage, and conclude section 106 consultation by:

- engaging in consultation;
- determining the extent of the Federal undertaking;
- defining the project's APE;
- identifying historic properties within the project's APE, if such properties exist; and
- assessing the effect(s) the project may have on any historic properties in the APE.

2. The State Historic Preservation Office

There are SHPOs in every State; they were created by the NHPA. The mission of the SHPO is to preserve and enhance the State's irreplaceable historic heritage as a matter of public interest. The SHPO is:

- a mandatory consulting party in the section 106 review process;
- responsible for other programs in addition to section 106 review;
- not required to conduct research, identify historic properties, or determine project effects related to section 106 projects on behalf of a Federal agency; and
- required to respond, either with concurrence or non-concurrence, to a Federal agency's adequately documented finding of effect. The SHPO is not a regulatory agency and does not have the authority to either clear or authorize federally funded, licensed, or permitted projects.

The SHPO:

- does not have a complete list of all historic properties within the State,
- cannot conduct site visits for every project, and
- cannot stop projects.

3. Federally Recognized Tribes

Federal agencies must consult with federally recognized tribes on a government-to-government basis (e.g., initial letter of consultation early in the process). Phone calls or meetings usually follow the letter. We encourage communication with tribes throughout the process.

4. Other Consulting Parties

The section 106 regulations state that Federal agencies, or others they've delegated authority to, must actively consult with specific individuals and organizations throughout the section 106 review process. A consulting party is defined as: "individuals and organizations with a demonstrated interest in the project due to the nature of their legal and economic relation to the undertaking or affected properties, or their concern with the undertaking's effect on historic properties" [36 CFR 800.2(c)(5)].

A summary of the parties with whom we must consult include:

- SHPO;
- THPO, if applicable;
- federally recognized tribes, if applicable;
- local units of government if the project may affect historic properties within their jurisdiction; and
- applicants for Federal funds, licenses, or permits.

SECTION C: Coordinating Section 106 and the National Environmental Policy Act

Both NEPA and the section 106 processes are intended as analytical tools so that issues concerning both the natural and built environments receive reasonable and fair consideration. These review processes are performed in the project planning stage, when adverse impacts to the environment can still be avoided or mitigated. It is important to note that while the NHPA and NEPA processes may be somewhat similar, they are separate and distinct laws (see Figure 1 for timing of NHPA compliance with respect to NEPA).

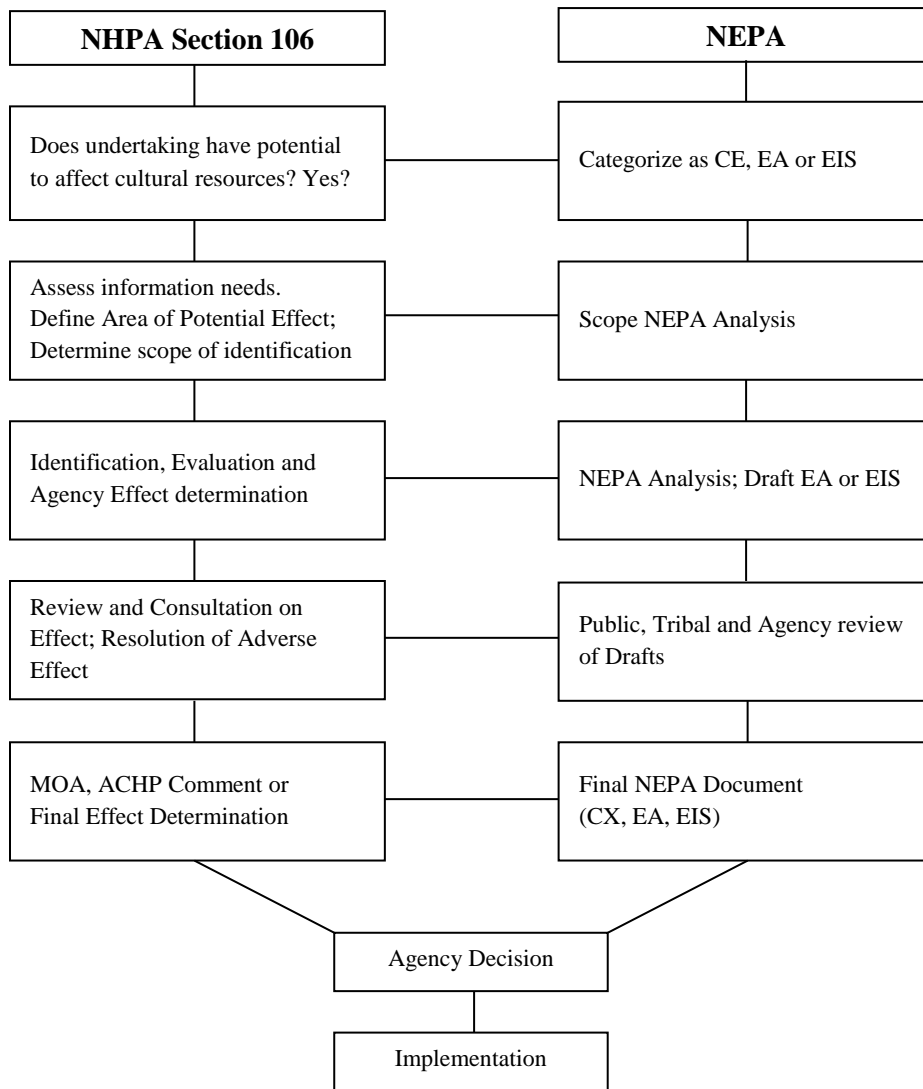
The information submitted for a NEPA review will not suffice for a section 106 review in most cases. Section 106 should be completed **first** and then be addressed in the NEPA document. However, this may not always be feasible as some steps in the section 106 process may lag behind the NEPA analysis. Keep in mind, a project that is categorically excluded under NEPA is not exempt from section 106.

Historic properties are often a part of the affected environment included for analysis in an Environmental Assessment (EA) or Environmental Impact Statement (EIS). One common strategy is to include historic properties in the NEPA process by ensuring compliance with the NHPA and triggering NHPA review; again, by voluntarily adopting measures suggested to address adverse effects may decrease the needed level of NEPA analysis.

Scoping for NEPA is a valuable and practical way to gather information on historic properties in a given project area, as it is for biological resources. A template for combining NEPA and NHPA consultation is provided in the [HCP Handbook Toolbox](#). In 2013, the Council on Environmental Quality and ACHP developed a handbook for integrating NHPA and NEPA.

Coordinating the public process required under NHPA with the NEPA public participation requirement is addressed in 36 CFR 800.8. Although the regulations allow for a substitution of the NEPA process for NHPA, this has not been done as no regulations have been developed to allow it.

Figure 1: Coordinating NEPA and Section 106



SECTION D: Definitions

Advisory Council on Historic Preservation (ACHP): an independent Federal agency that advises the President and Congress on historic preservation issues and administers the provisions of section 106 of the National Historic Preservation Act.

Agency Official: the chief official of the Federal agency responsible for all aspects of the agency's actions. If a State, local, or tribal government has assumed or has been delegated responsibility for section 106 compliance, the head of that unit of government is considered the head of the agency.

Area of Potential Effects (APE): the geographic area, or areas, within which an undertaking or project may directly or indirectly cause changes in the character or use of historic properties or historical resources, should any such resources be present.

Cultural Resource: is a broad category that describes a wide variety of resources, including archaeological sites, isolated artifacts, features, records, manuscripts, historical sites, and traditional cultural properties. Cultural resources may become historic properties as defined under section 106 if they meet the definitions of a historic property.

Effect: in Federal law, an adverse effect from an undertaking may alter characteristics of the historic property that qualify the property for inclusion in the National Register. For the purpose of determining effect, alteration to the property's location, design, setting, materials, workmanship, feeling, association, or use may be relevant, depending on a property's significant characteristics, and should be considered.

Historic Property: means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of Interior. This term includes properties of traditional religious and cultural importance to a tribe or Native Hawaiian organization and that meet the National Register criteria.

National Register Criteria: A property may be considered eligible for the National Register of Historic Places if it meets one or more of the following criteria:

- A. It is associated with events that have made a significant contribution to the broad patterns of history and cultural heritage.
- B. It is associated with the lives of people important in our past.
- C. It embodies the distinctive characteristics of a type, period, region, or method of construction, represents the work of an important creative individual, or possesses high artistic values.
- D. It has yielded, or may be likely to yield, information important in prehistory or history.

Qualified Archaeologist: a professional archaeologist meeting the Secretary of the Interior's Professional Qualifications Standards (43 FR 44738-9).

Regional Tribal Liaison: is the point of contact in the FWS for tribal issues. This person, if available, may also be part of section 106 consultations, but the position is not required under section 106 or its regulations.

Section 106: the section of the National Historic Preservation Act that requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Advisory Council on Historic Preservation an opportunity to comment on such undertakings. For more information on the section 106 process see the [HCP Handbook Toolbox](#).

State Historic Preservation Officer (SHPO): head of the Office of Historic Preservation in a particular State. This is the appointed official in each State and territory charged with administering the national historic preservation program, as required by the National Historic Preservation Act.

Undertaking: as established by section 301(7) of the National Historic Preservation Act, a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those:

- carried out by or on behalf of the agency;
- carried out with Federal financial assistance;
- requiring a Federal permit, license, or approval; and
- subject to State or local regulation administered by a party to whom a Federal agency delegated the project/activity.