

## HP FACT SHEET #1: SUMMARY OF SECTION 106 COMPLIANCE

**Assessment Questions:** The following three questions allow you to determine if your proposed project will require compliance with the regular Section 106 process, referred to below as the “Four Steps.” **Questions #1 and #2 do not require consultation with the State/Tribal Historic Preservation Officer (SHPO/THPO).**

1. Is your project an “undertaking” subject to Section 106 review? [800.3(a), 800.16(y)]
  - If no, then you have completed the process. Document the file.
  - If yes, then proceed to the next question.
2. Does your project have the “potential to cause effects” to historic properties? [800.3(a)(1)]
  - If no, then you have completed the process. Document the file.
    - A “no” response likely means that the project falls under “exempt activities” per 50.19, 58.34 or “categorical exclusions not subject to” related laws per 58.35(b).
  - If yes, then proceed to the next question.
3. Is your project subject to an existing Programmatic Agreement (PA)? [800.3(a)(2)]
  - If yes, notify SHPO/THPO that you will complete the process by complying with the terms of that PA.
  - If no, then proceed to the “Four Steps” below.

### The Four Steps: Identify, Evaluate, Assess Effects, Resolve Adverse Effects

- 1 & 2. Identify & Evaluate:
  - The agency official must identify the appropriate SHPO/THPO, plan to invite the public to participate, and identify other consulting parties. [800.3(c), (e), & (f)]
  - The agency official must determine and document the “area of potential effects” (APE). [800.4(a)(1), 800.16(d)]
  - The agency official must review existing information on historic properties in the APE; seek new information from consulting parties and sources likely to have knowledge on historic properties in the APE; gather information from Indian tribes or Native Hawaiian organizations as appropriate. [800.4(a)(2)-(4)]
  - The agency official must identify historic properties already listed on the National Register of Historic Places (NRHP). For potential historic properties, evaluate their significance by applying NRHP criteria found at 36 CFR Part 63. [800.4(b) & (c)]
  - Based on identification and evaluation efforts, the agency official must document its findings and make a determination.
    - If “no historic properties affected,” the agency official must submit the adequately documented finding (800.11(d)) to the SHPO/THPO and allow for a 30-day review. It must also notify the other consulting parties. [800.4(d)(1)]
      - With SHPO/THPO concurrence, the project, at this stage, may convert to an exempt activity per 58.34(a)(12).
    - If “historic properties affected,” the agency official must notify the SHPO/THPO and other consulting parties and proceed to the next step. [800.4(d)(2)]
3. Assess Effects:
  - The agency official must, in consultation with the consulting parties, apply the criteria of adverse effect to the historic properties, taking into consideration the views expressed by the consulting parties and the public. [800.5(a)]
  - Based on its consultation and assessment of effects, the agency official must document the findings and make a determination. The agency official may reach a “no adverse effect” determination when 1) the effects do not meet the adverse effect criteria, 2) the undertaking is modified to avoid adverse effects, or 3) conditions are imposed and agreed upon that avoid adverse effects (a.k.a., “conditional no adverse effect”). [800.5(b)]
    - If “no adverse effect,” the agency official must submit the adequately documented finding (800.11(e)) to all consulting parties and allow for a 30-day review. [800.5(c)] If consulting parties agree with, do not respond, or do not object to the finding, the agency official has completed the process and may proceed in accordance with the finding. [800.5(d)(1)]
    - If “adverse effect,” the agency must continue consultation and proceed to the next step. [800.5(d)(2)]

4. Resolve Adverse Effects:

- The agency official must notify the ACHP of the adverse effect finding and determine if ACHP wants to participate in consultation (if it hasn't already). [800.6(a)(1)]
- The agency official, SHPO/THPO, and ACHP may agree to invite other consulting parties; the agency official must provide all consulting parties with adequate documentation (800.11(e)) and allow members of the public to review documentation and express views. [800.6(a)(2)-(4)]
- The agency official must consult with all the consulting parties, with or without the ACHP, to consider project alternatives, and should agree to avoid, minimize, or mitigate adverse effects. [800.6(b)]
- When terms are agreed to, the agency official and consulting parties should execute a Memorandum of Agreement or Programmatic Agreement, depending on the nature of the undertaking. [800.6(c), 800.14(b)]
- The agency official must send a copy of the agreement to the ACHP and consulting parties, thus completing the Section 106 review process.

**Termination of Consultation:** This is rarely done and requires involvement of the Secretary of HUD or the chief elected official of the Responsible Entity.

1. Should the agency official and consulting parties not be able to agree on ways to avoid, minimize, or mitigate adverse effects, either the agency official, SHPO/THPO, or ACHP may terminate consultation. [800.7(a)]
  - If the agency official terminates, the head of the agency (e.g., Secretary, Mayor or County Executive) must request comments from the ACHP and notify all consulting parties. [800.7(a)(1)]
  - If the SHPO terminates, the agency official and ACHP may execute the agreement without SHPO. [800.7(a)(2)]
  - If the THPO terminates consultation regarding an undertaking *on tribal lands*, ACHP will issue comments to the head of the agency. [800.7(a)(3)]
  - If the ACHP terminates, it must notify the head of the agency and all consulting parties, and then issue comments to the head of the agency. [800.7(a)(4)]
2. While the ACHP prepares its comments, the agency official may be called on to provide additional information and assist with an onsite inspection by the ACHP. [800.7(c)]
3. Once the agency receives comments from ACHP, the head of the agency must take into account ACHP comments in reaching a final decision. Prior to approving the undertaking, the head of the agency must put the final decision in writing and make it available to ACHP, other consulting parties, and the public. [800.7(c)(4)]

References: 36 CFR Part 800, 24 CFR Part 50, 24 CFR Part 58.

***NEED ADDITIONAL HELP?***

CONTACT YOUR LOCAL HUD ENVIRONMENTAL OFFICER.

*Source: Environmental Planning Division, Office of Environment and Energy, CPD, October 2009*