

## 222 - Historic Preservation and Cultural Analysis

**222.1 Historic, Architectural and Archaeological Cultural Resources:** In 1966, the National Historic Preservation Act, as amended 2006 (NHPA), established “*a program of Preservation of Historic Properties throughout the Nation*”. The Secretary of the Interior was authorized to establish and maintain a National Register of Historic Places composed of districts, sites, buildings, structures and objects significant in American history, architecture, archaeology, engineering, and culture.

The Act authorized the establishment of a State Historic Preservation Officer (SHPO) to administer the State Historic Preservation Program, to manage each state’s cultural historic heritage and oversee the National Register of Historic Places. In Kentucky this agency is the Kentucky Heritage Council; the Executive Director is the SHPO.

A third entity established by the NHPA is the Tribal Historic Preservation Officer (THPO) who has jurisdiction over various tribal lands. Kentucky has no tribal owned property within its boundaries; however, in Kentucky, properties of traditional, religious, and cultural importance to tribes have been listed in the National Register. The THPO has Section 106 review authority over in these properties; the Kentucky Heritage Council has a listing of THPO’s that review undertakings in Kentucky. See the Kentucky Heritage Council’s web site at: <http://www.heritage.ky.gov/>

**222.2 Section 106 of the National Historic Preservation Act (NHPA):** This section requires Federal agencies to consider the effects of their activities on properties listed in/or determined eligible for listing in the National Register of Historic Places. These regulations seek to balance Historic Preservation concerns with the needs of Federal agencies. The Advisory Council on Historic Preservation (ACHP) is a regulatory agency that issues the procedures that guide Section 106 review; these regulations are found at 36 CFR Part 800 <http://www.nps.gov/nhl/36cfr800.pdf>

An activity, or “undertaking,” is any project that has any type of federal involvement i.e.: federal funding, permit, or license. In most instances the Federal agency delegates Section 106 compliance responsibilities to the applicant (e.g., the state agency, city or county agency, utility, or developer who is receiving Federal funds or applying for a Federal permit or license).

A Federal undertaking is, “*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; those requiring a Federal permit, license or approval; and those subject to state or local regulation administered pursuant to a delegation or approval by a Federal agency*” (36 CFR 800.16y). Many state administered programs have indirect Federal involvement through the permitting process that may be uncertain at the beginning of a project. Examples include: Unites States Army Corp of Engineers Permits for areas with any type of stream or wetland. Environmental Protection Agency permits; Federal Communication Commission regulations regarding cellular communication towers.

**222.3 Section 106 Process:** Under 36 CFR 800, “*It is the statutory obligation of the Federal agency to fulfill the requirements of Section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for Section 106 compliance.*” The Section 106 process must be completed, “*prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any*

*license. The Agency Official shall ensure that the Section 106 process is initiated early, so that a broad range of alternatives may be considered during the planning process for the undertaking” (36 CFR 800.1).* Section 106 review is a process with which Federal agencies must comply. Although it does not guarantee historic properties will not be affected by an undertaking, it does provide the opportunity for such effects to be considered and alternatives to avoid or minimize these effects be evaluated. It should be noted that the Section 106 consultation process is often one of compromise.

The main participants in the Section 106 review process include: Federal agencies, the SHPO/THPO, the Advisory Council on Historic Preservation (ACHP), and local governments. These participants are called “Consulting Parties”; their involvement in the process is requisite. Individual persons or groups with a demonstrated interest in the project may apply to the federal agency to be approved as Consulting Parties to the process.

To initiate the Section 106 process and determine if consultation will be required, a review request must be sent to the SHPO (Executive Director of the Kentucky Heritage Council). This request should detail the nature of the project and include supporting documentation such as photographs and the site location on a topographic map. By law the Kentucky Heritage Council has 30 days for Section 106 project review; however, due to the large number of projects the office reviews each year, sometimes this can take a significant longer time.

Many times the SHPO will request more documentation to complete the Section 106 review. If the project is extensive, they may request an Archaeological and/or Architectural *Cultural Resource Assessment Report* for the project. These assessments identify pre-historic sites and historic properties, evaluate their National Register status (listed or potentially eligible) and determine potential impacts. Specifications for consultants preparing these documents are available on the Kentucky Heritage Council webpage at <http://www.heritage.ky.gov/>. During review, the SHPO has the option of determining that the project will have a *No Historic Properties Affected; No Adverse Effect*; or potentially *Adverse Effect* finding (36CFR Part 800.4). The Criteria of Adverse Effect (36CFR Part 800.5) states an adverse effect is identified when “*an undertaking may alter, directly or indirectly, any of the characteristics of a historic property...in a manner that would diminish the integrity,*” of the property. Examples of an adverse effect include:

- Physical destruction or damage to all or part of the property.
- Alteration of a property.
- Removal of property from its historic location.
- Introduction of visual, atmospheric, or audible elements that diminish the integrity of the property’s significant historic features.

A finding of *Adverse Effect* requires the agency to provide the Advisory Council on Historic Preservation the opportunity to comment (36CFR Part 800.5(3)). Resolution of the Adverse Effect finding will require further consultation with the SHPO that should result in a Memorandum of Agreement stipulating the measures for mitigation.

**222.4 State Historic Preservation Officer:** The term SHPO refers to the State Historic Preservation Officer. In Kentucky, the SHPO is the Executive Director of the Kentucky Heritage Council. In addition to Section 106 review responsibilities, the SHPO also administers the National Register of Historic Places program for the State; provides

grants to local governments; maintains the inventory of archaeological and historical sites and historic buildings and structures; administers the Federal investment tax credit program; and provides educational and technical assistance on historic preservation issues.

For frequently asked questions see: <http://heritage.ky.gov/envreview/faqs.htm>.

**222.5 Cultural Resource Assessment Report - APE or “Area of Potential Effects:”** The Area of Potential Effects is 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 Area of Potential Effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking*” (36 CFR 800.16(d)). In consultation with the SHPO, establishment of the APE is the first phase of the Cultural Resource Assessment Report; this becomes the project area for the Cultural Historic Assessment.

**222.6 Significant Historic Properties:** A significant historic property is “*any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places (NRHP) maintained by the Secretary of the Interior*” (36 CFR 800.16(1)). The National Register of Historic Places has defined historic buildings as being fifty years of age or older; criteria considerations are provided for significant resources less than fifty years of age as well. The National Register of Historic Places has outlined four main criteria against which historic properties that are 50 years of age or older are assessed for significance. These criteria are the basis for which historic properties are evaluated in the Section 106 process:

- Criterion A: properties associated with events that have made a significant contribution to the broad patterns of our history.
- Criterion B: properties associated with the lives of persons significant in our past.
- Criterion C:
  - properties that embody the distinctive characteristics of a type, period, or method of construction, or
  - properties that represent the work of a master, or
  - properties that possess high artistic values, or
  - properties that represent a significant and distinguishable entity whose components may lack individual distinction; or
  - When an Archaeological Site Is “Significant.”
- Criterion D: properties that have yielded, or may be likely to yield information important in prehistory or history.

**222.7 Section 106 Review:** To successfully complete Section 106 review, Federal agencies must:

1. Determine if Section 106 of NHPA applies to a given project and, if so, initiate the review by providing:
  - a. A letter to the Kentucky Heritage Council with a project overview. The letter should identify if there are federal funds, licenses or permits that will be required for the project. The Kentucky Heritage Council will notify the agency if more information is required. It is the responsibility of the agency to conduct the Section 106 investigation.
  - b. A Public Involvement Plan that provides Section 106 information to the public and identifies potential consulting parties for the project shall be defined. Many times Federal Agencies have Section 106 Public Involvement Plans that are in place. Contact with the agency regarding their established procedures is recommended.
2. Identify and evaluate resources:
  - a. If the Kentucky Heritage Council requests more information regarding historic or archaeological resources further investigation and evaluation will be required. A records search of the files at the Kentucky Heritage Council will identify previously recorded properties; to initiate this process a Project Registration Form must be completed and provided to the KHC. Please see the KHC Environmental Review Section).  
<http://heritage.ky.gov/envreview/>  
Project Registration Forms can be obtained from Lynn Webb, Data Manager ([lynn.webb@ky.gov](mailto:lynn.webb@ky.gov)).  
  
There is a **GIS Report and Project Registration** fee of \$75. If the request for more information specifies Archaeological sites then a GIS site check from the Kentucky Office of State Archaeology will be required.  
  
This office performs state-level functions mandated by Kentucky Revised Statutes 164.705-735 (Kentucky Antiquities Act) and 433.879.1 (Cave Protection Legislation).  
  
**The Kentucky Antiquities Act** requires the UK Department of Anthropology to control archaeological fieldwork on state, county, and municipal lands in the Commonwealth through a permitting process.
  - b. If the project is extensive or has the potential to disturb archaeological resources, then the Heritage Council may request either/or both Historic and Archaeological Cultural Resource Assessment Reports be conducted. If this is the case then the GIS request and Project Registration Form will be part of the assessment report process. The Kentucky Heritage Council compiles a listing of professionals qualified to conduct these assessments.
3. Determination of Effect:
  - a. If there are no historic and/or archaeological resources that are listed in the National Register or are potentially eligible for listing in the APE, then a finding of *No Historic Properties Affected* is appropriate. For Section 106 compliance a clearance letter from the KHC with this finding will complete the process.

- b. If historic and/or archaeological resources are identified in the project vicinity that are listed or determined potentially eligible for the National Register then a Determination of Effect will document the potential project impacts to these resources. The project may have *No Effect*, *No Adverse Effect* or a potential *Adverse Effect* to these resources. If it is found that the project will have *No Effect* or *No Adverse Effect* to historic properties then a clearance letter from the KHC with these findings will complete Section 106 compliance.
4. Resolution of Effects: If it is determined that the project will have a potential *Adverse Effect* to the resource then consultation between the SHPO/THPO and the agency to identify measures to minimize or mitigate the effects will be required. In many cases amendment or alteration to the design of the project will result in resolution of the impacts. If the impacts are extensive then a Memorandum of Agreement (MOA) detailing the stipulations of the mitigation measures may be required. 36 CFR Part 800.5(c)(3) of the Advisory Council Rules and Regulations specifies that when an Adverse Effect finding has been determined, the agency must notify the Advisory Council in writing of the finding. If the Advisory Council decides to participate in the Section 106 consultation they may become involved in the development of the MOA. Once the MOA has been signed, it becomes a legal document that binds the agency to complete the stipulations as specified. Adherence to the stipulations in the MOA indicates that the Section 106 compliance has been completed by the agency.

**222.8 Local Governments:** Local governments, with an approved local preservation plan, can also be certified to conduct preservation activities and nominate properties to the National Register. These are called Certified Local Governments (CLG). A complete listing of all CLGs in Kentucky is available through the National Park Service at [http://grants.cr.nps.gov/CLG\\_NEW/CLG\\_REVIEW/search.cfm](http://grants.cr.nps.gov/CLG_NEW/CLG_REVIEW/search.cfm) . Although CLG's do not have authority for Section 106 review, they review proposed undertakings for compliance with the specifications of local historic zoning regulations over National Register and locally designated historic districts. If a project is located within a CLG community early contact with the local designee is recommended.

**222.9 State Laws:** The Kentucky state laws that govern Historic Preservation and Cultural Resources Management can be found at <http://www.lrc.state.ky.us/krs/titles.htm> . Some of these laws concern caves and cemeteries. When a cemetery needs to be removed there are certain Vital Statistics statutes regarding the removal process. All procedures must comply with the State Antiquities Act and Vital Statistics laws- *KRS 381.715*. This may be found at <http://www.lrc.ky.gov/KRS/381-00/715.PDF> .

## SECTION 106 FLOW CHART

**DETERMINE IF THE PROJECT IS A FEDERAL UNDERTAKING**



**Contact the SHPO**



**Project will not impact  
Archaeological/Historic Properties  
Section 106 Complete**



**SHPO Requests More Information**



**Archaeological/Cultural Historic Report**



**Archaeological/Historical Properties  
Listed/Eligible for National Register**



**Determination of Effect**

**Adverse Effect**

**No Archaeological/Historic Properties**



**No Adverse Effect**

**Memorandum of Agreement**

**No Historic Properties Affected**



**Section 106 Complete**

**Section 106 Complete**

**Section 106 Complete**