

Introduction

Section 106 – an overview

The Mandate

Section 106 of the National Historic Preservation Act requires that any project that will be federally-funded or have significant federal oversight must be reviewed for its impact to potentially significant historic resources. Consideration must be given to avoiding negative impacts.

The term “historic” includes architectural and archeological resources. A significant historic resource is one that is either listed, or determined eligible for listing, on the National Register of Historic Places.

Legislative Authority

Section 106 is part of the National Historic Preservation Act of 1966, as amended and is codified in 36 CFR Part 800. It outlines the procedure for the review of historic properties on projects with federal involvement. Section 110 of that same act outlines the review for historic properties that have been determined National Historic Landmarks – an elevated designation that indicates the property is of national importance. There are only 40 National Historic Landmarks in Maine, compared to nearly 15,000 National Register listed properties within the state.

Types of properties protected

Section 106 regulations do not define the eligibility criteria for the National Register of Historic Places, these criteria are defined in separate regulation by the Keeper of the National Register. For the most part, properties must be *at least 50 years of age* before they can even be considered as potentially significant. The property must meet one of the following four criteria and must also retain integrity of location, design, setting, materials, workmanship feeling, and/or association

- (a) **associated with events** that have made a significant contribution to the broad patterns of our history (*ex: Fort Western; Kennebec Arsenal; Shaker Village*)
- (b) **associated with lives of persons** significant in our past (*ex: Sarah Orne Jewett House; Harriet Beecher Stowe House; Wasdsworth-Longfellow House*)
- (c) **embodies distinctive characteristics** of a type, period or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction (*ex: New Portland Wire Bridge; Deer Isle Bridge; Blue Hill Falls Bridge*)
- (d) **has yielded, or may be likely to yield, information** important in prehistory or history (*Pemaquid Archeological Site; Whaleback Shell Middens, Damariscotta*)

Contributing elements, elements that on their own would not qualify for protection, but since they enhance the historic context of the main property must therefore be considered under 106 include: fences, rock walls, boundary markers, landscaping, viewsheds, etc.

Types of actions that require 106 review

Any activity that involves federal funding and or significant federal oversight (e.g., permitting) requires Section 106 review. Projects that do not meet either of those criteria are not subject to 106 review. These include projects that are fully-funded by the state and do not require federal permitting.

106 Review Process

The lead federal Agency, or its designee (in this case MaineDOT), will make a determination about whether or not there are any significant historic resources within the project limits and the area of potential effect (APE). If properties are found, the Agency then determines what level of effect will result. The following four determinations are possible:

- (1) Finding of no properties and therefore no effect: *no effect*.
- (2) Finding of properties, but the project will not effect them: *no effect*.
- (3) Finding of properties, but the project will not adversely effect them: *no adverse effect*.
- (4) Finding of properties and the project will adversely effect them: *adverse effect*.

After making a determination, the Agency forwards it to the State Historic Preservation Officer (SHPO), and/or the Tribal Historic Preservation Officer (THPO) when appropriate, for concurrence. The SHPO/THPO has 30 days to respond. Possible responses include:

- (1) No response after 30 days – indicates concurrence
- (2) Concurrence
- (3) Request for additional information
- (4) Disagreement with Agency's determination

If there is disagreement, the Agency can either continue consultation with SHPO/THPO or request input from the Advisory Council on Historic Preservation (ACHP), in order to resolve the issue. In cases with adverse impacts, an MOA outlining the agreed-upon minimization and mitigation efforts will be drafted among the Agency, SHPO/THPO and the ACHP, if they wish to participate.

Important point: Recent case law has upheld that the opinion rendered by the ACHP is advisory in nature only – it is not legally binding. Therefore, even though an Agency must show that it has carefully considered the ACHP's recommendations when planning a project, it is the Agency, not the ACHP, which has the authority to make the final determination regarding 106 compliance.

For More Information

Section 106 (general and detailed information): www.achp.gov

National Register of Historic Places (including database of NR-listed properties; guidance on restoring older structures; evaluation criteria): www.cr.nps.gov/nr/