

# *Protecting Historic Properties*

ADVISORY COUNCIL ON HISTORIC PRESERVATION

## *Protecting Historic Properties:*

# A CITIZEN'S GUIDE TO SECTION 106 REVIEW



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## **COVER PHOTOS:**

*Clockwise, from top left:* Historic Downtown Louisville, Kentucky; Section 106 consultation at Medicine Lake, California; bighorn sheep petroglyph in Nine Mile Canyon, Utah (photo courtesy Jerry D. Spangler); Worthington Farm, Monocacy Battlefield National Historic Landmark, Maryland (photo courtesy Maryland State Highway Administration).

# About the ACHP

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The mission of the Advisory Council on Historic Preservation (ACHP) is to promote the preservation, enhancement, and sustainable use of our nation's historic resources, and advise the President and the Congress on national historic preservation policy.

The ACHP, an independent federal agency, also provides a forum for influencing federal activities, programs, and policies that affect historic properties. In addition, the ACHP has a key role in carrying out the Preserve America program.

The 24-member council is supported by a professional staff in Washington, D.C. For more information contact:

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# Introduction

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Proud of your heritage? Value the places that reflect your community's history? You should know about Section 106 review, an important tool you can use to influence federal decisions regarding historic properties. By law, you have a voice when a project involving federal action, approval, or funding may affect properties that qualify for the National Register of Historic Places, the nation's official list of historic properties.

This guide from the Advisory Council on Historic Preservation (ACHP), the agency charged with historic preservation leadership within federal government, explains how your voice can be heard.

Each year, the federal government is involved with many projects that affect historic properties. For example, the Federal Highway Administration works with states on road improvements, the Department of Housing and Urban Development grants funds to cities to rebuild communities, and the General Services Administration builds and leases federal office space.

Agencies like the Forest Service, the National Park Service, the Bureau of Land Management, the Department of Veterans Affairs, and the Department of Defense make decisions daily

## *Consultation Matters*



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about the management of federal buildings, parks, forests, and lands. These decisions may affect historic properties, including those that are of traditional religious and cultural significance to federally recognized Indian tribes and Native Hawaiian organizations.

Projects with less obvious federal involvement can also have repercussions on historic properties. For example, the construction of a boat dock or a housing development that affects wetlands may also affect fragile archaeological sites and require a U.S. Army Corps of Engineers permit. Likewise, the construction of a cellular tower may require a license from the Federal Communications Commission and might compromise historic or culturally significant landscapes or properties valued by Indian tribes or Native Hawaiian organizations for traditional religious and cultural practices.

These and other projects with federal involvement can harm historic properties. The Section 106 review process gives you the opportunity to alert the federal government to the historic properties you value and influence decisions about projects that affect them.



The Bureau of Land Management worked with a large group of consulting parties to craft solutions to protect fragile rock art and other historic properties from the effects of increased truck traffic when natural gas wells were permitted near Nine Mile Canyon. (photo courtesy Jerry D. Spangler, Colorado Plateau Archaeological Alliance)

# What is Section 106 Review?

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In the National Historic Preservation Act of 1966 (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 the NHPA is crucial to that program because it requires consideration of historic preservation in the multitude of projects with federal involvement that take place across the nation every day.

Section 106 requires federal agencies to consider the effects of projects they carry out, approve, or fund on historic properties. Also, federal agencies must provide the ACHP an opportunity to comment on such projects prior to the agency's decision on them.

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 ensure that preservation values are factored into federal agency planning and decisions. Because of Section 106, federal agencies must assume responsibility for the consequences of the projects they carry out, approve, or fund on historic properties and be publicly accountable for their decisions.

## *Stewardship*



The Owe'neh Bupingeh Preservation Project has had a profound impact on the Ohkay Owingeh community in New Mexico and is heralded as a model planning effort for Native American communities in historic settings. (mud plastering workshop photo by Tania Hammidi)

# Understanding Section 106 Review

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Regulations issued by the ACHP spell out the Section 106 review process, specifying actions federal agencies must take to meet their legal obligations. The regulations are published in the Code of Federal Regulations at 36 CFR Part 800, “Protection of Historic Properties,” and can be found on the ACHP’s Web site at [www.achp.gov](http://www.achp.gov).

Federal agencies are responsible for initiating Section 106 review, most of which takes place between the agency and state and tribal or Native Hawaiian organization officials. Appointed by the governor, the State Historic Preservation Officer (SHPO) coordinates the state’s historic preservation program and consults with agencies during Section 106 review.

Agencies also consult with officials of federally recognized Indian tribes when the projects have the potential to affect historic properties on tribal lands or historic properties of significance to such tribes located off tribal lands. Some tribes have officially designated Tribal Historic Preservation Officers (THPOs), while others designate representatives to consult with agencies as needed. In Hawaii, agencies consult with Native Hawaiian organizations (NHOs) when historic properties of religious and cultural significance to them may be affected.

## **To successfully complete Section 106 review, federal agencies must do the following:**

- ▶ gather information to decide which properties in the area that may be affected by the project are listed, or are eligible for listing, in the National Register of Historic Places (referred to as “historic properties”);
- ▶ determine how those historic properties might be affected;
- ▶ explore measures to avoid or reduce harm (“adverse effect”) to historic properties; and
- ▶ reach agreement with the SHPO/THPO (and the ACHP in some cases) on such measures to resolve any adverse effects or, failing that, obtain advisory comments from the ACHP, which are sent to the head of the agency.

## What are Historic Properties?

In the Section 106 process, a historic property is a prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places. This term includes artifacts, records, and remains that are related to and located within these National Register properties. The term also includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization, so long as that property also meets the criteria for listing in the National Register.

## The National Register of Historic Places

The National Register of Historic Places is the nation's official list of properties recognized for their significance in American history, architecture, archaeology, engineering, and culture. It is administered by the National Park Service, which is part of the Department of the Interior. The Secretary of the Interior has established the criteria for evaluating the eligibility of properties for the National Register. In short, the property must be significant, be of a certain age, and have integrity:

- ▶ **Significance.** Is the property associated with events, activities, or developments that were important in the past? With the lives of people who were historically important? With distinctive architectural history, landscape history, or engineering achievements? Does it have the potential to yield important information through archaeological investigation about our past?
- ▶ **Age and Integrity.** Is the property old enough to be considered historic (generally at least 50 years old) and does it still look much the way it did in the past?

During a Section 106 review, the federal agency evaluates properties against the National Register criteria and seeks the consensus of the SHPO/THPO/tribe regarding eligibility. A historic property need not be formally listed in the National Register in order to be considered under the Section 106 process. Simply coming to a consensus determination that a property is eligible for listing is adequate to move forward with Section 106 review. (For more information, visit the National Register Web site at [www.cr.nps.gov/nr](http://www.cr.nps.gov/nr)).

When historic properties may be harmed, Section 106 review usually ends with a legally binding agreement that establishes how the federal agency will avoid, minimize, or mitigate the adverse effects. In the very few cases where this does not occur,



the ACHP issues advisory comments to the head of the agency who must then consider these comments in making a final decision about whether the project will proceed.

Section 106 reviews ensure federal agencies fully consider historic preservation issues and the views of the public during project planning. Section 106 reviews do not mandate the approval or denial of projects.



## SECTION 106: WHAT IS AN ADVERSE EFFECT?

If a project may alter characteristics that qualify a specific property for inclusion in the National Register in a manner that would diminish the integrity of the property, that project is considered to have an adverse effect. Integrity is the ability of a property to convey its significance, based on its location, design, setting, materials, workmanship, feeling, and association.

### **Adverse effects can be direct or indirect and include the following:**

- ▶ physical destruction or damage
- ▶ alteration inconsistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties
- ▶ relocation of the property
- ▶ change in the character of the property's use or setting
- ▶ introduction of incompatible visual, atmospheric, or audible elements
- ▶ neglect and deterioration
- ▶ transfer, lease, or sale of a historic property out of federal control without adequate preservation restrictions

# Determining Federal Involvement

If you are concerned about a proposed project and wondering whether Section 106 applies, you should first determine whether the federal government is involved. Will a federal agency fund or carry out the project? Is a federal permit, license, or approval needed? Section 106 applies only if a federal agency is carrying out the project, approving it, or funding it, so confirming federal involvement is critical.

## *National Register*



The National Register offers a rich diversity of properties such as Chicano Park in San Diego, California. (mural restoration photo by Ricardo Duffy, courtesy Caltrans)



## IS THERE FEDERAL INVOLVEMENT? CONSIDER THE POSSIBILITIES:

**Is a federally owned or federally controlled property involved, such as a military base, park, forest, office building, post office, or courthouse?** Is the agency proposing a project on its land, or would it have to provide a right-of-way or other approval to a private company for a project such as a pipeline or mine?

**Is the project receiving federal funds, grants, or loans?** If it is a transportation project, frequent sources of funds are the Federal Highway Administration, the Federal Transit Administration, and the Federal Railroad Administration. Many local government projects receive funds from the Department of Housing and Urban Development. The Federal Emergency Management Agency provides funds for disaster relief.

**Does the project require a federal permit, license, or other approval?** Often housing developments impact wetlands, so a U.S. Army Corps of Engineers permit may be required. Airport projects frequently require approvals from the Federal Aviation Administration.

Many communications activities, including cellular tower construction, are licensed by the Federal Communications Commission. Hydropower and pipeline development requires approval from the Federal Energy Regulatory Commission. Creation of certain new bank branches must be approved by the Federal Deposit Insurance Corporation.

## Federal Funds



Interstate 70 at the Georgetown-Silver Plume National Historic Landmark, Colorado. Impacts to the historic mountain towns were expected due to the planned expansion of the interstate. (photo courtesy J.F. Sato & Associates)

Sometimes federal involvement is obvious. Often, involvement is not immediately apparent. If you have a question, contact the project sponsor to obtain additional information and to inquire about federal involvement. All federal agencies have Web sites. Many list regional or local contacts and information on major projects. The SHPO/THPO/tribe, state or local planning commissions, or statewide historic preservation organizations may also have project information.

Once you have identified the responsible federal agency, write to the agency to request a project description and inquire about the status of project planning. Ask how the agency plans to comply with Section 106, and voice your concerns. Keep the SHPO/THPO/tribe advised of your interest and contacts with the federal agency.

## MONITORING FEDERAL ACTIONS

The sooner you learn about proposed projects with federal involvement, the greater your chance of influencing the outcome of Section 106 review.

Learn more about the history of your neighborhood, city, or state. Join a local or statewide preservation, historical, or archaeological organization. These organizations are often the ones first contacted by federal agencies when projects commence.

If there is a clearinghouse that distributes information about local, state, tribal, and federal projects, make sure you or your organization is on its mailing list.

Make the SHPO/THPO/tribe aware of your interest.

Become more involved in state and local decision making. Local planning reviews may indicate whether there is federal involvement in a proposed project, so be mindful. Ask about the applicability of Section 106 to projects under state, tribal, or local review. Does your state, tribe, or community have preservation laws in place? If so, become knowledgeable about and active in the implementation of these laws.

Review the local newspaper for notices about projects being reviewed under other federal statutes, especially the National Environmental Policy Act (NEPA). Under NEPA, a federal agency must determine if its proposed major actions will significantly impact the environment. Usually, if an agency is preparing an Environmental Impact Statement under NEPA, it must also complete a Section 106 review for the project.



# Working with Federal Agencies

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Throughout the Section 106 review process, federal agencies must consider the views of the public. This is particularly important when an agency is trying to identify historic properties that might be affected by a project and is considering ways to avoid, minimize, or mitigate harm to them.

Agencies must give the public a chance to learn about the project and provide their views. How agencies publicize projects depends on the nature and complexity of the particular project and the agency's public involvement procedures.

Public meetings are often noted in local newspapers and on television and radio. A daily government publication, the *Federal Register* (available at many public libraries and online at [www.federalregister.gov](http://www.federalregister.gov)), has notices concerning projects, including those being reviewed under NEPA. Federal agencies often use NEPA for purposes of public outreach under Section 106 review. Agencies may also coordinate their NEPA and Section 106 reviews.

Federal agencies also frequently contact local museums and historical societies directly to learn about historic properties and community concerns. In addition, organizations like the National Trust for Historic Preservation (NTHP) are actively engaged in a number of Section 106 consultations on projects around the country. The NTHP is a private, non-profit membership organization dedicated to saving historic

*Learn About the Project*



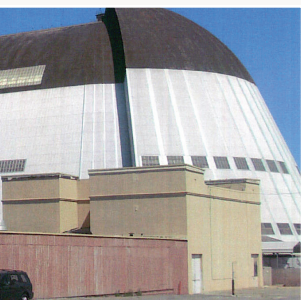
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places and revitalizing America's communities. Organizations like the NTHP and your state and local historical societies and preservation interest groups can be valuable sources of information. Let them know of your interest.

When the agency provides you with information, let the agency know if you disagree with its findings regarding what properties are eligible for the National Register of Historic Places or how the proposed project may affect them. Tell the agency—in writing—about any important properties that you think have been overlooked or incorrectly evaluated. Be sure to provide documentation to support your views.

When the federal agency releases information about project alternatives under consideration, make it aware of the options you believe would be most beneficial. To support alternatives that would preserve historic properties, be prepared to discuss costs and how well your preferred alternatives would meet project needs. Sharing success stories about the treatment or reuse of similar resources can also be helpful.

Applicants for federal assistance or permits, and their consultants, often undertake research and analyses on behalf of a federal agency. Be prepared to make your interests and views known to them, as well. But remember the federal agency is ultimately responsible for completing Section 106 review, so make sure you also convey your concerns directly to it.



Hangar I, a historic dirigible hangar at Moffett Field at NASA Ames Research Center, California. The unique nature of this historic resource has drawn wide public, and some congressional, interest.

# Influencing Project Outcomes

In addition to seeking the views of the public, federal agencies must actively consult with certain organizations and individuals during review. This interactive consultation is at the heart of Section 106 review.

Consultation does not mandate a specific outcome. Rather, it is the process of seeking, discussing, and considering the views of consulting parties about how project effects on historic properties should be handled.

To influence project outcomes, you may work through the consulting parties, particularly those who represent your interests. For instance, if you live within the local jurisdiction where a project is taking place, make sure to express your views on historic preservation issues to the local government officials who participate in consultation.

## *Speak Up*



Residents in the Lower Mid-City Historic District in New Orleans express their opinions about the proposed acquisition and demolition of their properties for the planned new Department of Veterans Affairs and Louisiana State University medical centers which would replace the facilities damaged as a result of Hurricane Katrina.



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You or your organization may want to take a more active role in Section 106 review, especially if you have a legal or economic interest in the project or the affected properties. You might also have an interest in the effects of the project as an individual, a business owner, or a member of a neighborhood association, preservation group, or other organization. Under these circumstances, you or your organization may write to the federal agency asking to become a consulting party.



## WHO ARE CONSULTING PARTIES?

The following parties are entitled to participate as consulting parties during Section 106 review:

- ▶ Advisory Council on Historic Preservation;
- ▶ State Historic Preservation Officers;
- ▶ Federally recognized Indian tribes/THPOs;
- ▶ Native Hawaiian organizations;
- ▶ Local governments; and
- ▶ Applicants for federal assistance, permits, licenses, and other approvals.

Other individuals and organizations with a demonstrated interest in the project may participate in Section 106 review as consulting parties “due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking’s effects on historic properties.” Their participation is subject to approval by the responsible federal agency.

When requesting consulting party status, explain in a letter to the federal agency why you believe your participation would be important to successful resolution. Since the SHPO/THPO or tribe will assist the federal agency in deciding who will participate in the consultation, be sure to provide the SHPO/THPO or tribe with a copy of your letter. Make sure to emphasize your relationship with the project and demonstrate how your connection will inform the agency's decision making.

If you are denied consulting party status, you may ask the ACHP to review the denial and make recommendations to the federal agency regarding your participation. However, the federal agency makes the ultimate decision on the matter.

Consulting party status entitles you to share your views, receive and review pertinent information, offer ideas, and consider possible solutions together with the federal agency and other consulting parties. It is up to you to decide how actively you want to participate in consultation.

## *Get Involved*



Section 106 consultation with an Indian tribe

## MAKING THE MOST OF CONSULTATION

Consultation will vary depending on the federal agency's planning process and the nature of the project and its effects.

Often consultation involves participants with a wide variety of concerns and goals. While the focus of some may be preservation, the focus of others may be time, cost, and the purpose to be served by the project.

### **Effective consultation occurs when you:**

- ▶ keep an open mind;
- ▶ state your interests clearly;
- ▶ acknowledge that others have legitimate interests, and seek to understand and accommodate them;
- ▶ consider a wide range of options;
- ▶ identify shared goals and seek options that allow mutual gain; and
- ▶ bring forward solutions that meet the agency's needs.

Creative ideas about alternatives—not complaints—are the hallmarks of effective consultation.



# How the ACHP Can Help

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Under Section 106 review, most harmful effects are addressed successfully by the federal agency and the consulting parties without participation by the ACHP. So, your first points of contact should always be the federal agency and/or the SHPO/THPO.

When there is significant public controversy, or if the project will have substantial effects on important historic properties, the ACHP may elect to participate directly in the consultation. The ACHP may also get involved if important policy questions are raised, procedural problems arise, or if there are issues of concern to Indian tribes or Native Hawaiian organizations.

Whether or not the ACHP becomes involved in consultation, you may contact the ACHP to express your views or to request guidance, advice, or technical assistance. Regardless of the

## *Collecting Comments*



A panel of ACHP members listen to comments during a public meeting.

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scale of the project or the magnitude of its effects, the ACHP is available to assist with dispute resolution and advise on the Section 106 review process.

If you cannot resolve disagreements with the federal agency regarding which historic properties are affected by a project or how they will be impacted, contact the ACHP. The ACHP may then advise the federal agency to reconsider its findings.



## CONTACTING THE ACHP: A CHECKLIST

If you have questions about Section 106 that the SHPO/THPO/federal agency cannot answer, you may contact the ACHP. Try to have the following information available:

- ▶ the name of the responsible federal agency and how it is involved;
- ▶ a description of the project;
- ▶ the historic properties involved; and
- ▶ a clear statement of your concerns about the project and its effect on historic properties.

If you suspect federal involvement but have been unable to verify it, or if you believe the federal agency or one of the other participants in review has not fulfilled its responsibilities under the Section 106 regulations, you can ask the ACHP to investigate. In either case, be as specific as possible.

# When Agencies Don't Follow the Rules

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A federal agency must conclude Section 106 review before making a decision to approve a project, or fund or issue a permit that may affect a historic property. Agencies should not make obligations or take other actions that would preclude consideration of the full range of alternatives to avoid or minimize harm to historic properties before Section 106 review is complete.

If the agency acts without properly completing Section 106 review, the ACHP can issue a finding that the agency has prevented meaningful review of the project. This means that, in the ACHP's opinion, the agency has failed to comply with Section 106 and therefore has not met the requirements of federal law.

A vigilant public helps ensure federal agencies comply fully with Section 106. In response to requests, the ACHP can investigate questionable actions and advise agencies to take corrective action. As a last resort, preservation groups or individuals can litigate in order to enforce Section 106.

If you are involved in a project and it seems to be getting off track, contact the agency to voice your concern. Call the SHPO or THPO to make sure they understand the issue. Call the ACHP if you feel your concerns have not been heard.

# Following Through

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## *Stay Informed*



Milton Madison Bridge over the Ohio River between Kentucky and Indiana. Bridge projects can affect a variety of cultural and historic properties. (photo courtesy Wilbur Smith Associates/Michael Baker Engineers)

After agreements are signed, the public may still play a role in the Section 106 process by keeping abreast of the agreements that were signed and making sure they are properly carried out. The public may also request status reports from the agency.

Designed to accommodate project needs and historic values, Section 106 review relies on strong public participation. Section 106 review provides the public with an opportunity to influence how projects with federal involvement affect historic properties. By keeping informed of federal involvement, participating in consultation, and knowing when and whom to ask for help, you can play an active role in deciding the future of historic properties in your community.

Section 106 review gives you a chance to weigh in when projects with federal involvement may affect historic properties you care about. Seize that chance, and make a difference!

# Contact Information

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## **Advisory Council on Historic Preservation**

Office of Federal Agency Programs

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Web site: [www.achp.gov](http://www.achp.gov)

*The ACHP's Web site includes more information about working with Section 106 and contact information for federal agencies, SHPOs, and THPOs. The ACHP also publishes Section 106 Success Stories at [www.achp.gov/sec106\\_successes.html](http://www.achp.gov/sec106_successes.html).*

## **National Association of Tribal Historic Preservation Officers**

P.O. Box 19189

Washington, D.C. 20036-9189

Phone: (202) 628-8476

Fax: (202) 628-2241

E-mail: [info@nathpo.org](mailto:info@nathpo.org)

Web site: [www.nathpo.org](http://www.nathpo.org)

## **National Conference of State Historic Preservation Officers**

444 North Capitol Street, NW, Suite 342

Washington, D.C. 20001

Phone: (202) 624-5465

Fax: (202) 624-5419

Web site: [www.ncshpo.org](http://www.ncshpo.org)

**For the SHPO in your state, see:**

**<http://ncshpo.org/shpodirectory.shtml>**



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### **National Park Service**

Heritage Preservation Services  
1849 C Street, NW (2255)  
Washington, D.C. 20240  
E-mail: [NPS\\_HPS-info@nps.gov](mailto:NPS_HPS-info@nps.gov)  
Web site: [www.nps.gov/history](http://www.nps.gov/history)

National Register of Historic Places  
1201 Eye Street, NW (2280)  
Washington, D.C. 20005  
Phone: (202) 354-2211  
Fax: (202) 371-6447  
E-mail: [nr\\_reference@nps.gov](mailto:nr_reference@nps.gov)  
Web site: [www.nps.gov/nr](http://www.nps.gov/nr)

### **National Trust for Historic Preservation**

2600 Virginia Avenue, NW  
Suite 1100  
Washington, DC 20037  
Phone: (800) 944-6847 or (202) 588-6000  
Fax: (202) 588-6038  
Web site: [www.preservationnation.org](http://www.preservationnation.org)

### **Office of Hawaiian Affairs**

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Honolulu, HI 96817  
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Web site: [www.oha.org](http://www.oha.org)

## *Beneath the Surface*





Ohio Department of Transportation workers made an unanticipated archaeological discovery while working just north of Chillicothe along state Route 104. It is a remnant of an Ohio & Erie Canal viaduct. (photo courtesy Bruce W. Aument, Staff Archaeologist, ODOT/Office of Environmental Services)

## TO LEARN MORE

For detailed information about the ACHP, Section 106 review process, and our other activities, visit us at [www.achp.gov](http://www.achp.gov) or contact us at:

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