CHAPTER 2:

INITIATION OF SECTION 106 PROCESS AND IDENTIFICATION OF CONSULTING PARTIES

Is The Project An Undertaking?

The Section 106 regulations at 36 CFR Section 800.16(y) define an “undertaking” 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.

Following establishment of the federal connection, a project on ODOT’s transportation program will proceed into the Section 106 process. For most federal-aid projects on ODOT’s program, FHWA serves as the lead federal agency with ultimate responsibility for any and all impacts of these projects on historic properties.

Section 106 applies to a state funded or state/local funded project when such a project needs a federal permit, license or approval. The most common example of this is when a state or state/local project needs a US Army Corps of Engineers (USACE) permit to proceed. In those situations, the USACE serves as the lead federal agency for Section 106 compliance.

Participants and Consultation in the Section 106 Process

The participants in the Section 106 process include the Federal agency official, the Advisory Council on Historic Preservation (ACHP), Section 106 consulting parties, and the public.

Advisory Council on Historic Preservation

The ACHP is an independent federal agency composed of President-appointed council members and professional staff. It oversees the Section 106 process, issues regulations (36 CFR Part 800), guidance, and advice on historic preservation issues and Section 106 compliance. It consults with and provides comments to federal agencies on the effect of programs and undertakings on historic properties. (Refer to www.achp.gov.)

Ohio Historic Preservation Office

Ohio’s state historic preservation office, known as the Ohio Historic Preservation Office (OHPO), is the official historic preservation agency for Ohio. It is designated to manage responsibilities delegated to the state by Congress in the National Historic Preservation Act of 1966.

OHPO consults with federal and state agencies to determine if projects that agencies fund, license, or permit will affect historic properties; prepares and distributes a state historic preservation plan; identifies historic places and archaeological sites; nominates properties to the National Register of Historic Places; reviews proposed rehabilitation work on historic buildings for federal and state tax credits; qualifies communities for the Certified Local Government program; administers a competitive matching grant program; advises property owners and stewards on building and site conservation; and offers educational programs and publications.
The office has professional staff with expertise in archaeology, history, architectural history, architecture, planning, and related fields. It is a division of the Ohio Historical Society. (Refer to http://www.ohiohistory.org/ohio-historic-preservation-office.)

Native American Tribal Consultation

Federally recognized Native American Indian tribes with ancestral/cultural ties to Ohio have been identified through consultation with the OHPO, the National Park Service and the ACHP. All federally recognized tribes with demonstrable ancestral/cultural ties to Ohio will be included in Native American Indian tribal consultation for ODOT projects.

The federal government has a government to government relationship with the tribes, which must be maintained in the consultation process. Please refer to FHWA’s updated Tribal Consultation Guidelines for detailed information on this subject.

In accordance with 36 CFR Section 800.3(f)(2) and the Section 106 PA, FHWA and ODOT-OES consult with federally recognized Native American Indian tribes that might attach religious and cultural significance to historic properties in the area of potential effects of the undertaking and invite them to be consulting parties. ODOT-OES conducts tribal consultation on behalf of FHWA pursuant with the Section 106 PA. ODOT District personnel and/or consultants may be asked to provide project information for ODOT-OES to include in tribal consultation materials. Refer to the Section 106 PA.

As a result of a tribal consultation workshop held in Tulsa, Oklahoma on April 12, 2005, FHWA and ODOT-OES developed a consultation process with federally recognized tribes with identified historic and/or cultural ties to Ohio. Refer to the report from the 2005 meeting.

Since no tribal lands currently exist in the State of Ohio, no tribal assumption of OHPO responsibilities by a Tribal Historic Preservation Officer (THPO) can occur for any ODOT transportation project.

Section 106 Consulting Parties

Pursuant to 36 CFR Section 800.2(c)1-5, individuals and organizations that “demonstrate an interest in the undertaking” will be identified and invited to participate as consulting parties in the Section 106 process. For projects on ODOT’s transportation program, these consulting parties include, but are not limited to the following based on the referenced citations and must be included in the project public involvement plan:

- State Historic Preservation Office.
- Native American Indian tribes that attach religious and cultural significance to historic properties that may be affected by the project.
- Representatives of local governments.
- Applicants for federal assistance.
- Individuals and organizations with a demonstrated interest in the project including but not limited to affected property owners, organizations such as local historical groups or museums, neighborhood organizations, historic bridge organizations, etc.
- The general public.

In addition, ODOT and FHWA, in consultation with the OHPO, may identify and invite any other parties entitled to be consulting parties (36 CFR Section 800.3(f)) and shall consider all written requests for participation as consulting parties. When deemed necessary by FHWA and/or ODOT, consultation meetings may be held with the consulting parties at key decision-making points during the project development process. This more formalized process is most common on higher level PDP projects (Paths 3, 4, and 5).
It must be emphasized that since this is federal regulatory requirement, projects on ODOT’s transportation program must include Section 106 Consulting Parties in project public involvement actions. However, there is considerable latitude on how consulting parties may be identified and engaged on a project. The regulations do not say how to do this; rather they say that the Federal agency shall seek and consider the views of the public (both individuals and organizations) with a demonstrated interest in the undertaking or have concerns with the undertaking’s effects on historic properties.

Lower level PDP projects (Path 1 and Path 2) will likely not require the more formal public involvement process that is commonly used on more complex higher level projects in the PDP. Project managers and planners have to rely on their professional experience to determine how best to inform and engage the public on a project. They should tailor their public involvement actions appropriately based on the scope and needs of their project.

These Path 1 and Path 2 projects that have no potential to affect historic properties due to the minimal nature of the projects or due to the absence of historic properties in the area of the projects will have no formal public involvement plan. In the PDP Planning Phase, when the stakeholders list developed, inclusion of local historical museums, historical societies, and/or historic neighborhood groups on that list will likely satisfy the regulation. Including these organizations or groups on the project mailing list will ensure that they will receive project information and requests for comments about a project. Public involvement for PDP Path 1 and 2 projects will most likely be accomplished through use of project announcements and direct mailings.

During the identification of stakeholders and development of plans to inform the public, project managers and planners can use project announcements in newspapers, direct mailings, announcements on websites, public meetings, etc., to identify and ask local groups and organizations if they have concerns about historic issues, properties, or features in the project area.

Therefore it is a requirement that consultants, ODOT staff, and LPA’s involved in the planning and environmental steps of the PDP abide by this regulation. The best and most current information available on how to successfully comply with this requirement on a project (or within a program) is the American Association of State Highway and Transportation Officials (AASHTO) Practitioner’s Handbook 06, “Consulting under Section 106 of the National Historic Preservation Act”. There are also resources to facilitate this process available in the consulting party information on ODOT-OES’ website.

**Public Involvement**

ODOT is committed to engaging the public on its projects. As a requirement in the NEPA process, ODOT and its partners keep the public informed and involved, forging beneficial relationships with the public which results in projects moving forward on schedule.

Public involvement is a dialogue intended to share, exchange, and solicit information and ideas in order to enhance project development. Public involvement should include all persons impacted by a project, as well as provide a forum for cooperative discussion, negotiations, and comment.

To ensure the public involvement effort creates and facilitates two-way communication, a public involvement plan is developed for each project pursuant with ODOT’s PDP and as appropriate for the PDP path of each project. Specifically, PDP Path 1 and 2 projects will not have a documented public involvement plan like that of complex Path 3 projects and all Path 4 and 5 projects. The purpose of the public involvement plan is to ensure a means by which agencies, stakeholders, and all other parties interested in or affected by a transportation project receive, and have an opportunity to exchange, project information. The establishment of the public involvement plan is a requirement in the Planning Phase of the PDP.
Refer to ODOT-OES’ Public Involvement Manual for more information on public involvement for ODOT transportation projects. Also refer to ODOT’s PDP toolkit webpage for examples of public involvement plans in the box titled “PDP Deliverable Example Downloads.”

Section 106 public involvement differs from and builds upon NEPA public involvement by being resource specific public involvement. The Section 106 regulations (36 CFR Part 800.2(d)) state:

- that the views of the public are essential to federal decision making,
- that federal agencies must provide the public with information about an undertaking,
- that agencies must seek and consider the views of the public regarding a project’s effects on historic properties, and
- that agencies may use NEPA public involvement procedures to meet the Section 106 requirement for a plan to involve the public.

This is a requirement for federal undertakings which may affect properties included in or eligible for inclusion in the NRHP. Public involvement is ongoing through the Section 106 process. Therefore it is essential for project managers and project planners to incorporate the intent of this regulation into their project public involvement process.

For ODOT to use NEPA public involvement procedures in lieu of having a separate Section 106 public involvement process, this requirement for Section 106 consultation must be part of the public involvement process on a project (regardless of its PDP path) that identifies project stakeholders, organizations and members of the public that may have an interest in cultural resources in a project area.

Efforts to identify Section 106 Consulting Parties should be incorporated into plans to involve the public (refer to the Section 106 Consulting Party section above). Information on the Section 106 process and applications to become Section 106 consulting parties should be made available at public meetings and through direct mailings. Even if the public involvement ‘plan’ on a lower level, or less complex, project is to do press releases and direct mailings, the intent of the requirements of Section 106 bulleted above must be incorporated into that information.

For more information on how to involve the public in the Section 106 process, refer to the AASHTO handbook and the information on ODOT-OES’ website referenced in the previous section on Section 106 Consulting Parties. The ACHP has also issued guidance for the public that addresses this requirement (see http://www.achp.gov/docs/CitizenGuide.pdf).

**AREA OF POTENTIAL EFFECTS**

The regulation at 36 CFR Section 800.4 requires that federal agencies make a reasonable and good faith effort to identify historic properties, i.e., those included in or eligible for inclusion in the NRHP, in the area of potential effects (APE).

The regulation at 36 CFR Section 800.16(d) defines the APE as “the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The APE is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.” This applies to both above ground and below ground resources, subject to both direct and indirect effects. It is, by necessity, a very broad definition.

The APE will be determined by ODOT, the OHPO, and FHWA for projects on ODOT’s transportation program. Determining an APE does not mean that any historic properties within its boundaries must be preserved. It does mean that they have to be taken into account during the Section 106 process.
The following list includes factors that ODOT, OHPO and FHWA consider in estimating and establishing an APE:

- How do various environmental factors influence the APE? Is the setting a rural or urban area? Is the surrounding landscape wooded? Open fields? What is the topography? What is the current land use? If developed, how is it developed?
- The scale of potential construction in relation to the surrounding setting.
- The APE should include all alternatives under consideration, as appropriate for projects under ODOT’s PDP project paths.
- The view from the project looking outward and the view from outside looking into the project area.
- The project’s potential to have more than just visual effects. Will the project have audible effects? Will construction impact undisturbed land? Will the project impact existing traffic patterns, land use, public access, etc.?
- The APE is not determined on the basis of land ownership.
- The APE is not synonymous with construction work limits.
- The APE should include all locations where the activity may result in changes in traffic patterns, land use, public access, etc.
- The APE should include all areas where there may be direct AND indirect impacts.
- An APE need not be a single area; it may cover a dispersed area.
- The APE must consider both above ground and below ground resources.
- The APE for archaeological resources will include horizontal considerations as well as vertical depending on the depth of construction activities.
- There is only one APE developed for a project for both history/architectural and archaeological resources.

The scope of cultural resources work on a project and timing of the work under the PDP is tailored to the type of cultural resources under consideration. For example in the Preliminary Engineering Phase, the APE for Phase I History/Architecture Survey will be based on a necessarily broad APE and will consider potential noise and visual impacts. For a Phase I archaeological survey for the project, which will take place during the Environmental Engineering Phase (and thus have more refined project engineering), the APE for that work will likely be more narrowly focused, have to consider vertical impacts, and will not likely be concerned with noise and visual impacts.

These are broad, general examples. We are trying to show that while there is only one, general APE for a project, it is dynamic and the cultural resource work conducted within that APE will be adjusted accordingly based on the project needs, project engineering, the progress of the project through the PDP, and other issues.

ODOT, OHPO and FHWA discuss and define the APE at appropriate concurrence points in the Section 106 process and may modify the APE in response to changes in projects. As stated, the APE on a project is dynamic and may change throughout the life of a project. Revisions to an APE may occur as a result of NEPA analyses and the identification of the preferred alternative, may occur due the incorporation of measures to minimize effects to historic properties, may occur as a result of detailed design, may occur as a result of consultation with consulting parties and/or may occur because of new information from another source.

ODOT-OES’ website has examples of APE maps for reference. One of these examples is on a minor, local project in Ironton and illustrates several intersections where ADA ramps were planned for installation. That is considered one APE even though there are multiple, extremely localized work locations for the ADA ramps. This is reflective of the nature of the proposed improvements and the potential extent of the effects of that work. The other example is the opposite extreme. It is the APE for history/architecture studies on the Cleveland Innerbelt project. This APE reflects the areal extent of direct and indirect potential effects due to changes in traffic patterns as well as direct footprint impacts. Again, this APE is reflective of the type of resource
being investigated. Detailed archaeological studies were not done in this broad APE. Also refer to Figure 2, Appendix K for another example of an APE map.