

PART II
CHAPTER 8
Assessments of Effect

October 2021

REVISIONS

- October 2021** **Effects Report—Added guidance for preparing Effects Reports in Section 8-3.1**
- References to Part II, Chapter 13: Procedures for Consulting Party Meetings added**
- December 2017** **Section 2.0 and 3.0 updated policy to reflect the requirement of the Tribal MOU and the use of IN SCOPE**

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8-1.0 Overview

After the identification of historic properties within the APE is complete for both above-ground and archaeological resources, assessment of effects will commence. There are three possible effect findings:

1. **“No historic properties affected”** - This finding is appropriate when it is determined that no historic properties are present in the APE **or** there are historic properties present, but the undertaking will not have any effect on them;
2. **“No adverse effect”** – This finding is appropriate when the undertaking may impact a historic property, but that impact will not alter the characteristics (directly or indirectly) that qualify a property for listing in the NRHP;
3. **“Adverse effect”** – A finding of “adverse effect” is appropriate when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling or association.

Making an effect finding and preparing supporting documentation as specified in 36 CFR 800.11(d) and (e) as applicable is required to successfully conclude the Section 106 process. The following chapters describe in detail the three effect finding types, documentation and consultation requirements.

8-2.0 Finding of "No Historic Properties Affected"

Once efforts to identify historic properties are complete and assessment of effects is concluded, if the applicant or their consultant believes that no historic properties are present or that historic properties are present but the project will have no effect on those historic properties [as defined at 36 CFR § 800.16(i)], they should proceed as follows:

1. Forward the recommendations and support documentation to INDOT-CRO for approval. Two templates have been prepared that may be used, by applicants or their consultants, to submit finding recommendations and the required supporting documentation. The **finding template** (“Sample Format for a Section 106 Recommendation for Area of Potential Effect, Eligibility Determinations, and Effect Findings and Section 4(f) Compliance Requirements”) and the template for **documentation** supporting a “No Historic Properties Affected” finding, as specified in 36 CFR § 800.11(d), are both included in Part 5- Forms (“Sample Format and Guidance for Documenting FHWA’s NO HISTORIC PROPERTIES AFFECTED finding”);
2. If INDOT agrees that no historic properties will be affected by the undertaking, INDOT will sign the finding. If INDOT disagrees with the recommendation, requires further information before reaching a decision, or requires revisions to the documents, it will send an e-mail to the applicant or their consultant setting forth its position. Once approved and

signed, INDOT will send the signature page to the applicant or consultant. Once received by the applicant or consultant the following actions should occur:

- a. The applicant or consultant will check-in the signed finding and 800.11 documentation to IN SCOPE;
 - b. Once approved by the INDOT-CRO reviewer, the consultant will:
 - i. Send the hard copy of the finding and 800.11(d) documentation to the SHPO for concurrence; and
 - ii. Email the non-Tribal consulting parties notifying them that the documents are available on IN SCOPE for their review and comment. The transmittal letter will be attached to the email. If an email address is not identified for a consulting party or if they request a hard-copy, the consultant should proceed to send a hard-copy. The email and transmittal letter should indicate that recipients have seven days to request a hard copy. Additionally, the transmittal letter should note that “if no one takes exception to the ‘no historic properties affected’ recommendation within 30 days, the Section 106 process for this project will be concluded.” INDOT-CRO will forward this email to the Tribal consulting parties.
3. Section 106 is concluded once the SHPO has agreed--in writing--with the finding or if, within 30 days of receipt, neither SHPO nor another consulting party has objected to the finding. If the SHPO or any consulting party objects--in writing--to INDOT's finding within 30 days of receipt of an adequately documented finding, the documentation will be submitted to FHWA for resolution;
 4. A public notice should be issued providing the public 30 days to submit comments on INDOT's finding. The public notice can be issued simultaneously with the distribution of the 800.11 documentation, once INDOT has signed the finding. A template providing guidance on the language to be placed in the public notice is provided in Part 5- Forms.

If there is no disagreement with the “no historic properties affected” finding after the 30-day consultation and public comment period, the Section 106 process is concluded.

8-3.0 Assessment of Adverse Effects

When historic properties are identified within the APE and they will be affected, it is necessary to apply the criteria of “adverse effect” to determine the appropriate finding of effect, taking into account consulting party input. “Adverse effects” may include “reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.”¹ “Adverse effects” on historic properties may include but are not limited to:

- Physical destruction of or damage to all or part of the property;

¹ 36 CFR 800.5(a)(1).

- Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous materials remediation, and provision of handicapped access, that is not consistent with the Secretary’s standards for the treatment of historic properties and applicable guidelines;²
- Removal of the property from its historic location;
- Change of the character of the property’s use or of physical features within the property’s setting that contribute to its historic significance;
- Introduction of visual, atmospheric or audible elements that diminish the integrity of the property’s significant historic features;
- Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and
- Transfer, lease or sale of property out of federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property’s historic significance.³

Questions to take into account during the effects assessment include:

- Will right-of-way be acquired from the historic property?
- Will any part of the property or its contributing elements, including landscape features, be altered or removed?
- Will there be introduction of visual elements that will diminish the property’s setting and feeling?
- Will the use of the property be affected in a way that could diminish its integrity?

When assessing “adverse effects,” it is important to understand why the property is significant and what aspects of integrity are most critical to convey that significance. For instance, removal of mature trees adjacent to a historic residence may be seen as an “adverse effect” due to diminishment of the property’s setting and feeling. Conversely, removal of mature trees adjacent to a historic industrial property may be less likely to have an “adverse effect.”

Only one “adverse effect” determination for one historic property is enough for the whole project to have an “adverse effect” finding. However, a finding of “adverse effect” **does not** mean that the project is a “bad project” or that a project cannot proceed; it simply means that alternatives to affecting the historic resource and ways to minimize affecting the historic resource must be considered. Ultimately, the decision to proceed rests with the federal agency.

FHWA and INDOT encourage phased application of the criteria of “adverse effect” for projects involving alternatives that consist of corridors or larger land areas, pursuant to 36 CFR §

² 36 CFR 68.

³ 36 CFR 800.5(a)(2).

800.5(a)(3). When an applicant believes such an approach is appropriate, the applicant should consult with FHWA and INDOT.

8-3.1 Effects Report

For most projects, the assessment of “adverse effects” is provided through the preparation of an Effects Report that is submitted to consulting parties prior to the release of an approved finding from FHWA or INDOT. The Effects Report articulates the QP’s recommendation of whether the project will result in a finding of No Adverse Effect or Adverse Effect. Consulting parties are afforded the opportunity to review the Effects Report and provide feedback so that FHWA and INDOT can make a sound decision on the formal effect finding. If there are disagreements with the QP’s recommended effect finding, FHWA and INDOT will want to resolve those prior to signing the finding and releasing the 800.11 documentation.

Examples of when an Effects Report is deemed necessary may include these circumstances:

- SHPO has not shared its opinion on the effect finding and FHWA and INDOT are not certain what that opinion will be;
- FHWA and INDOT are seeking feedback from SHPO and CPs on multiple alternatives and their effects on historic properties, including their opinions on Least Overall Harm when a Section 4(f) use occurs;
- The project is known to be controversial or is anticipated to have controversy due to effects on historic properties;
- An “Adverse Effect” is expected and FHWA and INDOT want to start discussions on potential avoidance/minimization/mitigation measures via submittal of the Effects Report

Effects Reports are treated as a formal Section 106 document review, with SHPO and other CPs allowed 30-days to comment. A recommended best practice is to convene a CPs meeting during the Effects Report 30-day review period. If possible, an on-site meeting helps SHPO and CPs get a better sense of the project, the historic property’s setting and feeling, and the nature of the impacts. Holding a CPs meeting during the review period elicits some feedback prior to the conclusion of the review period-so that questions or disagreements with the effect recommendations are known earlier in the process. Further, one of the most effective ways to support the eventual approved effect finding is to point towards the input received from consulting parties. Guidance and procedures for consulting party meetings can be found in Part II, Chapter 13.

While the Effects Report does add another review step in the Section 106 process, much of the materials necessary for its preparation can be used for the 800.11 documentation. This helps streamline the preparation of the 800.11 documentation.

Ultimately, preparation of an Effects Report reduces the likelihood of an objection by SHPO or another consulting party to the approved finding once released. While this interim review may add another step in the Section 106 process, it avoids disputes that are more difficult to resolve and more likely to cause lengthier project delays.

The decision to prepare an Effects Report should be made in consultation with the INDOT-CRO reviewer. Please check with your INDOT-CRO reviewer to determine if an Effects Report will be necessary.

The recommended format and content for preparation of the Effects Report is located in Part V: Forms.

8-3.2 Finding of “No Adverse Effect”

Upon completion of assessment of “adverse effects,” either through an Effects Report or at direction of INDOT-CRO, if the applicant or their consultant believes that the undertaking will have “no adverse effect” on historic properties, they should proceed as follows:

1. Forward the recommendations and support documentation to INDOT-CRO for approval. Two templates have been prepared that may be used, by applicants or their consultants, to submit finding recommendations and the required supporting documentation. The **finding template** (“Sample Format for a Section 106 Recommendation for Area of Potential Effect, Eligibility Determinations, and Effect Findings and Section 4(f) Compliance Requirements”) is included in Part 5- Forms. The template for **documentation** supporting a “no adverse effect” or “Adverse Effect” finding, as per 36 CFR 800.11(e), is included in Part 5-Forms (“Sample Format and Guidance for Documenting FHWA’s NO ADVERSE or ADVERSE EFFECT finding”);
2. When preparing the effect determination, specifically reference the criteria of “adverse effect” per 36 CFR 800.5(a)(1) as well as the examples of “adverse effects” per 36 CFR 800.5(a)(2). Keep in mind that the examples of “adverse effect” are not inclusive of all types of “adverse effects.” Nevertheless, referencing the examples indicates that the regulations and its description of “adverse effects” were considered.
3. If INDOT agrees that no historic properties will be adversely affected by the undertaking, INDOT will sign the finding. If INDOT disagrees with the recommendation, requires further information before reaching a decision, or requires revisions to the documents, it will send an e-mail to the applicant or their consultant setting forth its position. Once

approved and signed, INDOT will send the signature page to the applicant or consultant. Once received by the applicant or consultant the following actions should occur:

- a. The applicant or consultant will check in the signed finding and 800.11(d) documentation to IN SCOPE;
 - b. Once approved by the INDOT-CRO reviewer, the consultant will:
 - i. Send the hard copy of the finding and 800.11(d) documentation to the SHPO for concurrence; and
 - ii. Email the non-Tribal consulting parties notifying them that the documents are available on IN SCOPE for their review and comment. The transmittal letter will be attached to the email. If an email address is not identified for a consulting party or if they request a hard-copy, the consultant should proceed to send a hard-copy. The email and transmittal letter should indicate that recipients have seven days to request a hard copy. Additionally, the transmittal letter should note that “if no one takes exception to the ‘no adverse effect’ recommendation within 30 days, the Section 106 process for this project will be concluded.” INDOT-CRO will forward this email to the Tribal consulting parties.
4. Section 106 is complete when SHPO has agreed--in writing--with the finding or if, within 30 days of receipt, neither SHPO nor another consulting party has objected to the finding. If the SHPO or a consulting party objects in writing to INDOT’s finding of “no adverse effect,” then INDOT shall consult with FHWA and the objecting party to resolve this objection. If after such consultation FHWA determines that the objection cannot be resolved through consultation, then FHWA shall forward all documentation relevant to the objection to the ACHP, including FHWA’s proposed response to the objection. Within 15 days after receipt of all pertinent documentation, the ACHP shall exercise one of the following options:
- a) Advise FHWA that the ACHP concurs in FHWA’s proposed response to the objection, whereupon FHWA will respond to the objection accordingly; or
 - b) Provide FHWA with recommendations, which FHWA shall take into account in reaching a final decision regarding its response to the objection;
 - c) Should the ACHP not exercise one of the above options within 15 days after receipt of all pertinent documentation, FHWA may assume ACHP’s concurrence with the proposed response to the objection.

INDOT’s Project Commitments Database
Commitments made in Section 106 consultation to avoid or minimize effects should be entered in [INDOT’s Project Commitments Database](#). Commitments should be clear and specific so the project contractor understands how to implement effectively.

After the 15-day time period expires, or after FHWA receives and considers the ACHP’s advisory opinion on the effect finding, the FHWA will issue a letter to all consulting parties documenting the final finding.

5. A public notice should be issued providing the public 30 days to submit comments on INDOT's finding. The public notice can be issued simultaneously with the distribution of the 800.11 documentation, once INDOT has signed the finding. A template providing guidance on the language to be placed in the public notice is provided in Part V Forms.

If there is no disagreement with the “no adverse effect” finding after the 30-day consultation and public comment period, the Section 106 process is concluded.

8-3.3 Finding of “Adverse Effect”

Upon completion of assessment of “adverse effects,” if the applicant or their consultant believes that the undertaking will have an “adverse effect” on historic properties, they should proceed as follows:

1. Forward the recommendations and support documentation to INDOT-CRO for approval. Two templates have been prepared that may be used, by applicants or their consultants, to submit finding recommendations and the required supporting documentation. The **finding template** (“Sample Format for a Section 106 Recommendation for Area of Potential Effect, Eligibility Determinations, and Effect Findings and Section 4(f) Compliance Requirements”) is included in Part V Forms. The template for **documentation** supporting an “adverse effect” finding, as per 36 CFR 800.11(e), is included in Part V Forms (“Sample Format and Guidance for Documenting FHWA’s NO ADVERSE or ADVERSE EFFECT finding.”);
2. When preparing the effect determination, specifically reference the criteria of “adverse effect” per 36 CFR 800.5(a)(1) as well as the examples of “adverse effects” per 36 CFR 800.5(a)(2). Keep in mind that the examples of “adverse effect” are not inclusive of all types of “adverse effects.” Nevertheless, referencing the examples indicates that the regulations and its description of “adverse effects” were considered.
3. If INDOT agrees with recommendations of “adverse effect,” it will forward the recommendations to FHWA for signature. After FHWA signature, the document will be returned to the applicant or their consultant for distribution to the SHPO and posting to IN SCOPE for other consulting party review following guidance in 8-3.5 below. If INDOT disagrees with the recommendation, requires further information before reaching a decision, or requires revisions to the documents, it will send an e-mail to the applicant or their consultant setting forth its position;

4. FHWA, or INDOT on their behalf, will notify the ACHP of the likely "adverse effect," with documentation provided by the consultant, and invite them to be a consulting party. If there is no known controversy, FHWA (or INDOT on its behalf) will notify the ACHP concurrently with the finding review period. When there is controversy, FHWA will notify the ACHP at the conclusion of the finding review period to provide the ACHP with the latest consultation summary. In any case, the ACHP will notify FHWA within 15 days of receipt of the notice whether it will participate.
5. The applicant or consultant will check in the signed finding and 800.11(d) documentation to IN SCOPE. Once approved by the INDOT-CRO reviewer, the consultant will:

- i. Send the hard copy of the finding and 800.11(d) documentation to the SHPO for concurrence; and
- ii. Email the non-Tribal consulting parties notifying them that the documents are available on IN SCOPE for their review and comment. The transmittal letter will be attached to the email. If an email address is not identified for a consulting party or if they request a hard-copy, the consultant should proceed to send a hard-copy. The email and transmittal letter should indicate that recipients have seven days to request a hard copy. Where deemed appropriate by INDOT or FHWA, the transmittal letter forwarding the 800.11(e) documentation should schedule a Section 106 consulting parties meeting to discuss that documentation. This will enable INDOT and FHWA to ensure that all reasonable minimization options have been evaluated and will allow INDOT and FHWA to work with the consulting parties to resolve outstanding issues and begin to discuss appropriate mitigation measures. INDOT-CRO will forward this email to the Tribal consulting parties.

6. The project may proceed if the SHPO has agreed--in writing--with the finding or if, within 30 days of receipt, neither SHPO nor another consulting party has objected to the finding. If the SHPO or any consulting party objects--in writing--to INDOT's finding within 30 days of receipt of an adequately documented finding, the documentation will be submitted to FHWA for resolution.
7. A public notice should be issued providing the public 30 days to submit comments on INDOT's finding. The public notice can be issued simultaneously with the distribution of the 800.11 documentation, once FHWA has signed the finding. A template providing guidance on the language to be placed in the public notice is provided in Part V Forms. If no one disagrees with the finding after the 30-day consultation and public comment period, the resolution of "adverse effect" stage of the Section 106 process may begin.

Notifying the ACHP

When notifying the ACHP of an adverse effect, the following form and instructions should be completed:

<http://www.achp.gov/docs/e106-instructions-form.pdf>.

Once the form is completed, the form will be provided to the INDOT-CRO reviewer. FHWA or INDOT on their behalf will forward to the ACHP.

8. If a disagreement arises between the applicant, INDOT, FHWA, and/or the SHPO regarding resolution of “adverse effect,” an additional Section 106 consulting party meeting involving the ACHP may be necessary.

Please see Part II Chapter 9 for specific guidance on resolution of “adverse effects.”

Please see Part II, Chapter 13 for guidance and procedures for consulting party meetings.