HISTORIC PRESERVATION REVIEW

By: John Rappa, Chief Analyst

ISSUE
Describe the federal and state processes for determining whether and how a government action affects historic property. Describe how citizens can intervene to prevent the destruction of properties on the National Register of Historic Places. Identify the roles and compositions of Connecticut’s State Historic Preservation Office (SHPO) and Historic Preservation Council.

SUMMARY
With limited exceptions, federal and state laws require agencies to determine how their proposed actions could affect historic properties. It is important to note that these laws do not prohibit agencies from taking actions that negatively impact such resources, such as demolishing a historic building or constructing a road through an historic site. Rather, they require agencies to “stop, look, and listen” before making decisions that affect historic properties. To comply with these laws, agencies must collect information on how their decisions could potentially impact historic properties and, if feasible, consider ways to avoid adversely affecting them or mitigating those effects.

Abbreviations

NEPA: National Environmental Policy Act—requires federal agencies to assess how their actions affect the environment, including historic properties
42 U.S.C. 4321 et seq.
40 C.F.R. 1500 et seq.

NHPA: National Historic Preservation Act—requires federal agencies to consider the impact of their undertakings on historic properties eligible for listing on the National Register of Historic Places; NHPA is often referred to as “Section 106,” which is the section of the law specifying the process for NHPA compliance
54 U.S.C. 300101 et seq.
36 C.F.R. 800

Policy Act: Connecticut Environmental Policy Act—requires state agencies to consider how their actions affect the environment, including historic properties
CGS § 22a-1—22a-1h
Reg. § 22a-1a-1—22a-1a-12

Protection Act: Connecticut Environmental Protection Act—allows parties to file suit or intervene in a proceeding to prevent the unreasonable destruction of historic property or harm to the environment
CGS § 22a-14 et seq.
Two key federal laws, the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA or Section 106), are the general, overarching, federal laws that require agencies to examine how their actions affect historic properties. But several other federal requirements also address historic preservation concerns in specific contexts (see this National Park Service webpage for more information). This report focuses on NEPA and Section 106.

Federal legal requirements vary depending on the nature of the proposed action. NEPA’s requirements for assessing environmental impacts apply when a federal agency begins planning an action that could affect the quality of the human environment, including cultural resources and historic properties. If the NEPA process reveals that the proposed action has the potential to adversely affect a property eligible for listing, or listed, on the National Register of Historic Places (hereinafter “National Register-eligible property”) the agency may additionally have to comply with the Section 106 process for determining how to avoid or mitigate such effects if the project is pursued. There are also situations where an agency may have to complete the Section 106 but not the NEPA process.

NEPA and Section 106 serve similar purposes but come into play at different stages of a project’s planning. NEPA is generally triggered when an action is still in the early planning stages. Its process helps agencies discover what types of resources the proposed action could affect. Section 106’s process helps agencies decide how to resolve impacts on historic properties once the action is in the final planning stages.

At the state level, the Connecticut Environmental Policy Act (Policy Act) requires state agencies to determine how their actions could affect the environment, which includes historic structures and landmarks. The Policy Act’s requirements apply regardless of whether the affected historic property is National Register-eligible.

For purposes of the National Register of Historic Places, Historic Properties are:

Districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and that:

A. are associated with events that have made a significant contribution to the broad patterns of our history;

B. are associated with the lives of significant persons in our past;

C. embody the 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; or

D. have yielded or may be likely to yield, information important in history or prehistory (National Park Service).

For more information on the listing process, see the National Park Service website.
Unlike NEPA, Section 106, and the Policy Act, the Connecticut Environmental Protection Act (Protection Act) does not require agencies to determine how proposed actions could affect historic property. Instead, it allows anyone, without having to establish that he or she is aggrieved, to (1) bring a declaratory or injunctive action to prevent the unreasonable destruction of historic property or (2) intervene in a proceeding to stop such an action.

This report concludes by describing the roles and composition of Connecticut’s SHPO and its advisory bodies.

**FEDERAL HISTORIC PRESERVATION REVIEW PROCESSES**

**Federal Law**

All federal agencies must comply with NEPA and Section 106 before taking any action that could affect historic property. Both laws allow federal agencies to delegate responsibility for completing the required processes to state and local governments undertaking projects requiring federal approval or financial assistance. And, in some situations, a federal agency may require a private party to comply with the laws’ requirements (e.g., when a private party applies for a federal license, the federal agency can require the party to prepare the information, analyses, and recommendations needed to assess the action’s environmental effects). However, if responsibility for documentation is delegated to a private party, the agency remains legally responsible for ensuring that the private party complied with the law.

For convenience, this report includes these government and private entities when it refers to “federal agencies.”

**NEPA Overview.** NEPA requires agencies to evaluate how proposed actions affect the human environment, including aesthetic, historic, and cultural resources and sacred sites. Because NEPA covers a wide range of resources, NEPA review is regularly undertaken in conjunction with other mandated environmental reviews, such as that required under the Endangered Species Act. When a proposed action affects National Register-eligible property, federal law explicitly allows agencies to simultaneously comply with NEPA and Section 106 by using the “substitution process“ *(36 C.F.R. 800.8)*. An agency must notify the Advisory Council on Historic Preservation and the appropriate SHPO before taking this approach.

(For more information on this process, see the federal government’s 2013 *Handbook for Integrating NEPA and Section 106.*)
NEPA does not specify a procedure for implementing its requirements; consequently, federal agencies must adopt their own procedures that fulfill NEPA’s review requirements. However, NEPA provides a basic framework for determining environmental impacts. As Figure 1 shows, the framework involves several levels of review that correspond with the scale of the action and its impacts, each level requiring a more in-depth evaluation of the action’s effects.

**Figure 1: NEPA Process**

**Review Levels.** The first level of NEPA review requires the agency to determine if an action qualifies for a categorical exclusion (CE). CEs represent a category of actions that an agency determines, based on experience, will not have a significant impact on the environment. But CE status is not absolute. An agency must always check whether “extraordinary circumstances” exist, especially when the proposed action affects matters such as cultural sites, endangered species, and wetlands. For example, an agency may have determined that a CE applies to the installation of bike paths in federal parks, but if the paths are planned in a park that was once a historic battlefield, then the agency may determine that extraordinary circumstances exist.
If the action does not qualify for a CE, the agency must prepare an environmental assessment (EA), which generally explains the action’s purpose, describes its environmental effects, identifies alternative actions, and lists the people and organizations the agency consulted to determine the action’s effects. The EA process concludes when the agency (1) determines the action will not have significant environmental effects and issues a “finding of no significant impact” or (2) determines it needs to prepare an environmental impact statement (EIS).

Federal law lays out more requirements for the EIS process than it does for the CE and EA processes. The steps in the EIS process are as follows:

1. The agency notifies the public that it intends to prepare an EIS by issuing a “Notice of Intent,” which also describes how it will conduct meetings, hearings, and listening sessions to gather information about the action’s potential effects (i.e., scoping).

2. The agency identifies potential cooperating agencies and consulting parties and analyzes the environmental issues relevant to the EIS.

3. As part of the draft EIS, the agency describes the rationale for the proposed action and provides information on alternatives to it, allowing interested parties to compare the environmental effects of various proposals.

4. When the agency completes the draft EIS, it must notify the public that it is available for comment.

5. The agency must consider all substantive comments and conduct further analysis as necessary to prepare a final EIS.

6. After the agency releases its final EIS and discloses its proposed action to the public, a public comment period commences.

7. The agency must wait at least 30 days before preparing a “record of decision” (ROD), which explains the agency’s decision, alternatives it considered, and its plans for mitigating potential environmental effects and monitoring those commitments. It is the agency’s final action prior to undertaking the activity. Until the agency issues the ROD, it cannot undertake an action that significantly affects the environment.

It is through the EIS process that agencies negotiate their proposed action with other agencies and the public. Like Section 106, NEPA does not prohibit agencies from taking an action that significantly affects the environment. Rather, NEPA is designed to force agencies to consider the impact of their proposed action, and alternatives to it, on the environment.
Section 106

Overview. The purpose of a Section 106 review is to ensure that federal agencies consider the value of preserving historic property as part of their planning and decision making processes. Specifically, agencies must use the Section 106 process to determine whether their projects, activities, or programs will affect a National Register-eligible property. Federal agencies are responsible for compliance with Section 106 if a project, activity, or program is undertaken (1) using federal funds or financial assistance or (2) pursuant to a federal permit, license, or approval.

As Figure 2 shows, the Section 106 process has four major steps, each requiring the agency to answer a specific “threshold question” about the proposed action’s effect on historic property. In determining how to answer these questions, the agency must consult with affected states’ SHPOs and other “consulting parties,” such as local governments, federally recognized tribes, and applicants.

Figure 2: Section 106 Process

Step 1: Start Process
- Is there an undertaking with potential to cause effects?
  - NO: Start Action
  - YES: Proceed to Step 2

Step 2: Identify Historic Properties
- Are National Register-eligible properties affected?
  - NO: Start Action
  - YES: Proceed to Step 3

Step 3: Assess Adverse Effects
- Are National Register-eligible properties adversely affected?
  - NO: Start Action
  - YES: Proceed to Step 4

Step 4: Resolve Adverse Effects
- Have adverse effects been resolved?
  - NO: Start Action
  - YES: Proceed to Step 1

Source: Advisory Council on Historic Preservation
If through the Section 106 process the agency determines that an action has the potential to affect a National Register-eligible property, then the agency must identify and evaluate cultural resources that may be present (e.g., through an archeological survey or historic research). If historic properties will be impacted by the proposed undertaking, the agency must (1) work with the applicable SHPO and consulting parties to determine how to avoid, minimize, or mitigate damage to the property and (2) give the public an opportunity to express their views on resolving adverse effects.

As Figure 2 above shows, Section 106 is not a preservation mandate. The purpose of the process is to limit the impact of agency actions on National Register-eligible property. When an adverse effect is found, there are three possible outcomes:

1. The agency agrees to an action that avoids creating the adverse effect.

2. If there are no feasible and prudent alternatives to the action, the agency, appropriate SHPO, and consulting parties enter into a memorandum of agreement identifying how the agency will minimize or mitigate the action’s adverse effects.

3. If the parties cannot agree, the agency obtains and considers an advisory opinion from the Advisory Council on Historic Preservation before undertaking the action.

**CONNECTICUT**

Connecticut agencies assess the impact of their actions on historic property through the Connecticut Environmental Policy Act (Policy Act), Connecticut’s equivalent to NEPA. The Policy Act requires state agencies to evaluate how their proposed actions, or the actions they fund, will affect the environment, including important historic, cultural, and natural aspects of Connecticut’s heritage.

A different law—the Connecticut Environmental Protection Act (Protection Act)—allows citizens to bring a court action or intervene in a proceeding to stop an action they believe will significantly harm the environment or lead to the unreasonable destruction of historic property, including actions that have been reviewed under the Policy Act.

**Policy Act**

Like NEPA, the Policy Act generally requires state agencies to identify whether state actions could adversely affect the environment, including “historic structures and landmarks,” which the act defines as any (1) building, structure, object, or site that is significant in American history, architecture, archaeology, and culture or (2) property used in connection with such property, including sacred and archaeological...
sites. As is the case under NEPA, if a state agency determines its actions could adversely affect the environment, the agency must consider whether to avoid or mitigate the effects.

Figure 3 below shows the steps state agencies must take to comply with the Policy Act.

As the above Figure 3 shows, the process for complying with the Policy Act is very similar to the NEPA process. First, an agency must determine if a proposed action could significantly affect the environment based on the information contained in its environmental classification documents, which are lists of typical agency actions that agencies prepare to help them identify whether a proposed action may have significant environmental impacts. Classification documents serve a purpose similar to the list of CEs prepared by agencies pursuant to NEPA.

If the action could significantly affect the environment, the agency begins a public scoping process in which it solicits comments from other agencies and the public about the proposed action’s environmental effects. The agency may hold a scoping meeting (hearing) at its discretion, but it must hold one if at least 25 people or an association with at least that number request one. The purpose of the scoping process is to determine whether the agency should prepare an environmental impact evaluation (EIE). (According to the state’s SHPO, if the proposed action could affect a historic property, SHPO will recommend that the agency follow a procedure similar to the Section 106 process to determine if proposed action will
affect National Register-eligible property. If it doesn’t, then SHPO makes a finding of “No Historic Properties Affected.” SHPO serves only as a consulting party; it cannot stop the agency from going forward with the project.)

If an agency determines that the proposed action may significantly impact the environment, it must proceed with an EIE, which is the state’s parallel to NEPA’s EIS. The process for drafting and circulating an EIE is very similar to the EIS process, in that the agency must give agencies and the public an opportunity to review the agency’s proposed action and alternatives to it. After the comment period, the agency must review and respond to substantive comments it received and, if necessary, conduct further environmental study or amend the EIE. The agency must also prepare a ROD, which must include information on whether it (1) intends to proceed with the proposed action and (2) has adopted all practicable means to avoid or minimize environmental harm.

The agency must submit the EIE and ROD to the Office of Policy and Management (OPM), which must assess whether these documents support the agency’s decision. If OPM decides they do, the agency may proceed with the action. If OPM decides otherwise, it may require the agency to revise and resubmit the EIE.

**Protection Act**

The Protection Act allows parties that would not otherwise have standing to oppose the unreasonable destruction of historic properties or actions that may cause harm to the environment to intervene to prevent such destruction or harm. The act gives parties standing to oppose the action even if it does not specifically harm them or affect their property.

The act grants this intervention right to any individual or legal entity, political subdivision of the state, state agency, or the attorney general, allowing them to file a Superior Court action seeking declaratory and equitable relief against any person or entity that proposes to unreasonably destroy historic structures and landmarks or harm the environment. The historic properties protected by the law are those properties (1) listed or under consideration for listing as individual units on the National Register of Historic Places or (2) that contribute to the historical significance of a district listed or under consideration for listing on the Register.

The law establishes a similar right of intervention in any administrative, licensing, or other proceeding, or judicial review of such proceedings, by pleading that the action will, or likely will, unreasonably destroy historic properties or harm the environment. Notably, unlike interventions aimed at preventing environmental
harm, a party intervening to prevent a historic property’s unreasonable destruction is liable for any costs if it cannot make a prima facie showing that the action will, or likely will, destroy the property.

According to the state’s SHPO, while private individuals and entities may intervene in a proceeding involving the unreasonable destruction of historic property, in practice, they often seek SHPO’s assistance. If SHPO believes the circumstances warrant intervention, it can refer the matter to the State Historic Preservation Council, which may then vote on whether to ask the Connecticut attorney general to intervene to prevent the unreasonable destruction of the historic property.

**CONNECTICUT HISTORIC PRESERVATION AGENCIES**

The law assigns historic preservation related powers, duties, and functions to the Department of Economic and Community Development (DECD), which executes them through Connecticut’s SHPO and two bodies that advise the office: the State Historic Preservation Council (Council), and State Historic Preservation Board (Board). Figure 4 shows the relationships between these entities.

**DECD**

DECD’s statutory duties include (1) recognizing, protecting, preserving, and promoting historic resources and (2) interpreting and presenting the state’s history and culture. DECD is also responsible for reviewing planned state and federal actions to determine their impact on historic structures and landmarks (CGS § 10-392 and § 10-409).

DECD inherited these duties from the Connecticut Commission on Culture and Tourism under a law that also eliminated the commission and transferred SHPO, the council, and the board to DECD (PA 11-48).
**SHPO**

SHPO is the successor of the Connecticut Historical Commission, which was formed in 1955. The commission was subsequently reconstituted as the Connecticut SHPO to implement the 1966 National Historic Preservation Act by advising federal agencies on actions that could affect historic property and performing other historic preservation duties federal law prescribes, including preparing historic preservation plans, surveying and inventorying historic property, and obtaining public comments about actions affecting historic property (36 C.F.R. § 61.4). Five full-time program managers work for SHPO.

(“SHPO” is often used interchangeably to refer to either the “State Historic Preservation Office” or the “State Historic Preservation Officer.” In practice, the responsibilities of the designated officer are fulfilled by the office as a whole, so a distinction is not required.)

**Board and Council**

Both the board and council help SHPO and DECD fulfil their mandates. Table 1 compares the composition and statutory duties of these entities.

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<th>Board</th>
<th>Council</th>
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<tr>
<td><strong>Statutory Authority</strong></td>
<td>CGS § 10-321q and 36 C.F.R. § 61.4</td>
<td>CGS § 10-409</td>
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<td><strong>Board Composition</strong></td>
<td>Federally mandated 10-member board appointed by SHPO for one-year terms</td>
<td>12-member gubernatorialy appointed council that must, by law, include the state historian and state archaeologist; members serve four-year terms</td>
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<td>Members represent a variety of historic preservation-related professional disciplines; each must meet professional standards established by federal law</td>
<td>Governor appoints chairperson</td>
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<td><strong>Mission</strong></td>
<td>Review and make recommendations regarding property nominated for listing on National Register of Historic Places; participate in reviews of nomination-related appeals</td>
<td>Authorized to ask the attorney general to intervene to prevent the unreasonable destruction of historic properties</td>
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<td>Advise SHPO regarding federal Historic Preservation Fund-supported activities (e.g., evaluating historic resources, implementing a state historic preservation plan, or special research projects)</td>
<td>Generally responsible for advising DECD on its statutory historic preservation-related functions, which include:</td>
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<td>• helping historic structure owners seek federal or other aid for historic preservation purposes</td>
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<td>• formulating standards for municipalities in the delineation of historic districts</td>
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<td>• making recommendations to the General Assembly regarding the preservation of state-owned historic structures and landmarks</td>
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FEDERAL GOVERNMENT RESOURCES

“NEPA and NHPA: Handbook for Integrating NEPA and Section 106 Reviews” (March 2013)


“The Citizen’s Guide to the National Environmental Policy Act” (December 2007)

STATE GOVERNMENT RESOURCES

“Connecticut Environmental Policy Act: An Environmental Permitting Fact Sheet” (2011)

“Connecticut Environmental Policy Act Overview” (2013)

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