

National Historic Preservation Act (sections 106, 110 & 402)

Agencies: All federal agencies; the Department of the Interior and the Advisory Council on Historic Preservation

Citation: [16 U.S.C. §§ 470a et seq.](#)

Enacted as: “An Act – To establish a program for the preservation of additional historic properties throughout the Nation, and for other purposes”, on October 15, 1966

Where Law Applies: The National Historic Preservation Act (NHPA) requires federal agencies to consider the effects of their undertakings on historic properties in the United States, including the outer continental shelf and the exclusive economic zone (section 106, 16 U.S.C. § 470f). Federal undertakings outside of the United States must take into account adverse effects on sites inscribed on the World Heritage List or on the foreign nation’s equivalent of the National Register for the purpose of avoiding or mitigating adverse effects (section 402, 16 U.S.C § 470a-2).

Summary:

The [National Historic Preservation Act of 1966](#) (NHPA or Act) (16 U.S.C. §§ 470a et seq.) provides for consideration of the value of a variety of [heritage properties or resources](#), including resources of federal, state, local, and international significance, and recognizes the ever-increasing growth of the Nation’s urban centers. Among other things, the NHPA authorizes the Secretary of the Interior to establish and promulgate regulations for the National Register of Historic Places, which is composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture (16 U.S.C. § 470a(1)(A)). In addition, the Secretary is also authorized to set forth National Historic Landmark designation criteria and promulgate regulations for nominating historic properties for inclusion in the World Heritage List, in accordance with the terms of the Convention concerning the Protection of the World Cultural and Natural Heritage (16 U.S.C. § 470a(2)). No property is to be nominated for inclusion in the World Heritage List until the Secretary determines that such property is of international significance (16 U.S.C. § 470A-1(b)).

The NHPA established the [Advisory Council on Historic Preservation](#) (ACHP), which is now an independent federal agency ([16 U.S.C. § 470i](#)). The Council is directed to advise the President and Congress on historic preservation matters, review the policies and programs of federal agencies to improve their consistency with the purposes of the Act, conduct training and educational programs, and encourage public interest in preservation (16 U.S.C. § 470j). Most importantly, the Act places the Council in the central role of administering and participating in the preservation review process established by section 106 (16 U.S.C. § 470). The center of federal agency responsibilities under the NHPA can be found in sections 106 and 110 of the Act.

Section 106 ([16 U.S.C. § 470f](#)) requires federal agencies having direct or indirect jurisdiction over a proposed federal or federally assisted “[undertaking](#)” to consider the effects of the undertaking on historic properties or resources that are either eligible for listing or are listed on

the National Register of Historic Places. The Council has issued regulations that set forth the “[Section 106 process](#)”, which explain how Federal agencies must take into account the effects of their actions on historic properties and how the Council will comment on those actions (16 U.S.C. § 470s).

Section 110 ([16 U.S.C. § 470h-2\(a\)](#)) mandates that federal agencies assume responsibility for the preservation of historic properties or resources that fall under the agency’s jurisdiction. Additionally, federal agencies must carry out their programs and projects in accordance with the purposes of the NHPA (16 U.S.C. § 470h-2(d)). Congress also added a new provision that directs federal agencies to withhold grants, licenses, approvals, or other assistance to applicants who intentionally, significantly, and adversely affect historic properties (16 U.S.C. § 470h-2(k)). This provision is designed to prevent applicants from destroying historic properties prior to seeking federal assistance in an effort to avoid the section 106 process.

Section 402 ([16 U.S.C § 470a-2](#)) requires that federal undertakings outside of the United States take into account adverse effects on sites inscribed on the World Heritage List or on the foreign nation’s equivalent of the National Register for the purpose of avoiding or mitigating adverse effects. Congress added this provision to the NHPA in 1980 to govern federal undertakings outside the United States. The seminal cases interpreting section 402 are the [Dugong v. Rumsfeld](#), and [Dugong v. Gates](#) cases.

Source: <http://www.achp.gov/book/sectionII.html> and http://www.gc.noaa.gov/gcil_seaward.html#nhpa, last visited July 3, 2013

Legislative History:

After World War II, the United States experienced a period of rapid socioeconomic change. The Federal government initiated several large-scale projects, including the construction of dams and reservoirs by the U.S. Army Corps of Engineers and the creation of the Interstate Highway System under the Eisenhower Administration. Established by the National Interstate and Defense Highways Act of 1956, the highway system was intended to enable rapid deployment of troops in the case of an attack. These projects resulted in “alarming damage to historic neighborhoods, buildings, structures, and archeological sites.”

In the 1960s, the Kennedy Administration created the Urban Renewal Program, which was focused on revitalizing city “slums”, sometimes at the expense of historic resources. During the Johnson Administration, First Lady Bird Johnson initiated a beautification program which led to the production of a comprehensive report, *With Heritage So Rich*. The report recommended creating a national historic preservation program, which ultimately led to Congress passing the National Historic Preservation Act in 1966.

Source: Thomas F. King, *Cultural Resource: Law and Practice*, 2d ed. (New York: Altamira Press, 2004), p. 20-21).

Cases:

- *Dugong v. Rumsfeld*, [2005 WL 522106 \(N.D. Cal. 2005\)](#).
 - Noting that unlike NEPA, the NHPA explicitly demonstrates Congress’s intent that the law apply abroad.
- *Okinawa Dugong v. Gates*, [543 F. Supp. 2d 1082 \(N.D. Cal. 2008\)](#).
 - Holding that the NHPA applies extraterritorially through section 402 and therefore requires the Department of Defense to consider the impacts of a proposed facility on the dugong, a species of large marine mammal related to manatees.

Law Articles:

- Danny Davis, [Department of Defense Must Comply with National Historic Preservation Act](#), National Sea Grant Law Center. (section 106)
 - Discusses the case, *Okinawa Dugong v. Rumsfeld* (2005), and the role of the NHPA in the decision.
- Emily Monteith, *Lost in Translation: Discerning the International Equivalent of the National Register of Historic Places*, 59 DEPAUL L. REV. 1017 (2010). (section 402)
 - This Comment focuses on the ambiguity in § 402 concerning what a foreign historic preservation law or system must consist of to qualify as “equivalent of the National Register.” According to the author, “the ambiguity of this “equivalency” standard may inhibit the initial identification of cultural resources that are entitled to the procedural protection of § 402, thereby reducing the likelihood that the resources in question will actually receive the benefits of § 402.” *Id.* The author argues that, at minimum, a country must maintain a register of culturally significant property. Additionally, the reach of § 402 should be limited to only properties that are actually designated for their cultural or historic significance. The author also notes the benefits of liberal extension of NHPA’s protections, recognizing that limiting the scope of protection to the types of properties that the National Register recognizes would undermine the internationalism of § 402, which is to allow foreign nations to determine what types of properties are relevant to their history and cultural heritage.
 - Provides a basis for an expansive interpretation of section 402.
- Rebecca S. Schoen, [Confronting the Appalachian Breakdown: Historic Preservation Law in Appalachia and the Potential Benefits of Historic Preservation for Rural Communities](#), 110 W. VA. L. REV. 1303, 1327 (2008). (section 106, 110)
 - This article, in part, discusses section 106 protective review and section 110 regarding federal stewardship of historic properties.
- Lauren Jensen Schoenbaum, [The Okinawa Dugong and the Creative Application of U.S. Extraterritorial Environmental Law](#), 44 TEX. INT’L L.J. (Spring 2009), 457-78. (section 402)
 - This comment discusses the specific threat to the dugong as a result of the planned U.S. naval base relocation. It also explores the domestic limitations of NEPA and Endangered Species Act (ESA) and why the plaintiffs in the *Dugong* cases were forced to rely on NHPA for U.S. involvement. It provides a detailed analysis of the court’s reasoning through an explanation of how the court applied the rule in its initial

- test, and also how the court determined an animal could be protected under an act better known for protecting physical landmarks. Finally, this comment shows how justification for the plaintiffs' victory leads to analysis of how this case flies in the face of established environmental policy not to expand U.S. protection extraterritorially and why courts should reconsider extending U.S. environmental law beyond its borders.
- Mitsuhiro A. Takahashi, [*Okinawa Dugong v. Rumsfeld: Extraterritorial Operation of the U.S. Military and Wildlife Protection Under the National Historic Preservation Act*](#), 28 U.C. DAVIS ENVTL. L. & POL'Y J. (Fall 2004), 182-97. (section 106)
 - This paper explores whether the National Historic Preservation Act can stop environmentally destructive acts of the U.S. military overseas. The discussion focuses on the U.S. military's planned development in Okinawa, Japan and the threats that this new development project poses to an endangered species, the Dugong. Section II provides the background for the current environmental conflict in Okinawa associated with the presence of the U.S. military. Section III describes the legal arguments raised by grassroots organizations to protect the Dugongs from the military base construction. Section IV analyzes the legal arguments for protecting the Dugongs under the NHPA. This paper concludes that NHPA can and should be applied extraterritorially to halt the U.S. military base construction in Okinawa, Japan.
 - Miyume Tanji, [*Court Rules in the "Okinawa Dugong" Case – Implications for U.S. Military Bases Overseas*](#), 40 Critical Asian Studies 475 (2008). (section 402)
 - This article discusses the background and trajectory of the lawsuit and the implications of this judgment. The outcome of this lawsuit is expected to improve processes of evaluating and managing environmental and other social impacts of U.S. military forces on hosting communities in Okinawa/Japan. The case also demonstrates the potential of transnational civil society actors to overcome a deficient democratic system within one state. The expanded theater of the anti-base Okinawans' protest brought them new allies while avoiding difficult and unnecessary conflict on the ground at home.

Other Relevant Sources:

- Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act, [63 Fed. Reg. 20496](#) (April 24, 1998) (discusses the implications of Section 402 when carrying out work that could impact foreign historic properties and connects the implementation of Section 402 to Executive Order 12114).
- [Executive Order 13287 "Preserve America"](#) - March 3, 2003 (President George W. Bush). This EO required federal agencies to recognize that federal historic properties are valuable assets that can support agency missions and also stimulate local economic development. Section 3 of the EO establishes an accountability system to gauge agency implementation of the mandates of the NHPA and the EO.
 - [The Preserve America Executive Order Report to the President](#)
- [Executive Order 13007 "Indian Sacred Sites"](#) – May 24, 1996 (President Clinton).

This EO directs Federal land-managing agencies to accommodate Native Americans' use of sacred sites for religious purposes and to avoid adversely affecting the physical integrity of sacred sites. Some sacred sites may be considered traditional cultural properties and, if older than 50 years, may be eligible for the National Register of Historic Places. Thus, compliance with the Executive Order may overlap with Section 106 and Section 110 of NHPA. Under the Executive Order, Federal agencies managing lands must implement procedures to carry out the directive's intent. Procedures must provide for reasonable notice where an agency's action may restrict ceremonial use of a sacred site or adversely affect its physical integrity. Federal agencies with land-managing responsibilities must provide the President with a report on implementation of Executive Order No. 13007 one year from its issuance.

Executive Order No. 13007 builds upon a 1994 Presidential Memorandum concerning government-to-government relations with Native American tribal governments. The Memorandum outlined principles Federal agencies must follow in interacting with federally recognized Native American tribes in deference to Native Americans' rights to self-governance. Specifically, Federal agencies are directed to consult with tribal governments prior to taking actions that affect federally recognized tribes and to ensure that Native American concerns receive consideration during the development of Federal projects and programs. The 1994 Memorandum amplified provisions in the 1992 amendments to NHPA enhancing the rights of Native Americans with regard to historic properties.

Source: <http://www.achp.gov/book/sectionVI.html#VI>, last visited Dec. 3, 2012

- [Executive Order 13006](#) “Locating Federal Facilities on Historic Properties in our Nation’s Central Cities” – May 21, 1996 (President Clinton).
This Executive Order reaffirms the Federal Government's commitment to historic preservation leadership as articulated in NHPA, calling upon Federal agencies to give, whenever economically prudent and operationally appropriate, first consideration to historic properties in historic districts when locating Federal facilities. If no such property is suitable, agencies must next consider other sites in historic districts, and then historic properties outside of historic districts. Any construction or rehabilitation undertaken by Federal agencies must be architecturally compatible with the surrounding historic properties.

The Executive Order also directs Federal agencies to reform regulations and procedures that impede location of Federal facilities in historic properties or districts and to seek the Council's assistance in this effort. Finally, Executive Order No. 13006 calls upon Federal agencies to seek partnerships with States, local governments, Indian tribes and private organizations with the goal of enhancing the Nation's preservation program.

Source: <http://www.achp.gov/book/sectionVI.html#VI>, last visited Dec. 3, 2012

- [Executive Order 11593](#) “Protection and Enhancement of the Cultural Environment” – May 15, 1971 (President Nixon).

This EO required federal agencies to administer cultural properties under their control and direct their policies, plans, and programs in such a way that federally owned sites, structures, and objects of historical, architectural, or archaeological significance were preserved, restored, and maintained. To achieve this goal, Federal agencies were required to locate, inventory, and nominate to the National Register of Historic Places all properties under their jurisdiction or control that appear to qualify for listing in the National Register. The courts have held that Executive Order No. 11593 obligates agencies to conduct adequate surveys to locate "any" and "all" sites of historic value, although this requirement applies only to federally owned or federally controlled properties.

Moreover, the Executive Order directed agencies to reconsider any plans to transfer, sell, demolish, or substantially alter any property determined to be eligible for the National Register and to afford the Council an opportunity to comment on any such proposal. Again, the requirement applied only to properties within Federal control or ownership. Finally, the Executive Order required agencies to record any listed property that may be substantially altered or demolished as a result of Federal action or assistance and to take necessary measures to provide for maintenance of and future planning for historic properties.

Source: <http://www.achp.gov/book/sectionVI.html#VI>, last visited July 3, 2013

- NOAA's General Council for International Law – [Seaward Limits of the National Historic Preservation Act](#)
- [Advisory Council on Historic Preservation](#): an independent Federal agency that administers the Section 106 process under the NHPA and that provides a forum for influencing Federal activities, programs, and policies as they affect historic resources.
- [Federal Historic Preservation Case Law, 1966-1996: Thirty Years of the National Historic Preservation Act, and Update 1996-2000](#)
- National Historic Preservation Act [Fact Sheet](#)
- Section 106 [Fact Sheet](#)
- The National Historic Preservation [Program](#)
- Protecting Historic Properties: [A Citizen's Guide to Section 106 Review](#)