

From: [Hicks, Keri -FS](#)
To: [Tu, Kenneth K -FS](#)
Cc: [Koeppel, Christopher - FS](#); [Stephens, Doug \(dstephens01@fs.fed.us\)](#); [Dale, Robin -FS](#); [King, James - FS](#)
Subject: FW: Does rule making trigger Section 106?
Date: Thursday, September 6, 2018 8:46:00 AM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)

Hi Ken, I mentioned in my Aug. 31 note to you that I had reached out to our liaison to the Advisory Council on Historic Preservation requesting his thoughts on whether rule making is an undertaking under Section 106 of the NHPA. Please see trailing notes. He concurs with our conclusion.

I wasn't able to make the extended core team call yesterday, so I want to make sure you understand we're not making a 'no potential to cause effects' determination per 36 CFR 800.3(a)(1). Instead, we've determined that rule making is not an undertaking per 36 CFR 800.3(a) and Section 106 review will occur at the forest plan amendment step or when projects in the areas newly open to development are proposed.



Keri Hicks, MA
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Caring for the land and serving people

From: Chris Daniel [mailto:cdaniel@achp.gov]
Sent: Wednesday, September 5, 2018 11:00 AM
To: Hicks, Keri -FS <khicks@fs.fed.us>
Cc: Stephens, Doug -FS <dstephens01@fs.fed.us>
Subject: RE: Does rule making trigger Section 106?

Keri,

Sorry for the delay in getting back to you on this, but I have an answer. Rulemaking does not typically trigger 106 because there isn't an undertaking yet to consult on. It is my understanding that the rule change would only allow the FS to approve/permit a new type of activity that previously was not allowed. Regardless, these new projects/activities/permits would constitute undertakings, which would be required to undergo Section 106 review "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license" just like any other

undertaking. This might be as part of the Forest Plan update if there is enough information to consult on at that time or it might be when the projects are proposed (it all depends on how detailed the plan update is). In addition, the Region has a PA that guides its 106 compliance. Overall, I think your position is correct.

However, the ACHP has been known to comment on rulemaking when it has the potential to affect the 106 process. This usually only happens when the rulemaking would alter or circumvent the 106 process. It does not appear that the FS' rulemaking is seeking to change the 106 process because all the projects that come out under this new rule would still need to be consulted on. As such, it is unlikely that our office would comment on the rule making effort.

I hope this helps.

Sincerely,

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From: Hicks, Keri -FS [<mailto:khicks@fs.fed.us>]
Sent: Monday, August 27, 2018 3:11 PM
To: Chris Daniel
Cc: Doug Stephens
Subject: RE: Does rule making trigger Section 106?

Yes, Section 106 would occur at some point in the future, if the rule making proceeds & the Forest Plan is amended. Potentially several years down the road, new on-the-ground projects will be proposed & at that point Section 106 review will occur.



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From: Chris Daniel [<mailto:cdaniel@achp.gov>]
Sent: Monday, August 27, 2018 11:04 AM
To: Hicks, Keri -FS <khicks@fs.fed.us>
Cc: Stephens, Doug -FS <dstephens01@fs.fed.us>
Subject: RE: Does rule making trigger Section 106?

Keri,

Will any new projects, which will now be allowed because of this rule change, would still need to be reviewed/permitted/funded by the USFS? If so, then I'd suspect that 106 would occur at that point.

I'll ask my OGC as well.

Sincerely,

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Check out our new [training overview](#) website for Section 106 classroom, webinar, and e-learning courses taught by experienced ACHP staff. Register **today** for the new one-day [Section 106 Basics classroom course](#) in Salt Lake City on October 10 or San Francisco on November 14!

From: Hicks, Keri -FS [<mailto:khicks@fs.fed.us>]
Sent: Thursday, August 23, 2018 3:50 PM
To: Chris Daniel
Cc: Doug Stephens
Subject: Does rule making trigger Section 106?

Hi Chris, I wanted to run this question by you. Alaska Region is working with the State of Alaska to develop a state specific roadless rule – [link to news release](#). There will be an EIS prepared, but no on the ground projects will be proposed as a result of this effort. In order for on the ground projects to be proposed, the Tongass NF will have to amend their forest plan. I chatted with Doug & it's our opinion that rule making doesn't trigger Section 106. I'm wondering what your thoughts are on this. I'm happy to talk about this on the phone if you'd like. Hope all is well. Thanks! Keri



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