

# Cultural Resources Management for USEPA Personnel



*Eastern Surplus Superfund Site and archaeological discovery  
Meddybemps, Maine*



An instruction manual for implementing  
**Section 106 of the  
National Historic Preservation Act**  
and the  
**Revised Regulations of the  
Advisory Council on Historic Preservation  
on Protection of Historic Properties**

July 2013

**COMPLIANCE WITH SECTION 106 OF THE NHPA:  
WORKING WITH THE REGULATIONS**

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**VIRTUAL RESOURCES**

- Listing of SHPOs by State: <http://www.ncshpo.org>
- Listing of THPOs by State: <http://www.nps.gov/history/thpo/>
- Regulations 36 CFR Part 800: <http://www.achp.gov/regs-rev04.pdf>
- Professional Qualification Standards: [http://www.nps.gov/history/local-law/arch\\_stnds\\_9.htm](http://www.nps.gov/history/local-law/arch_stnds_9.htm)
- NHPA and NEPA Integration Guidance:  
[http://www.achp.gov/docs/NEPA\\_NHPA\\_Section\\_106\\_Handbook\\_Mar2013.pdf](http://www.achp.gov/docs/NEPA_NHPA_Section_106_Handbook_Mar2013.pdf)

IT'S THE LAW



RULES & REGS REQUIRE IT



IT'S POLICY

IT'S A GOOD IDEA



## **UNIT #1: WHY SHOULD YOU CARE ABOUT HISTORICAL AND ARCHAEOLOGICAL RESOURCES?**

### **Reason 1 It's the law**

Page 3 of this manual lists many of the Federal Laws which require protection of historical and archaeological resources. As you can see, there are at least 30 different laws which contain provisions requiring protection of cultural resources. You should especially be familiar with the following:

**The American Antiquities Act of 1906** (16 USC 431-433) first codified the federal authority to protect cultural resources as well as natural resources. This Act found strong support in the east where there was intense interest in protection of properties linked to the colonial era and the revolutionary war. It was further bolstered by support from the west, where concern for protection of natural and scenic resources had led naturally to a desire to protect above ground archaeological sites and ruins. It prohibited disturbance of archaeological resources and objects of antiquity on federal lands without a permit. It also gave the President authority to designate national monuments.

**The Historic Sites, Buildings, Objects, and Antiquities Act of 1935** (16 USC 461-467). This Act declared that "it is a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States". It laid the groundwork for today's legislative protections for historic resources. This Act, commonly known as the Historic Sites Act, first established the role of the Secretary of the Interior and the National Park Service in historic preservation.

**The National Historic Preservation Act (NHPA) of 1966** as amended (16 USC 470-470t, 110)

- Section 101(a): Established the National Register of Historic Places.
- Section 201-212: Established the Advisory Council on Historic Preservation (ACHP) and authorized them to develop implementing regulations.
- Section 106: Established a required review process to protect resources which is now commonly known as **106 Review**.
- Section 110: Required all Federal Agencies to develop a Preservation Program and to designate a qualified official to be known as the agency's "preservation officer" with responsibility for coordinating agency activities under this Act.

**The Native American Graves Protection and Repatriation Act of 1990** (25 USC 3001-3013) specified ownership and control of Native American cultural items which are excavated or discovered on Federal or tribal lands. NHPA and NAGPRA are distinctly different laws and each imposes a different requirement on the agency. These two should not be confused. (See unit 6).

### **Reason 2 The regulations require it.**

If you look at page 4 of your manual, you will see at the top of the page a list of regulations which protect cultural resources. In particular, you should note the regulations of two parties:

- A. **The Advisory Council on Historic Preservation (ACHP)** or ("the Council") whose regulations, at 36 CFR Part 800 are titled "Protection of Historic Properties." These

specify the procedures for conducting a Section 106 review. They are the central focus of this course. 36 CFR Part 800 is attached to your course manual. You should read these regulations. There are 23 members on the Advisory Council; the EPA Administrator is an observer to the Council.

- B. **The Secretary of the Interior** who keeps the National Register of Historic Places and sets the standards for:
- Architectural and Engineering documentation (HABS/HAER)
  - Professional Qualifications
  - Rehabilitation
  - Treatment of Historic Properties

**Reason 3 It's policy.**

EO 11593 "Protection and Enhancement of the Cultural Environment" (1971)

Requires federal agencies to consult with the Advisory Council on Historic Preservation in development of procedures to preserve and enhance sites, structures, and objects of historical or archaeological importance.

EO 13007 "Indian Sacred Sites" (1996)

Requires federal agencies to (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.

EO 13287 "Preserve America" (2003)

This order establishes federal policy to provide leadership in preserving America's heritage by actively advancing the protection, enhancement, and contemporary use of the historic properties owned by the federal government. It also encourages agencies to seek partnerships with state, tribal, and local governments and the private sector to make more efficient and informed use of these resources for economic development and other recognized public benefits.

**Reason 4 It's a good idea.**

Why is it a good idea to protect historical and archaeological resources? Write down one or more reasons why you think it might be important.

Are there any reasons why you think it might **not** be a good idea to protect historical and archaeological resources?

## **Laws, Regulations, Standards, Guidelines, and Executive Orders Related to Cultural Resources**

This listing was prepared by the National Park Service. For more information on any of the items listed, visit the Park Service at <http://www.nps.gov/history/>.

### **Laws**

Abandoned Shipwreck Act of 1987 (PL 100-298; 43 U.S.C. 2101-2106)  
American Antiquities Act of 1906 (16 USC 431-433)  
American Indian Religious Freedom Act of 1978 (42 USC 1996 and 1996a)  
Archeological and Historic Preservation Act of 1974 (16 USC 469-469c)  
Archaeological Resources Protection Act of 1979, as amended (16 USC 470aa-mm)  
Bald Eagle Protection Act of 1940 (16 USC 668-668d)  
The Copyright Act of 1976 (17 USC 101 et seq. [1988 & Supp. V 1993])  
Disposal of Records (44 USC 3301 et seq.)  
Endangered Species Act of 1973, as amended (16 USC 1531-1543)  
Federal Property and Administrative Services Act of 1949, as amended (40 USC 483 [b])  
Federal Records Act of 1950, as amended (Records Management by Agencies, 44 USC 3101 et seq.)  
Freedom of Information Act of 1982 (5 USC 552)  
Historic Sites, Buildings, Objects, and Antiquities Act of 1935 (16 USC 461-467)  
Internal Revenue Code of 1986 (Qualified Conservation Contributions) (26 U.S.C.170[h])  
Internal Revenue Code of 1990 (Rehabilitation Credit) (26 USC 47)  
Lacey Act of 1900 (18 USC 43-44)  
Marine Mammal Protection Act of 1972 (16 USC 1361-1407)  
Migratory Bird Treaty Act of 1918 (16 USC 703-711)  
Mining in the National Parks Act of 1976 (Section 9) (16 USC 1908)  
Museum Properties Management Act of 1955(16 USC 18)  
National Environmental Policy Act of 1969 (42 USC 4321)  
National Historic Preservation Act of 1966, as amended (16 USC 470-470t, 110)  
National Park Service Organic Act of August 25, 1916 (16 USC 1-4, 22, 43)  
Native American Graves Protection and Repatriation Act of 1990 (25 USC 3001-3013)  
Outer Continental Shelf Lands Act (43 USC 1332 )  
Preservation, Arrangement, Duplication, Exhibition of Records (44 USC 2109)  
Privacy Act of 1974 (5 USC 552a)  
Public Buildings Cooperative Use Act of 1976 (40 USC 601a)  
Reservoir Salvage Act of 1960, as amended (16 USC 469-469c)  
Theft of Government Property (18 USC 641)  
1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (19 USC 2601)

## **Laws, Regulations, Standards, Guidelines, and Executive Orders Related to Cultural Resources (continued)**

### **Regulations**

Certifications Pursuant to the Tax Reform Act of 1976 (36 CFR 67.2)  
Curation of Federally-Owned and Administered Archeological Collections (36 CFR 79)  
Disposition of Federal Records (36 CFR 1228)  
Federal Records; General (36 CFR 1220)  
Freedom of Information Act Regulations (36 CFR 810)  
Historic Preservation Requirements of the Urban Development Action Grant Program (36 CFR 801)  
National Historic Landmarks Program (36 CFR 65)  
National Register of Historic Places (36 CFR 60) and Determinations of Eligibility for Inclusion in the National Register (36 CFR 63)  
Native American Graves Protection and Repatriation Act: Final Rule (43 CFR 10)  
Preservation of American Antiquities (43 CFR 3)  
Procedures for State, Tribal, and Local Government Historic Preservation Programs (36 CFR 61)  
Protection of Archeological Resources (43 CFR 7)  
Protection of Historic Properties (36 CFR 800)  
Research Specimens (36 CFR 2.5)

### **Standards and Guidelines**

Abandoned Shipwreck Act Guidelines  
Guidelines for Federal Agency Responsibilities, Under Section 110 of the NHPA  
Preparation of Environmental Impact Statements: Guidelines (40 CFR 1500)  
The Secretary of the Interior's Standards for Architectural and Engineering Documentation  
The Secretary of the Interior's Professional Qualification Standards (48 FR 22716, Sept. 1983)  
The Secretary of the Interior's Proposed Historic Preservation Professional Qualification Standards  
The Secretary of the Interior's Standards for Rehabilitation (36 CFR 67)  
The Secretary of the Interior's Standards for the Treatment of Historic Properties (36 CFR 68)

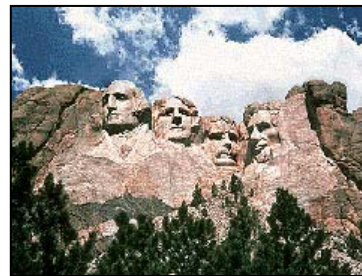
### **Executive Orders**

Executive Order 11593 Protection and Enhancement of the Cultural Environment (1971)  
Executive Order 13006 Locating Federal Facilities On Historic Properties In Our Nation's Central Cities (1996)  
Executive Order 13007 Indian Sacred Sites (1996)  
Executive Order 13287 Preserve America (2003)  
Executive Memorandum on Tribal Consultation (2009)





**DISTRICTS**



**SITES**



**BUILDINGS**



**STRUCTURES**



**AND OBJECTS**

**ON OR ELIGIBLE FOR LISTING IN THE NATIONAL REGISTER OF HISTORIC PLACES.**

## UNIT #2 WHAT ARE “CULTURAL RESOURCES”?

Historic and Archaeological Resources include districts, sites, buildings, structures, and objects listed in or eligible for listing in the National Register of Historic Places. These may also be listed in the Historic American Buildings Survey (HABS) or Historic American Engineering Record (HAER) and/or may be National Historic Landmarks.

**Sites:** the locations at which events of historical significance have occurred. Examples include a battlefield site (Gettysburg), building ruins, campsite, the place where a treaty was signed (Appomattox Courthouse), first landing point (Plymouth Rock), first point of settlement (Jamestown), and prehistoric and historic archaeological sites.

**Districts:** areas which include numerous historic structures, sites, buildings and objects as well as “contributing elements,” e.g. Capitol District with buildings, monuments, memorials, museums (and their contents) parks, streets, roads, fences railings, lighting, lawns, etc; Mill District with mill(s), dam and reservoir, raceways, canals, rail spurs, mill housing, church, school, etc. “Contributing Elements” may be as simple as a piece of lawn or a fence, or as complex as the overall setting or context of a resource including noise or air quality.

**Buildings:** structures built principally to accommodate human use such as barns, forts, hotels, houses, or industrial facilities that are important either because they are:

- 1) architecturally valuable as prime examples of building types, (like a Shaker barn or a Greek Revival public building, or a Federal Period house, etc.)
- 2) or associated with important historical figures or events (as Monticello is associated with Thomas Jefferson and Mount Vernon with George Washington. Appomattox Court House is associated with the end of the Civil War. Sutter’s Mill is associated with the 49'ers Gold Rush, etc.)

**Other Structures:** constructed for utilitarian purposes, such as barns, sheds, outhouses, salt works, mines, quarries, or kilns.

**Objects:** examples include stones covered with Petroglyphs, the sword of Lafayette, an Atlatl, an artillery piece, a stone drill, or a plaque.

**Traditional cultural properties** (such as dance grounds, vistas/viewsheds, waterways etc.) are also cultural properties which may be subject to protection.



**WHO DECIDES WHAT IS AND ISN'T A CULTURAL  
"RESOURCE"?**

- You
- Your Branch Chief or Division Head
- The State Historic Preservation Officer
- The Tribal Historic Preservation Officer
- The Secretary of the Department of the Interior
- The Public



**WHAT ARE THE CRITERIA OF ELIGIBILITY?**

- Associated with Significant Events
- Associated with Lives of Significant Persons
- Embodying Distinctive Characteristics
- Containing Important Prehistoric or Historic Information

## **UNIT #3      EPA's ACTIONS: AFFECTS TO CULTURAL RESOURCES**

### **Who decides what is and isn't a resource? The Key Players**

- EPA Responsible Official (Usually the Division head or Branch Chief) - as advised by EPA cultural resource personnel, the project manager or program manager, the program or project staff and their consultant archaeologists and historians.
- State Historic Preservation Officer (SHPO) - Center of coordination efforts and the first point of contact for EPA. The SHPO is responsible for developing a "Comprehensive Statewide Historic Preservation Plan" and implementing it.
- Tribal Historic Preservation Officer (THPO) - For federally recognized tribes with a delegated program, otherwise the tribe may provide a representative under the consultation process.
- Secretary of the Department of the Interior - The Secretary is the keeper of the National Register and also develops criteria of eligibility for the register

### **The Criteria Used to Determine Register Eligibility      (36 CFR 60.4)**

"The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and:

- (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or
- (b) that are associated with the lives of persons significant in our past; or
- (c) that 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) that have yielded, or may be likely to yield, information important in prehistory or history."

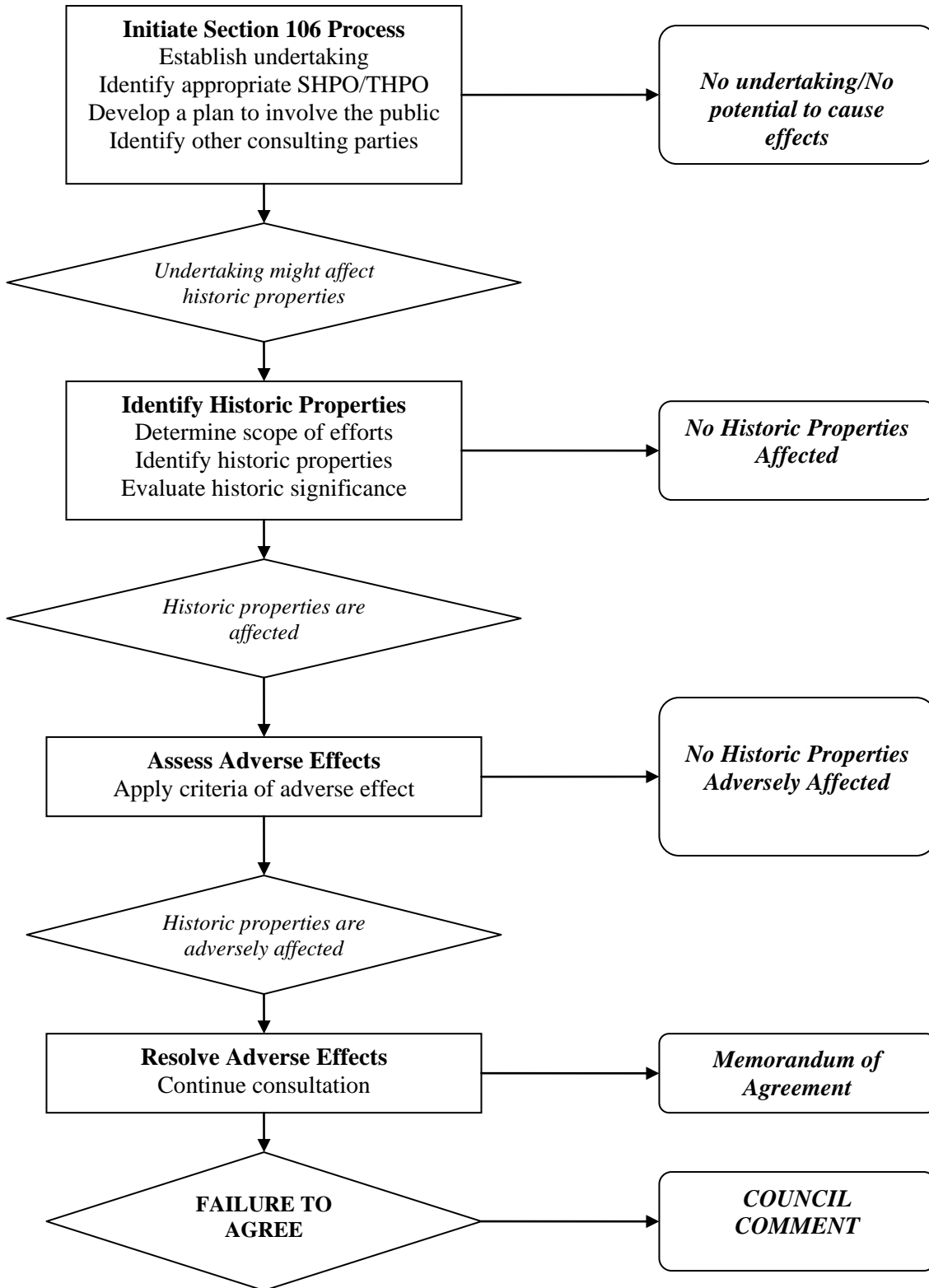
Note that this definition is very broad and that it allows for listing of a wide range of different resource types anywhere in the nation. What may appear to you to be empty field, hillside or desert may actually be a major prehistoric site of significant archaeological importance. What might look to the casual observer like decaying junk might actually be an important remnant of a bygone industrial age.

There are also a number of qualifiers on these criteria. The Council calls them "Criteria considerations." Ordinarily cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years shall not be considered eligible for the National Register.

However, such properties will qualify if they are integral parts of districts that do meet the criteria or if they fall within the following categories:

- (a) A religious property deriving primary significance from architectural or artistic distinction or historical importance; or
- (b) A building or structure removed from its original location but which is significant primarily for architectural value, or which is the surviving structure most importantly associated with a historic person or event; or
- (c) A birthplace or grave of a historical figure of outstanding importance if there is no appropriate site or building directly associated with his<her> productive life.
- (d) A cemetery which derives its primary significance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events; or
- (e) A reconstructed building when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan, and when no other building or structure with the same association has survived; or
- (f) A property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance; or
- (g) A property achieving significance within the past 50 years if it is of exceptional importance.”

**The Section 106 Process Flow Chart  
(adapted from the ACHP)**





# UNIT FOUR      MAKING THE 106 PROCESS WORK FOR YOU

## FOUR STEPS TO SUCCESS:

I    INITIATE THE PROCESS

II    IDENTIFY HISTORIC PROPERTIES

III    ASSESS ADVERSE EFFECTS

IV    RESOLVE ADVERSE EFFECTS





## UNIT #4 MAKING THE 106 PROCESS WORK FOR YOU: FOUR STEPS TO SUCCESS

Handout: The Section 106 Process: Flow Chart, ACHP February 2001 (attached)

### STEP I: INITIATE THE PROCESS

**Question: Do you have an “undertaking” which might affect historic properties?**

First, you must determine if you have an “undertaking” as defined by the National Historic Preservation Act. The 106 process should be coordinated with other reviews (e.g. NEPA)

The ACHP’s regulations define “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.” (36 CFR 800.16(y))

Then, identify consulting parties. Consulting parties include:

The appropriate SHPO and/or THPO (listing available at [www.achp.gov](http://www.achp.gov))

Other consulting parties identified by the SHPO/THPO

Members of the general public - outreach should reflect the:

- nature and complexity of the undertaking
- nature and complexity of the impacts
- extent of Federal involvement in the undertaking
- likely public interest and
- confidentiality concerns

Then consult with the identified parties to:

- include the parties in the Agency planning process
- establish the nature of the undertaking
- establish the nature of the undertaking’s effects.

### **Two possible answers:**

NO! This is not an undertaking and/or this has no potential to cause effects.

YES! This is an undertaking which might affect Historic Properties - GO TO STEP II

## **STEP II IDENTIFY HISTORIC PROPERTIES**

**The Question: Are there historic properties in the project area which might be affected by the undertaking?**

In this step, you will work with the SHPO/THPO to determine the Area of Potential Effect (APE), identify historical properties, identify properties of religious and cultural significance to recognized tribes and make a determination on properties and the potential effects.

In general, the steps you will follow in the process of identifying historic properties are:

1. Establish areas(s) of potential effect
2. Determine whether the area has been surveyed or otherwise inspected to identify historic properties
3. Determine whether the area is "large" or "small"
4. Determine whether the available information provides a reliable basis for decision making
5. Determine whether the area should be subjected to intensive survey, and whether such a
6. survey can be carried out within a reasonable period of time and at reasonable cost
7. Determine whether an alternative to intensive survey is appropriate
8. Decide how to proceed with Section 106 review

### **Survey of historic properties**

Few Agency employees have the necessary expertise to complete the research needed to evaluate the presence of, or significance of cultural resources. Therefore it is frequently necessary to work with consultant archaeologists and historians. Archaeologists and historians may be contracted directly by the Agency, but more commonly are consultants to the applicant or project proponent.

Much of the work that needs to be done is research. The resource identification process is divided into two progressive levels of survey:

Stage IA - Documentation Review and Strategy Development, and

Stage IB - Site Recognition Survey.

In certain instances, the limited scope of the project or its limited potential for effect on cultural resources may permit the combination of the two levels of survey.

### **Stage IA - Documentation Review and Strategy development**

The applicant, through the assistance of a qualified professional, carries out the Stage IA survey to identify documented cultural resources and areas of cultural sensitivity in the project area. The information from the survey is used to screen and develop project alternatives in order to minimize direct and indirect impacts on historic and cultural resources. At a minimum, the survey should include the following:

- A broad-based literature search,
- Analysis of documentation obtained from the SHPO, state archaeologist, historical and

archaeological societies, libraries, museums and universities (at the local, state, and regional levels),

- Analysis of published accounts, models of settlement systems and geomorphology to predict the relative potential of the project area for the existence of documented resources, and
- An initial field reconnaissance for familiarization with the planning area.

The qualified professional will prepare a report of the survey, including recommendations for whether or not additional investigation is necessary. The EPA, in consultation with the state reviewing agency, then evaluates the report and its recommendations for adequacy.

If additional work is recommended, the report should contain an explicit research strategy for the field survey (Stage IB-Site Recognition Survey). The scope of the Stage IB will include the sampling of areas of varying cultural sensitivity identified in the Stage IA survey.

### **Stage IB - Site Recognition Survey**

The survey area for the Stage IB survey will be the area of direct impact of the proposed alternative(s) and will be based on the research design. This survey will determine the presence or absence of important cultural resources that could be affected by the proposed project and will target those resources which would require further investigation. Subsurface testing to identify undocumented archaeological sites will generally be necessary. Survey methodology and field activities will be documented in a report prepared by the qualified professional detailing specific recommendations for further action in relation to the proposed alternatives.

EPA, in consultation with the state reviewing agency, will evaluate all findings and recommendations for adequacy and assess, in conjunction with facility planning documents, the potential of project impacts. If potential impacts on an identified resource cannot be avoided or insufficient data on the resource is available, the state/EPA will advise of the need to conduct a Stage II - Site Definition and Evaluation Survey. The state/EPA will evaluate the design and scope of the proposed Stage II survey for its adequacy,

### **Stage II - Site Definition and Evaluation Survey**

This survey is carried out by the applicant on identified cultural resources that may be subject to impact. The survey is undertaken when direct effects on a resource cannot be avoided by reasonable modification of the undertaking or when information (extent, depth, significance) about a resource is insufficient to assess avoidance/preservation alternatives. At a minimum, this survey will provide data to allow for an assessment of the resource's National Register eligibility (boundaries, integrity and significance) according to the "Criteria for Evaluation" in 36 CFR 60.6. EPA and the state, in consultation with the SHPO, will use this data to:

- Avoid impacts to the cultural resource,
- Assess the need to request a determination of eligibility from the Keeper of the National Register (36 CFR 63),

- Assess the proposed impact on the resource, and
- Develop a proposal for appropriate mitigation should the cultural resource be determined eligible for listing in the National Register and avoidance is not practical.

### **Stage III - Data recovery.**

Data recovery is sometimes appropriate to resolve adverse effects where disturbances are unavoidable (i.e. certain archaeological sites). Data recovery can take the form of archaeological excavation, recordation of architectural elements, or documentation of configurations of contributing elements. See unit seven for guidance on the use of Data Recovery as a means to resolve adverse effects.

### **National Register Eligibility Process**

When a resource appears to meet the criteria for listing on the National Register, the EPA, in consultation with the SHPO, will apply the “Criteria for Evaluation” to the resource. EPA, with assistance from the state agency, will prepare appropriate documentation according to DOI guidelines for eligibility. As part of the documentation, EPA will also solicit a written opinion from the SHPO concerning the resource eligibility. If both the EPA and SHPO agree on the eligibility, then the resource is considered eligible by “Consensus Determination”.

If a question exists, or if EPA and the SHPO cannot agree on eligibility, the documentation can be transmitted to the Keeper of the National Register for an official determination of eligibility pursuant to 36 CFR 63.3.

### **The answers:**

**NO!** “**No historic properties affected**” either because there are no historic properties in the APE or because there are historic properties, but the undertaking won’t affect them.

If so, provide documentation to the SHPO/THPO, notify consulting parties, and make documentation available to the public. SHPO/THPO and Advisory Council have 30 days to file an objection. If none filed within 30 days,

106 COORDINATION COMPLETED

**YES! Historic properties affected PROCEED TO STEP III**

## STEP III DETERMINE EFFECT

In this step, you work with the SHPO/THPO and the public to apply the criteria of adverse effect and determine if the effect of your undertaking on historic properties will be adverse.

**The question: Will the affect on Historic Properties be adverse?**

### **Criteria are Defined by §800.5(a)(1):**

**“(1) Criteria of adverse effect.** An adverse effect is found 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. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. 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.”

Who decides if an effect is adverse? The same parties who made the decision regarding what is and isn't a resource in Unit Three. These parties must be consulted regarding the effect. Usually, the guidance of the SHPO/THPO is instrumental in the Agency decision regarding effects although the Council may step in, especially to resolve disputes regarding resources and effects.

Review the list of examples of adverse effects below (taken from §800.5(a)(2)). Can you offer specific examples of effects which result from your projects or programs?

### **“(2) Examples of adverse effects.**

Adverse effects on historic properties include, but are not limited to:

- (i) Physical destruction of or damage to all or part of the property;
- (ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation and provision of handicapped access, that is not consistent with the Secretary's Standards for the Treatment of Historic Properties (36 CFR part 68) and applicable guidelines;
- (iii) Removal of the property from its historic location;
- (iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;
- (v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;
- (vi) 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
- (vii) 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. “

**The criteria of adverse effect are applied in consultation with consulting parties.**

You must:

- consult with the SHPO/THPO
- consult with any tribe regarding religious and cultural significance
- consider views provided by consulting parties and the public.

Phased application is allowed for corridors, large areas, and cases where access to properties is restricted.

**Two possible answers:**

**NO! No Historic Properties Adversely Affected**

You must provide documentation and findings to all consulting parties and to the public. The SHPO/THPO has 30 days to file an objection. If the SHPO/THPO does not respond in 30 days, then that is the same as agreement.

The Council will review only if there is a disagreement or by specific Council request. The Council has 15 days to review. If there is no Council response within 15 days that is the same as agreement

106 COORDINATION COMPLETED

**YES! Historic Properties Adversely Affected**

PROCEED TO STEP IV

**STEP IV RESOLVE ADVERSE EFFECTS**

**Question: Can we come to an agreement which will allow us to proceed in a manner which will minimize and/or mitigate adverse effects?**

A. Send notification to the Council - ACHP must be notified for **all** adverse effect findings. ACHP can be notified by sending them the same documentation package as was sent to consulting parties. The notification must include a description of:

- the undertaking and the APE
  - identification steps and affected historic properties
  - effects and applicability of the criteria of adverse effect
  - views of consulting parties and the public.

It is soon the

important that the Council be notified of **every** finding of adverse effect as as the finding is complete. **The MOA should NOT be the first notice that Council receives of an undertaking with adverse effects.**

B. Invite

the Council to participate if:  
a National Historic Landmark is adversely affected,  
a Programmatic Agreement is proposed, or  
The agency wants Council involvement.

C. minimize

Consider alternatives to avoid effects and alternatives to mitigate or effects to historic properties.

Alternatives to **avoid** potential effects to historic properties might include:  
no action alternative;  
shift in alignment;  
relocation to different area;  
design or process modification;  
non-structural solutions; or  
other.

Alternatives to **mitigate or minimize** potential effects might include:  
shift in alignment;  
design or process modification;  
non-structural solutions;  
data recovery;  
**HABS/HAER\*** documentation; or  
other.

\* Historic American Building Survey/Historic American Engineering Record

**Answers:**

**YES!** Negotiate stipulations, prepare MOA, get signatures and approvals  
**SECTION 106 IS COMPLETE. SEE UNIT 5 - “AGREEMENT DOCUMENTS”**

**NO!** Council **must** be invited to participate. Council may either consult, or comment  
**SEE UNIT 6A - “WORKING WITH THE ADVISORY COUNCIL”**

**A. WHAT ARE AGREEMENT DOCUMENTS?**

**NAE s/ MOAs / PAs**

**B. HOW IS THE DECISION TO PREPARE A DOCUMENT REACHED?**

**C. WHO PREPARES THE DOCUMENT?**

**WHEREAS**

**NOW**

**THEREFORE**

**D. WHO SIGNS THE DOCUMENT?**



**E. WHY DO WE NEED AGR. DOCUMENTS?**

**F. CAN THEY BE REVISED?**

**G. WHAT IF THE TERMS AREN'T CARRIED OUT?**



## UNIT 5      AGREEMENT DOCUMENTS

### A. What are agreement documents?

Agreement documents are the formal written evidence that the Agency has complied with the 106 process. Decision documents record the findings of the 106 process, formalize the agreement between consulting parties, and provide a written record of the measures to be undertaken to resolve adverse effects.

The term "agreement document" includes three types of documents that conclude the process of review under Section 106. Each type represents an agreement between an agency and a SHPO, or an agreement among an agency, the SHPO, the Council, and sometimes other parties.

**"No Adverse Effect" (NAE)** determinations are made by agencies in consultation with SHPOs under 36 CFR §800.5(b). Often in making such a determination, an agency, an SHPO, and sometimes other parties agree on project changes or conditions to prevent adverse effects to historic properties.

**Memoranda of Agreement (MOA)** are executed under 36 CFR §800.6(c). In an MOA, an agency, a SHPO, the Council, and sometimes other parties agree on measures to avoid, reduce, or mitigate adverse effects on historic properties, or to accept each effect in the public interest.

**Programmatic Agreements (PA)** are executed under 36 CFR §800.14(b). In a PA, an agency, the Council, and other parties agree on a process for considering historic properties with respect to an entire agency program.

### B. How is the decision to prepare an agreement document reached?

The process leading to an agreement document depends on the nature of the undertaking and its effects.

**NAE determinations.** Under the regulations, the responsible Federal agency official applies the Council's Criteria of Effect and Adverse Effect [36 CFR §800.5(a)] to historic properties within an undertaking's ts, in consultation with the SHPO. If the fact that the undertaking will have no adverse effect is obvious, reaching the determination should be easy and involve only simple, routine consultation between the agency and SHPO. If there are questions to be resolved about the nature of the undertaking's effects, however, substantial consultation may go into reaching the determination, involving onsite reviews, study of documents, weighing of alternatives, perhaps making alterations in project plans, and the development of conditions which, once agreed upon, will ensure, within reason, that adverse effects will be avoided.

**MOAs.** If the agency's application of the Criteria of Adverse Effect indicates that the undertaking will have adverse effects, achieving agreement normally requires more

formal consultation, often involving a wider range of parties than is typical of an NAE determination. Still, however, the nature of the consultation process is determined by the extent of the undertaking and its effects. It may be obvious that there is no reasonable alternative to the action causing adverse effects, and the measures that can be adopted to reduce or mitigate such adverse effects may be equally obvious. In such a case an MOA can usually be developed promptly. Where an undertaking presents more complex issues, consultation involves careful discussion of the undertaking's various effects, examination of alternatives to avoid or mitigate those effects, and a careful weighing of the public interest, often in the context of public meetings, onsite inspections, the conduct of appropriate studies, and the participation of diverse groups of people. The result is usually an MOA representing the best compromise solution agreeable to all the consulting parties.

**PAs.** A PA is usually developed because an agency finds that its actions under a given program, within a large and complex project, or with respect to a given class of undertakings will require many individual requests for Council comment under 36 CFR §§800.4 through 800.6, and that making such requests will be inefficient or otherwise inconsistent with effective program management. Under such circumstances the agency suggests to the Council, or to a SHPO, that a PA be developed prescribing a review process tailored to its particular program, to stand in place of the normal Section 106 review process. Alternatively, the Council, a SHPO, or some other party may suggest to an agency that a PA is appropriate, and the agency may agree. The parties then notify the potentially concerned public and consult to reach agreement. The responsible agency and the Council are always consulting parties on a PA, together with one or more SHPOs or the National Conference of SHPOs (NCSHPO). Other parties participate in consultation and sign the PA depending on the nature of the program and its effects. The process of consultation toward a PA under 36 CFR §800.14(b) is extremely flexible; to accommodate the diversity of Federal programs, the regulations avoid prescribing a particular procedure. Once agreement is reached, the consulting parties execute the PA, which then goes into effect, superseding the terms of 36 CFR §§800.3 through 800.6 with respect to actions under the program the PA covers.

### **C. Who prepares the agreement document?**

**NAE determinations.** Under 36 CFR §800.5(b), the Federal agency official is responsible for making an NAE determination, and therefore is responsible for documenting it. A document memorializing an agreement on which an NAE determination is based may, however, include specific conditions recommended by another party (e.g., a SHPO).

**MOAs.** The regulations at 36 CFR §800.6(b)(1) permit agencies and SHPOs to resolve adverse effects without Council participation, provided the responsible agency notifies the Council when it determines a finding of adverse effect for a project. This notification affords the Council the opportunity to participate if it chooses. MOAs developed without Council participation are submitted by the agency to the Council for review; acceptance of such an MOA by the Council concludes the Section 106 review process. Such MOAs are commonly called two-party MOAs because a minimum of two parties (the agency official and the SHPO) sign them before they are sent to the Council. Other parties may sign as concurring parties.

The regulations also permit the Council to participate formally in the consultation process (36 CFR §800.6(b)(2)). In such an event, the Council is a formal signatory to the MOA along with the agency official, the SHPO, and any other parties. Such an MOA is commonly referred to as a three-party MOA because it has a minimum of three signatories (agency official, SHPO, and Council). Three-party MOAs are often prepared by the Council, but can be prepared by any of the other consulting parties, once the parties have reached agreement on its content.

The Council can also participate informally in the consultation process, so an agency official or SHPO can ask the Council to provide a draft two-party MOA that the consulting parties can then finalize and send to the Council for review and acceptance. The Council will help develop such drafts to the extent that time and personnel limitations permit.

**PAs.** PAs are usually prepared in final form by the Council, though they are often prepared in draft by an agency official or an SHPO or group of SHPOs, or by others. The Council must be consulted in the development of a PA. [36 CFR §800.14(b)] Certain kinds of frequently used PAs, such as those covering the programs of local governments using Community Development Block Grants (CDBG) and related program funds, are commonly prepared by SHPOs or local governments with minimum Council participation, however.

### **D. Who signs the agreement document?**

Three-party MOAs are created as the result of consultation under 36 CFR §800.6(b)(2), in which the Council elects to participate in consultation, or is invited to consult by the agency or SHPO.

In some cases, two-party MOAs (36 CFR §800.6(b)(1)) are most appropriate. The Council must be notified when an adverse effect on historic properties is found and consultation begins toward a two-party agreement. Upon receiving such notification, or upon otherwise learning about the undertaking, the Council may elect to participate formally in the consultation.

**NAE determinations.** NAE determinations are usually memorialized in letters signed by the relevant agency official, sometimes with attached conditions or exhibits, and are sent to the SHPO with appropriate supporting documentation. SHPOs may concur in NAE determinations in the same letter that is signed by the agency official, or in a separate letter. Other parties may concur in NAE determinations. Unless an agency has legal authority to delegate its Section 106 responsibilities to another party, the agency official's signature on the NAE document is mandatory.

**MOAs.** At minimum, two parties sign every MOA. Normally the two parties are the Federal agency official responsible for the undertaking and the SHPO. If the SHPO declines to sign the MOA, or fails to respond within 30 days after receiving an agency request for his or her signature, the agency official can ask the Council to sign the MOA in lieu of the SHPO. [36 CFR §800.6(b)(1)(v)]

When a two-party MOA is accepted by the Council, the Council's authorized representative signs it on an acceptance line. The Council's representative signs three-party MOAs in the same manner as the agency officials and SHPOs. A Federal agency official may only delegate MOA signature authority to a representative of a State or local government if the agency has legal authority to delegate its Section 106 responsibilities. Where multiple Federal agencies are involved in an undertaking, all may sign the MOA, or signature authority may be formally delegated to a lead agency.

Where the undertaking will affect the lands of an Indian tribe, the tribe must be invited to concur in any agreement document. With respect to two-party and three-party MOAs, other parties who have participated in consultation may be invited to concur. For example a local preservation organization may be invited to concur in an MOA if the agency and SHPO (and the Council, if it is a participant) agree to do so.

**PAs.** PAs are signed by the representative of the responsible agency or local government and by the Council. They are also usually signed by an SHPO, several SHPOs, or the president of NCSHPO, depending on the nature of the program they cover. Other parties may concur in a PA.

## **E. Why do we need agreement documents?**

Execution and implementation of an agreement document, whether it be an NAE determination, an MOA, or a PA, evidences a Federal agency's fulfillment of its responsibilities under Section 106. In other words, agreement documents indicate both that the agency has taken the effects of the undertaking into account, and that the agency has afforded the Council a reasonable opportunity to comment. An agreement document obligates the parties to carry out its terms. If the terms cannot be carried out the document must be amended, or further comments of the

Council must be sought in accordance with the regulations.

#### **F. Can agreement documents be revised?**

Agreement documents are normally revised if the nature of the undertaking changes. For example, the locations where effects will occur or the nature of those effects may be altered, or unanticipated effects may be identified after the agreement document is concluded. Revisions also are made if the measures originally agreed upon become insufficient to address the preservation problems involved, or if they are unduly expensive or otherwise infeasible. Revisions are sometimes made to accommodate a change in approach occasioned by professional concerns, such as a change in the research questions addressed in an archeological data recovery program. Finally, revisions may be necessary if a considerable amount of time passes between execution of the agreement document and implementation of its terms, during which time concepts of historic significance and how to deal with various kinds of historic properties may change.

If after executing an MOA an agency determines that it will be unable to carry out the MOA's terms, the agency should request an amendment in accordance with 36 CFR §800.6(c)(7). Any other party to an agreement document may request an amendment--for example, a party may request an amendment if that party believes a change has occurred in the undertaking, which creates new preservation problems that must be addressed. Amendments are negotiated in the same manner as original agreements. Although the regulations do not specify a process for amending agreements associated with NAE determinations, or for amending PAs, these documents too should be revised, where necessary, through consultation among the original participants.

#### **G. What if an agreement document's terms are not carried out?**

Since implementation of an agreement document evidences fulfillment of an agency's Section 106 responsibilities, it follows that failure to implement its terms evidences that the agency's Section 106 responsibilities have not been fulfilled.

**NAE determinations.** Agencies are required by the regulations to carry out the measures they agree to in reaching NAE determinations (36 CFR §800.5(d)(1)). If an agency fails to do so, it has not complied with Section 106 and must resubmit the undertaking for review.

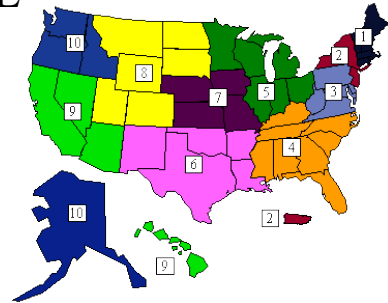
**MOAs.** Failure to carry out an MOA's terms requires that the agency resubmit the undertaking to which the MOA pertains for Council comment, by preparing a new MOA or amending the existing MOA. If consultation to prepare a new MOA or amendments proves unproductive, the agency is required to seek Council comment (36 CFR §800.6(c)(8)).

**PAs.** Failure to carry out a PA's terms requires that the responsible agency comply with the regulations on a case-by-case basis with respect to individual undertakings that would otherwise be covered by the PA (36 CFR §800.14(b)(2)(v)).



A. THE ADVISORY COUNCIL

B. THE SHPO/THPO



C. NATIVE AMERICAN TRIBES AND  
NATIVE HAWAIIAN ORGANIZATIONS



D. THE PUBLIC



## **UNIT 6      WORKING WITH CONSULTING PARTIES**

### **A. Working with the Advisory Council on Historic Preservation**

#### 1.      Criteria for Council Involvement

The Council is likely to get involved if the project involves:

- Substantial impacts on important properties,
- Important questions of policy or interpretation,
- Procedural problems, or
- Issues of concern to Native Americans.

The regulations do not specify the conditions under which the Council should be invited to participate, except that 36 CFR § 800.10 requires that the Council participate in consultation concerning direct and adverse effects on National Historic Landmarks. The Council should be invited to participate when the undertaking under review is complicated or potentially controversial, when there is substantial public interest in the historic preservation issues involved, when the undertaking presents issues about which Council policy is not established, or when the national perspective the Council can bring to bear on preservation issues is required or may be useful. Appendix A to 36 CFR Part 800 includes the Council criteria for involvement with individual Section 106 cases.

The Council can be consulted informally during a process which otherwise proceeds as a two-party consultation.

#### 2.      National Landmarks

If there are adverse impacts on National Landmarks the Council **must** be invited to consult and so must the Secretary of the Interior. 36 CFR § 800.10 requires that the Council participate in consultation concerning direct and adverse effects on National Historic Landmarks.

#### 3.      Council Comments:

- must be made within 45 days (unless otherwise agreed)
- are sent to the Agency Head (with copies to the Federal Preservation Officer and consulting parties)
- may be issued even when the Council is a signatory to the MOA

### **B. Working with the SHPO/THPO**

The SHPO/THPO is the official designated to carry out the 106 process for most projects. Regulations now put the SHPO/THPO in charge, with appeal to the Council. The SHPO is also the individual designated by the governor of the state to develop and administer the Historic Preservation Plan for the State as required by the National Historic Preservation Act. The SHPO is therefore a central repository and archive for all aspects of documentation of historical and archaeological resources within the state. This means that the SHPO is the central source for all of the contextual data which will be needed to adequately evaluate the resources affected by your project.

- Contact the SHPO/THPO as soon as an undertaking is identified
- SHPO/THPO's office will assign a contact to track the undertaking
- Routine coordination with the SHPO/THPO or contact is key to making the process work
- Look to leadership by SHPO/THPO in eligibility determinations
- Notify SHPO/THPO of the Area of Project Effect (APE) early on
- If SHPO/THPO agrees on a finding of No Historic Properties Affected then 106 coordination process is complete.
- If SHPO/THPO thinks there might be eligible resources in the APE, SHPO/THPO will provide guidance on the need for further investigation/documentation.
- SHPO/THPO/THPO is usually the permitting/licensing authority for archaeological excavation
- SHPO/THPO reviews draft MOA and signs final MOA.
- SHPO/THPO can assist Agency to determine the appropriate level of documentary recording. Agency then verifies that all documentary recording is completed and accepted by SHPO/THPO prior to the initiation of undertaking.
- SHPO may designate appropriate state and local archive locations for copies of the documentation.

The SHPO is mandated under law to provide assistance to the agency. However, like EPA, the SHPO has to work with limited resources. It is therefore important to ensure that inquiries to the SHPO are structured narrowly within the context of the 106 process. The SHPO usually can't, for example, tell you if there are or are not resources in your project area. However, consultation with the SHPO can help you to determine the need for an archaeological or historical survey of your project area. The SHPO won't provide you with a scope of work for the survey, but will typically review draft research proposals to ensure that the survey will be responsive to project need.

### **C. Working with the Tribes**

The 106 Consultation requirements apply to all Federally Recognized tribes. Tribes with a THPO should always be consulted. Tribes without a THPO must still be consulted if project would affect:

- properties **on** tribal lands or
- religious and cultural properties **off** tribal lands.

The THPO is distinct from the SHPO in that the THPO's authority is limited only to tribal lands and to tribal religious and cultural properties off tribal lands. Therefore the THPO does not have the broader archives or repository of statewide information held by the SHPO.

Even tribes without a THPO (i.e. who have not assumed the authority of the SHPO for the tribe) may still have a tribal representative who should be consulted. This consultation is required to help the Agency determine the potential for effects on cultural resources. Native American participation is necessary to identify sacred properties and artifacts of major cultural significance.

The Native American Graves Protection and Repatriation Act of 1990 (25 USC 3001-3013) may apply to resources in the project area.



Native American Human Remains and Objects including:

**Associated funerary objects** - objects originally placed with, and still associated with Native American human remains;

**Unassociated funerary objects** - objects originally placed with, but no longer accompanied by, Native American human remains;

**Sacred objects** - ceremonial objects needed for the practice of religion;

**Objects of cultural patrimony** - objects having ongoing historical, traditional or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native.

NAGPRA should not interfere with scientific study. If a lineal descendant, Indian tribe, or Native Hawaiian organization requests culturally affiliated Native American cultural items, the Federal agency or museum shall expeditiously return such items “unless such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States. Such items shall be returned by no later than 90 days after the date on which the scientific study is completed.” This provides ample opportunity for evaluation and conservation of resources before return.

#### **D. Working with the Public**

The 106 Process must be open to interested parties at all stages. Participants may include local members of the community, residents in and near the APE, local historical societies, members of unrecognized tribes, etc. These must all have an opportunity to participate in the 106 process.

The 106 public participation requirements can normally be fulfilled in coordination with other program or project based public participation activities. Plan to include the 106 process when developing your public participation programs. When making contact through the advertisements, newsletters and the media for public meetings, hearings and workshops remember to explicitly mention the 106 process (e.g “...and in compliance with Section 106 of the National Historic Preservation Act”). Collect and save all comments and correspondence relative to historic preservation to document the public coordination process and its results.

ADVISORY COUNCIL  
GUIDANCE



TWELVE KEYS TO SUCCESSFUL DATA  
RECOVERY PROGRAMS



CONSERVATION AND THE FATE OF RECOVERED  
RESOURCES



## UNIT 7 DATA RECOVERY GUIDANCE

- A. The viability of data recovery as a means for resolving adverse effects depends on the nature of the resource. Data recovery programs must be closely tailored to the basis of eligibility. The Advisory Council has issued guidance on data recovery at 64 FR 27085-27087 (attached to the regulations in this manual). If this guidance is followed, the Council is unlikely to intervene in recovery actions.
- B. There are twelve keys to successful data recovery programs:
1. The site must be valuable chiefly for information which can be recovered
  2. No human remains, funerary objects, sacred objects, or items of cultural patrimony
  3. No long-term value for preservation in place
  4. No special significance to an ethnic group or a community which would object
  5. Site not valuable for permanent in-situ display or public interpretation
  6. Data recovery plan with research design approved and implemented
  7. Work performed by professionals meeting qualification standards (48 FR 44738-39)
  8. Adequate resources allocated to complete plan with periodic reporting to all parties
  9. Final Report which meets DOI's standards (42 FR 5377-79) sent to SHPO/THPO
  10. Oversight and peer review provided for large, unusual or complex projects
  11. No unresolved issues with Tribes attaching religious and cultural significance to site
  12. Terms and conditions part of MOA or Programmatic Agreement

### C. Conservation and the Fate of Recovered Resources

Under the 12 guidelines provided above, data recovery can be an effective means for resolving adverse effects. To ensure that data is not lost, however, the research must be completed thoroughly. NAGPRA requires that human remains, associated and unassociated funerary objects, and objects of tribal patrimony must be promptly surrendered to tribal authorities. However, it provides that any such objects which are the subject of on-going study may remain in the possession of the federal government (or its representatives) while the study is underway. This clause provides ample opportunity for proper completion of field studies, post field-work research and conservation of recovered resources before the resources are surrendered. Objects must then be surrendered within 90 days of the completion of the study.

**UNIT 8      INTEGRATING SECTION 106 AND NEPA 36 CFR § 800.8(a)**

It is important to recognize the distinction between coordinating reviews and substituting the NEPA analysis and documentation (NEPA review) for Section 106 procedures. Coordination means maintaining the standard steps in the Section 106 review process but aligning them with the development of the NEPA review. Substitution means fulfilling the purposes of Section 106 review in the context of a NEPA review, without employing the standard Section 106 steps. Coordination of NEPA reviews and Section 106 compliance processes under 36 CFR § 800.8(a) typically allows the responsible federal agency's environmental review processes to be comprehensive and less duplicative, and should be done for all undertakings to the greatest extent possible. Substitution of NEPA for Section 106 compliance is an optional tool that may be appropriate in certain circumstances but not necessarily all. In that respect, substitution is similar to the use of a Section 106 program alternative.<sup>1</sup>

The ACHP and CEQ are in the process of finalizing guidance that illustrates the benefits of coordinating or substituting Section 106 and NEPA procedures, for example, integrating the two processes:

- Facilitates a broad discussion of effects to the human environment and integrates the consideration of historic properties with other environmental factors.
- Provides a more holistic view of the proposed federal undertaking and its effects, and ensures that historic preservation concerns are not treated as an afterthought.
- Reduces the probability that cultural resources that do not meet the criteria for listing on the National Register of Historic Places are given insufficient consideration.
- Offers the public opportunities to provide more focused and timely input.
- Enables agencies to develop timelines and milestones that eliminate duplication.
- Promotes transparency and accountability in federal decision-making.

The guidance, in the form of a handbook, provides NEPA and Section 106 practitioners, project managers and proponents, environmental planners, and contractors with key concepts and strategies for integrating these two analyses. Many federal agencies have their own implementing regulations or administrative protocols for implementing NEPA or approved program alternatives for Section 106 compliance. These recommendations serve as a foundation from which federal agencies may develop or revise their own procedures or protocols to best suit their agencies' missions, their agencies' frameworks for implementing their programs, and their agencies' approaches to specific undertakings to satisfy the requirements of both NHPA and NEPA.

NEPA and Section 106 both require federal agencies to consider environmental impacts before making project and program decisions. NEPA has a broader scope, including the entire environment, of which cultural resources are one integral element. Section 106 and its implementing regulations, 36 CFR Part 800, focus on a specific subset of cultural resources: those properties that are listed on or meet the eligibility criteria for the National Register. Thus, coordinating the Section 106 and NEPA processes works best when agency actors begin Section 106 simultaneously with the NEPA process. Where NEPA and Section 106 are not aligned the findings in each process will not fully inform the other, and it is

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<sup>1</sup> See 36 CFR § 800.14 (providing several methods for federal agencies to meet their Section 106 obligations through the development and implementation of program alternatives such as alternative procedures, programmatic agreements, exempted categories, standard treatments, and program comments).

possible that key relevant information will be revealed late in decision-making, or the processes might become overly complicated.

Several misconceptions may create impediments to effective coordination of Section 106 and NEPA. For instance, the Section 106 process is not a form of mitigation to be referenced in a NEPA document. While substantive mitigation measures may result from the Section 106 review, Section 106 review is a procedural requirement. Further, limiting the cultural resources section of a NEPA document to considering only Section 106 and historic properties may not be sufficient to address the full range of cultural resources that NEPA requires. Historic properties and cultural resources are not synonymous terms, and often refer to different resources. Finally, compliance with Section 106 does not necessarily fulfill the requirements of the Native American Graves Protection and Repatriation Act, the Archaeological Resources Protection Act, or the many other federal and states laws, regulations, and policies that require consideration of historic properties and cultural resources.

The entire 50-page guidance, jointly issued by ACHP and CEQ is available at:

[http://www.achp.gov/docs/NEPA\\_NHPA\\_Section\\_106\\_Handbook\\_Mar2013.pdf](http://www.achp.gov/docs/NEPA_NHPA_Section_106_Handbook_Mar2013.pdf)

SUPPLEMENTAL  
ATTACHMENTS  
for  
NHPA TRAINING

# NEW ENGLAND TRIBAL CONTACTS

(Revision: 10/10/2013)

TRIBE	CONTACTS
<b>HOULTON BAND OF MALISEET INDIANS</b> 88 Bell Road Littleton, ME 04730 PHONE: 207/532-4273, 1/800/545-8524 FAX: 207/532-6883	Brenda Commander, Chief; Brian Reynolds, Administrator (no Vice Chief) <b>Environmental Contacts:</b> Susan Young, Natural Resources Director, <a href="mailto:ogs1@maliseets.com">ogs1@maliseets.com</a> * Sharri Venno, Environmental Planner, x215 <a href="mailto:envplanner@maliseets.com">envplanner@maliseets.com</a> Cara O'Donnell Water Resource Spec., x212 <a href="mailto:water@maliseets.com">water@maliseets.com</a> Matthew Edberg, Natural Resource spec., <a href="mailto:timber@maliseets.com">timber@maliseets.com</a> THPO: Sharri Venno coordinates NHPA Section 106 reviews
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## SECTION 106 WORKSHOP SCENARIOS

### 1. Brownfields: Assessment of Effects of Undertakings

You have received a cleanup grant and there was prior coordination with the SHPO and the EPA PO on the assessment activities. You are good to go and you don't need to deal with Section 106, right?

Wrong: Coordination was only done for Phase II assessment activities. You will need to consult with your EPA PO and have them initiate consultation with the SHPO because cleanup most likely involves activities that may have an adverse effect.

**Discussion:** You will be implementing your cleanup funding at a property already listed on the National Historic Register. Which of the following undertakings would warrant consultation with the SHPO due to potential for adverse effects?

- Underground storage tank removal - No, if tank is close enough to threaten stability of a building, tank would be filled rather than removed. Filling of tank would not have potential for adverse effect.
- Soil excavation and off-site disposal - Yes
- Injection of remedial amendments via Geoprobe® - No
- Hazardous materials abatement - No
- Construction of soil cap - Yes
- Demolition of structures - Yes
- Construction of new structures - Yes

### 2. Superfund: Eligibility for Listing on National Historic Register

You have a building less than 50 years old that you want to demolish with Superfund funding, you are all set and you don't need to involve Section 106, right??

Wrong: Just because a building is younger than 50 years old does not mean that there are no issues. For instance, the World Trade Center (opened in 1973) has been listed on the National Historic Register.

**Discussion:** Which of the properties described below are eligible for listing on the National Historic Register?

- 19<sup>th</sup> century industrial building predominantly used for manufacturing of rubber products, including military shoes and replica tanks used during WWII as diversionary tactic - Likely eligible if integrity retained
- Victorian-style residential neighborhood initially developed to house mill workers - Likely eligible if integrity retained
- Nondescript post-office building constructed in 1953; vacant since 2002 - Likely not eligible
- Town green/center and adjacent church, dating back to early 1900s - Maybe; only if part of a historic district or has some non-religious significance (architectural or historical)

- Commercial corridor developed in 1970s, including underutilized multi-unit retail buildings, vacant movie theater, and several small grocery stores and other family businesses - **Likely not eligible**
- Nightclub, now vacant, that was reconstructed in the 1980s to match a previous venue that was popular during the advent of early blues and rock n roll musicians - **Maybe; only if part of restoration master plan, accurate, and no other building of same significance has survived**

### 3. Private development/NPDES Stormwater

A residential developer wishes to construct a subdivision in a non-delegated CWA NPDES state. Since the project site is more than one acre of disturbance, the developer has filed for coverage under the nationwide NPDES permit for stormwater discharges by filing her project under the electronic Notice of Intent (e-NOI) system 14 days prior to commencing construction. The area of development was a battle site from King Philips War in the 1600's. A tribe that claims cultural affiliation is concerned that the developer has not adequately investigated or addressed the impacts of the construction to potential underground battlefield features at the site. Should EPA be involved? Is this project a federal undertaking?

**EPA needs to be involved, as it is a federal undertaking since the nationwide NPDES permit is involved. EPA should consult with the tribe and SHPO as part of the 106 process, and if necessary, investigate the issues.**

### 4. Consultation Partners

The cleanup grant is part of a larger redevelopment project with lots of federal funding, you must be good to go because some other federal agency should have done the coordination, right?

**Wrong: You need to figure out what federal agency did the 106 coordination and get a copy of their letter from the SHPO. Confer with your EPA PO and have them write a letter to the SHPO stating that your activities are the same as what was discussed before and you are all set. Sometimes, the previous agreement does not cover what you want to do so consultation will be required.**

**Discussion:** Your community has been awarded an EPA Cleanup Grant to facilitate redevelopment of an eligible former textile mill located on the banks of a river that was once a power source for numerous 18<sup>th</sup> and 19<sup>th</sup> century industrial developments. DOT has also provided funding to road upgrades as part of the project and a Community Development Block Grant has also been allocated by HUD to assist in development of affordable housing at a portion of the property. Who is the agency responsible for maintaining compliance with Section 106? -

**For projects with multiple federal agencies involved, 36 CFR Part 800.2(2) specifies that the agencies may designate a lead agency to fulfill their collective responsibilities under Section 106.**

**HUD is the only federal agency that delegates their compliance to the group that receives the funding. So there is generally no circumstance where HUD would lead consultation.**

## 5. Mitigation of Adverse Effects During Assessment Phase

Your building is not eligible for listing so you are all set right?

Wrong: Your building may be adjacent to a historic district and could affect a view shed.

**Discussion:** It turns out your building is determined to have an adverse effect on the viewshed of the adjacent historic district. Impacts to viewshed may be difficult to mitigate without killing the project. How can your assessment activities be expanded as a means of mitigating the adverse impact?

You could retain an archaeologist/historian to photo-document your site and the adjacent district in a manner which captures the essence of the area prior to your project. Archaeology and/or historical investigation conducted at your site to evaluate for potential historical resources that may be consistent with those that make the adjacent district significant.

## 6. Mitigation of Adverse Effects During Cleanup Planning and Cleanup Phases

The building was determined to be eligible for listing 10 years ago. You are planning on using your cleanup grant to demolish the building because there is contamination underneath the building. Now what?

Since the eligibility determination was made years ago and the property meets the definition of a brownfields, it may be in such poor condition that it no longer meets the criteria to be listed. It may not retain the integrity to stay listed. You will need to have your EPA PO discuss with the SHPO and most likely hire a historical architect to make a current determination. If the building does not retain integrity it will not be eligible for listing and you are done. If it does, you will need to enter into an MOA with the SHPO. This document is agreed to by the grantee, SHPO and EPA and details the adverse effects and the mitigation plan.

**Discussion:** Your historical architect determines that, though the effects of time have degraded the building, it still retains its historical integrity and thus remains eligible for listing. Prior to initiating MOA negotiations, you and your team must consider how your cleanup plan and site design can be modified to mitigate adverse impacts that will result from building demolition.

Revisit your soil cleanup approach. If excavation and disposal was the selected strategy, are there areas where soil can be left in place to support a particular feature of the building which can be retained (i.e. chimney, wall, etc.). A combination of excavation, capping, and/or soil vapor control may be an appropriate cleanup approach which mitigates both environmental risks and adverse effects to historical resources.

Enhancement of the existing historical dataset for the site is an indirect mitigation approach. Compile historical photographs and maps or create a new photographic record of the pre-project conditions. Plan to display these resources in the new building.



Revisit your architectural design. Plan to recover usable building materials for incorporation in the new construction, such as timbers, field stones, etc.

**Discussion:** During excavation of contaminated soil, the contractor discovers a field stone retaining wall that was previously unknown due to heavy vegetation coverage. Remedial and grading requirements for the site necessitate removal of soil adjacent to this resource. What are some appropriate mitigation actions that could be taken in response to this discovery?

Notify the SHPO of this discovery and describe a plan to survey, map, and photo-document the wall to establish a historical record of this feature. If possible, recover the wall remnants and incorporate them into final site. For example, use the stones to construct a retaining wall at another area of the site.

## 7. Enforcement Actions

A town finds itself under an EPA enforcement action to come into compliance under the Clean Water Act. The court orders the town to initiate construction of a new wastewater treatment plant on a designated parcel of land, and EPA would not permit any further delays to the town's non-compliance without enforcement action taken against the town. This designated land parcel was used by the Massachusetts Bay Colony in the 1600s as a holding camp for Native Americans who were to be shipped off as slaves. Their descendants claim per oral tradition that there are burials on the land parcel from those who perished while under custody at the encampment. However, there is no literature on or past studies of the site. The town was under a strict court order to initiate construction. Should this situation exempt the town from tribal consultation under NHPA?

No. The town should still follow the Section 106 process to determine if there will be an effect. If the environmental situation poses an imminent threat to public health or safety, the emergencies situations process may be applicable (800.12)

## 8. Dam Removal/404 Wetlands Program

Removing a dam may require evaluations and permits from state, federal, and local authorities. These requirements are typically to ensure that the removal is done in a manner that is safe and minimizes short and long term impacts to the river and floodplain.

There is a certain dam removal project in New England that has been funded by a local river restoration advocacy group and both the town and state have approved the project. Because the activity will impact wetlands, and EPA's authority under CWA Section 404 Dredge and Fill permitting process is exercised. Additionally, the impoundment creates elevated thermal temperatures which violate the EPA-approved state water quality standards. However, the dam structure and its impoundment are a source of pride for the community, and the impoundment has been a favorite spot for fishing, swimming and boating for over 100 years. The dam, which once served a mill industry, no longer serves an industrial purpose. The dam is proposed to be removed to restore the river to its natural state, allow fish spawning, and improve water quality. Is the dam removal a federal undertaking? Can the impoundment itself be considered a historic property?

The project is a federal undertaking since a federal permit is involved. The Section 106 process should be followed to determine if the dam structure is eligible for the National Registry. The impoundment should be evaluated under the 106 process as it may be considered a Traditional cultural property as a vista or waterway which may be subject to protection.

**Discussion:**

The following federal requirements may apply to dam removal: Rivers and Harbors Act Permit; FERC License Surrender or Non-power License Approval; Federal Consultations (Endangered Species Act Section 7 Consultation, Magnuson- Stevenson Act Consultation, National Historic Preservation Act Compliance) State Certifications (Water Quality Certification, Coastal Zone Management Act Certification)

**9. SRF Sewer Project**

A certain part of a New England bayside town is in need of community sewer, as the residences are served by old cesspools, and due to the sandy soils, the bay is constantly eutrophic and has experienced high bacteria counts in its waters. The sewer project is funded under the SRF program and the state has provided the town with a loan for the project. The area has overlapping tribal cultural affiliation. How should the project proponent proceed? What role and responsibilities does EPA have in the project? What documents should be considered for the NHPA process?

The project is a federal undertaking since federal funding is involved. If a programmatic agreement is in place delegating the responsibility of carrying out NHPA responsibilities to the state, the state should take the lead. EPA retains oversight authority. A Memorandum of Agreement among the parties (state, town, EPA, SHPO and THPO) is recommended to ensure that roles and responsibilities, as well as disposition of features or remains found are clearly defined.

**10. Adverse Effect to Historic District**

EPA entered into an agreement and signed an MOA recognizing that the entire Raritan Arsenal in Edison, NJ, Middlesex County, is eligible for the NRHP. The period of significance is pre-WWI through the Korean War. The facility is in disrepair and a number of structures are underused and decrepit. Others have been demolished through neglect (36 CR 800). EPA is responsible for the land and structures here at the Edison Facility--one of the few actual landholdings for the agency.

EPA decided (Facilities) last year that it wanted to complete the demolition of four large warehouses that are not unique except for the experimental use of roof materials in certain areas. EPA has no ties and never used the buildings.

EPA Facilities submitted a letter to the NJSHPO voiding the MOA and deciding that since the buildings are falling apart they are no longer eligible and it is not necessary to consult with the SHPO nor advise the ACHP of an adverse effect. Facilities feels strongly about this because the price of scrap steel is rising and the contractor will demolish the buildings for free.

The regional office wants a level one recordation that would cost EPA about \$150k; Facilities does not want to spend this much money on a recordation of old warehouses. The regional office has now involved the EPA HQ Office of federal Activities with the view that HQ will intervene. What should be done?

No black and white answer here!

11. Multi federal agency involvement and responsibilities

South Coast Rail project is beginning to gain steam. The project will involve an air permit from the EPA, as well as a dredge and fill permit from the US Army Corps of Engineers. The route for the rail will impact some cedar swamps that a tribe considers sacred as a resource for medicine and healing. Should the tribe who considers this area as culturally significant be consulted under the 106 process, even archaeology studies revealed no historic properties? Should EPA assume the lead role?

The project is a federal undertaking as federal permits are involved. Since EPA's permit is a minor involvement as compared to USACE's involvement under the 404 permitting process, USACE should assume the lead role for consultation, with EPA as a consulting party. While there may be no historic properties present, since the cedar swamps are considered a **Traditional cultural property**, the swamps may be subject to protection, and the 106 process should address the impacts.

12. Projects constructed by tribes on reservation trust land with EPA funding

A tribe received an EPA Drinking Water Tribal Set-aside grant to replace a water storage tank. The existing tank is 89 years old, and is made of redwood stave boards, and over the years tribal members have etched into the wood engravings depicting tribal ceremonies of the past, including names of the participants. The tribal public works department, who is managing the grant, wants the leaking tank demolished and does not plan on following any historic preservation process, citing the project as an "internal tribal matter." The EPA project officer, having visited the site, is aware of the potential for the tank to be eligible for the National Register. What should the project officer do?

The project is a federal undertaking as federal funding is involved, and regardless of the structure located on tribal trust lands, NHPA regulations (federal law) are not superseded by tribal departmental or administrative decisions. The project officer, responsible for overseeing grant requirements which include compliance with applicable federal law, should facilitate discussion with the public works department and the THPO. The same applies for any grant funded by EPA... the Project Officer is responsible for ensuring that the grant conditions are met, which include federal law. This includes EPA Tribal Coordinators and EPA Program Officers who manage EPA-funded grant programs including GAP, 106, 319, Air, Wetlands and Brownfields.

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APPENDIX A (continued)

To the best of your knowledge, are any historic or archaeological properties known to exist within the project's area of potential impact? If so, specify.

What is the total acreage of the project area?

Woodland _____	acres	Productive Resources:	
Wetland _____	acres	Agriculture _____	acres
Floodplain _____	acres	Forestry _____	acres
Open space _____	acres	Mining/Extraction _____	acres
Developed _____	acres	Total Project Acreage _____	acres

What is the acreage of the proposed new construction? \_\_\_\_\_ acres

What is the present land use of the project area?

Please attach a copy of the section of the USGS quadrangle map which clearly marks the project location.

This Project Notification Form has been submitted to the MHC in compliance with 950 CMR 71.00.

\_\_\_\_\_  
Signature of Person submitting this form: \_\_\_\_\_ Date: \_\_\_\_\_

Name: \_\_\_\_\_

Address: \_\_\_\_\_

City/Town/Zip: \_\_\_\_\_

Telephone: \_\_\_\_\_

REGULATORY AUTHORITY

950 CMR 71.00: M.G.L. c. 9, §§ 26-27C as amended by St. 1988, c. 254.

950 CMR: OFFICE OF THE SECRETARY OF THE COMMONWEALTH

APPENDIX A

MASSACHUSETTS HISTORICAL COMMISSION

220 MORRISSEY BOULEVARD

BOSTON, MASS. 02125

617-727-8470, FAX: 617-727-5128

**PROJECT NOTIFICATION FORM**

Project Name: \_\_\_\_\_

Location / Address: \_\_\_\_\_

City / Town: \_\_\_\_\_

Project Proponent

Name: \_\_\_\_\_

Address: \_\_\_\_\_

City/Town/Zip/Telephone: \_\_\_\_\_

Agency license or funding for the project (list all licenses, permits, approvals, grants or other entitlements being sought from state and federal agencies).

Agency Name

Type of License or funding (specify)

**Project Description (narrative):** \_\_\_\_\_

**Does the project include demolition? If so, specify nature of demolition and describe the building(s) which are proposed for demolition.**

**Does the project include rehabilitation of any existing buildings? If so, specify nature of rehabilitation and describe the building(s) which are proposed for rehabilitation.**

**Does the project include new construction? If so, describe (attach plans and elevations if necessary).**



PROJECTS CANNOT BE PROCESSED WITHOUT THIS INFORMATION

Project Boundaries and Description

- Attach the relevant portion of a 7.5' USGS Map (photocopied or computer-generated) **indicating the defined project boundary.** (See RPR Instructions and R&C FAQs for guidance.)
- Attach a detailed narrative description of the proposed project.
- Attach a site plan. The site plan should include the project boundaries and areas of proposed excavation.
- Attach photos of the project area (overview of project location and area adjacent to project location, and specific areas of proposed impacts and disturbances.) (Informative photo captions are requested.)
- A DHR file review must be conducted to identify properties within or adjacent to the project area. Provide file review results in **Table 1** or within project narrative description. (Blank table forms are available on the DHR website.)  
File review conducted on \_\_\_\_ / \_\_\_\_ / \_\_\_\_.

Architecture

Are there any buildings, structures (bridges, walls, culverts, etc.) objects, districts or landscapes within the project area?  Yes  No  
If no, skip to Archaeology section. If yes, submit all of the following information:

Approximate age(s):

- Photographs of **each** resource or streetscape located within the project area, with captions, along with a photo key. (Digital photographs are accepted. All photographs must be clear, crisp and focused.)
- If the project involves rehabilitation, demolition, additions, or alterations to existing buildings or structures, provide additional photographs showing detailed project work locations. (i.e. Detail photo of windows if window replacement is proposed.)

Archaeology

Does the proposed undertaking involve ground-disturbing activity?  Yes  No  
If yes, submit all of the following information:

- Description of current and previous land use and disturbances.
- Available information concerning known or suspected archaeological resources within the project area (such as cellar holes, wells, foundations, dams, etc.)

**Please note that for many projects an architectural and/or archaeological survey or other additional information may be needed to complete the Section 106 process.**

**DHR Comment/Finding Recommendation** *This Space for Division of Historical Resources Use Only*

- Insufficient information to initiate review.  Additional information is needed in order to complete review.
- No Potential to cause Effects  No Historic Properties Affected  No Adverse Effect  Adverse Effect

Comments: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

*If plans change or resources are discovered in the course of this project, you must contact the Division of Historical Resources as required by federal law and regulation.*

Authorized Signature: \_\_\_\_\_ Date: \_\_\_\_\_



Please mail the completed form and required material to:

New Hampshire Division of Historical Resources  
State Historic Preservation Office  
Attention: Review & Compliance  
19 Pillsbury Street, Concord, NH 03301-3570

DHR Use Only	
R&C #	_____
Log In Date	___/___/___
Response Date	___/___/___
Sent Date	___/___/___

## Request for Project Review by the New Hampshire Division of Historical Resources

- This is a new submittal  
 This is additional information relating to DHR Review & Compliance (R&C) #:

### GENERAL PROJECT INFORMATION

Project Title

Project Location

City/Town

Tax Map

Lot #

NH State Plane - Feet Geographic Coordinates: Easting  
(See RPR Instructions and R&C FAQs for guidance.)

Northing

Lead Federal Agency and Contact (if applicable)  
(Agency providing funds, licenses, or permits)

Permit Type and Permit or Job Reference #

State Agency and Contact (if applicable)

Permit Type and Permit or Job Reference #

### APPLICANT INFORMATION

Applicant Name

Mailing Address

Phone Number

City

State

Zip

Email

### CONTACT PERSON TO RECEIVE RESPONSE

Name/Company

Mailing Address

Phone Number

City

State

Zip

Email

This form is updated periodically. Please download the current form at [www.nh.gov/nhdhr/review](http://www.nh.gov/nhdhr/review). Please refer to the Request for Project Review Instructions for direction on completing this form. Submit one copy of this project review form for each project for which review is requested. **Include a self-addressed stamped envelope** to expedite review response. Project submissions will not be accepted via facsimile or e-mail. This form is required. Review request form must be complete for review to begin. Incomplete forms will be sent back to the applicant without comment. Please be aware that this form may only initiate consultation. For some projects, additional information will be needed to complete the Section 106 review. All items and supporting documentation submitted with a review request, including photographs and publications, will be retained by the DHR as part of its review records. Items to be kept confidential should be clearly identified. For questions regarding the DHR review process and the DHR's role in it, please visit our website at: [www.nh.gov/nhdhr/review](http://www.nh.gov/nhdhr/review) or contact the R&C Specialist at [christina.st.louis@dcr.nh.gov](mailto:christina.st.louis@dcr.nh.gov) or 603.271.3558.





**MEMORANDUM OF AGREEMENT**

**BETWEEN [insert Agency]**

**AND THE**

**[insert name of State or Tribe] ["STATE" or "TRIBAL"] HISTORIC PRESERVATION OFFICER**

**REGARDING THE [insert project name and location]**

**WHEREAS** the [Agency] ([insert Agency abbreviation]) plans to ["carry out" or "fund" or "approve"/"license"/"permit" or other appropriate verb] the [insert project name] (undertaking) pursuant to the [insert name of the substantive statute authorizing the Federal agency involvement in the undertaking], [insert legal cite for that statute]; and

**WHEREAS** the undertaking consists of [insert a brief explanation of the undertaking]; and

**WHEREAS**, [Agency abbreviation] has defined the undertaking's area of potential effect (APE) as [insert written description and/or "described in Attachment XXX"]; and

**WHEREAS** [Agency abbreviation] has determined that the undertaking may have an adverse effect on [insert name of historic property(ies)], which ["is" or "are"] ["listed in" or "eligible for listing in"] the National Register of Historic Places, and has consulted with the [insert name of State or Tribe] ["State" or "Tribal"] Historic Preservation Officer (["SHPO" or "THPO"]) pursuant to 36 C.F.R. part 800, of the regulations implementing Section 106 of the National Historic Preservation Act (16 U.S.C. § 470f); and

**WHEREAS** [Agency abbreviation] has consulted with the [insert name of Tribe(s)], for which [insert name of historic property(ies)] ["has" or "have"] religious and cultural significance, and has invited the Tribe[s] to sign this Memorandum of Agreement (MOA) as an invited signatory [Insert this whereas clause if appropriate]; and

**WHEREAS**, [Agency abbreviation] has consulted with [insert names of other consulting parties, if any] regarding the effects of the undertaking on historic properties and has invited them to to sign this MOA as a ["invited signatory(ies)" or "concurring party(ies)"]; and

**WHEREAS**, in accordance with 36 C.F.R. § 800.6(a)(1), [Agency abbreviation] has notified the Advisory Council on Historic Preservation (ACHP) of its adverse effect determination with specified documentation and the ACHP has chosen not to participate in the consultation pursuant to 36 CFR § 800.6(a)(1)(iii); and

NOW, THEREFORE, [Agency abbreviation] and the ["SHPO" or "THPO"] agree that the undertaking shall be implemented in accordance with the following stipulations in order to take into account the effect of the undertaking on historic properties.

#### STIPULATIONS

[Agency abbreviation] shall ensure that the following measures are carried out:

**[I.-III. (Or whatever number of stipulations is necessary) Insert negotiated measures to avoid, minimize, or mitigate the adverse effects on historic properties.]**

#### IV. DURATION

This MOA will be null and void if its terms are not carried out within five (5) years **[or specify other appropriate time period]** from the date of its execution. Prior to such time, [Agency abbreviation] may consult with the other signatories to reconsider the terms of the MOA and amend it in accordance with Stipulation VIII below.

#### V. POST-REVIEW DISCOVERIES

If potential historic properties are discovered or unanticipated effects on historic properties found, the [Agency abbreviation] shall implement the discovery plan included as attachment **[insert number of attachment]** of this MOA. **[Insert this stipulation if there is an indication that historic properties are likely to be discovered during implementation of the undertaking.]**

#### VI. MONITORING AND REPORTING

Each **[insert a specific time period]** following the execution of this MOA until it expires or is terminated, [Agency abbreviation] shall provide all parties to this MOA **["and the ACHP" if desired]** a summary report detailing work undertaken pursuant to its terms. Such report shall include any scheduling changes proposed, any problems encountered, and any disputes and objections received in [Agency abbreviation]'s efforts to carry out the terms of this MOA.

#### VII. DISPUTE RESOLUTION

Should any signatory \* or concurring party to this MOA object at any time to any actions proposed or the manner in which the terms of this MOA are implemented, [Agency abbreviation] shall consult with such party to resolve the objection. If [Agency abbreviation] determines that such objection cannot be resolved, [Agency abbreviation] will:

A. Forward all documentation relevant to the dispute, including the [Agency abbreviation]'s proposed resolution, to the ACHP. The ACHP shall provide [Agency abbreviation] with its advice on the resolution of the objection within thirty (30) days of receiving adequate documentation. Prior to reaching a final decision on the dispute,



**[Agency abbreviation]** shall prepare a written response that takes into account any timely advice or comments regarding the dispute from the ACHP, signatories and concurring parties, and provide them with a copy of this written response. **[Agency abbreviation]** will then proceed according to its final decision.

B. If the ACHP does not provide its advice regarding the dispute within the thirty (30) day time period, **[Agency abbreviation]** may make a final decision on the dispute and proceed accordingly. Prior to reaching such a final decision, **[Agency abbreviation]** shall prepare a written response that takes into account any timely comments regarding the dispute from the signatories and concurring parties to the MOA, and provide them and the ACHP with a copy of such written response.

C. **[Agency abbreviation]**'s responsibility to carry out all other actions subject to the terms of this MOA that are not the subject of the dispute remain unchanged.

#### VIII. AMENDMENTS

This MOA may be amended when such an amendment is agreed to in writing by all signatories. The amendment will be effective on the date a copy signed by all of the signatories is filed with the ACHP.

#### IX. TERMINATION

If any signatory to this MOA determines that its terms will not or cannot be carried out, that party shall immediately consult with the other parties to attempt to develop an amendment per Stipulation VIII, above. If within thirty (30) days (or another time period agreed to by all signatories) an amendment cannot be reached, any signatory may terminate the MOA upon written notification to the other signatories.

Once the MOA is terminated, and prior to work continuing on the undertaking, **[Agency abbreviation]** must either (a) execute an MOA pursuant to 36 CFR § 800.6 or (b) request, take into account, and respond to the comments of the ACHP under 36 CFR § 800.7. **[Agency abbreviation]** shall notify the signatories as to the course of action it will pursue.

Execution of this MOA by the **[Agency abbreviation]** and **["S" or "T"]HPO** and implementation of its terms evidence that **[Agency abbreviation]** has taken into account the effects of this undertaking on historic properties and afforded the ACHP an opportunity to comment.\*\*

#### SIGNATORIES:

**[insert Agency name]**

\_\_\_\_\_ Date

**[insert agency official name and title]**

**[insert name of State or Tribe] ["State" or "Tribal"] Historic Preservation Officer**

\_\_\_\_\_ Date  
**[insert name and title]**

**INVITED SIGNATORIES:**

**[insert invited signatory name]**

\_\_\_\_\_ Date  
**[insert name and title]**

**CONCURRING PARTIES:**

**[insert name of concurring party]**

\_\_\_\_\_ Date  
**[insert name and title]**

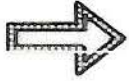
Notes:

*\* This document assumes that the term "signatory" has been defined in the agreement to include both signatories and invited signatories.*

*\*\* Remember that the agency must submit a copy of the executed MOA, along with the documentation specified in Sec. 800.11(f), to the ACHP prior to approving the undertaking in order to meet the requirements of section 106. 36 CFR § 800.6(b)(1)(iv).*

ATTACHMENT 7  
EMAIL NOTIFICATION TO PASSAMAQUODDY  
TRIBE AND PENOBSCOT NATION and RESPONSES





**Section 106 of the National Historic Preservation Act**  
AmyJean McKeown to: soctomah

01/27/2010 12:27 PM

Hi Donald, I just called you office and they suggested that I send you an e-mail. I am a project officer in the Brownfields Program at EPA. We have three sites in Maine (with more to come) that we need to initiate consultation. I spoke with Bonnie Newsom this morning and she suggested that I contact all four tribes in Maine.

The sites are:

Howland Tannery, Howland - cleanup of contamination along the Penobscot River with subsequent capping.

Webster's Mill, Orono - cleanup of contamination along the Penobscot River with subsequent capping.

Aerofab Mill, Sanford - demolition of a building and soil remediation.

What information would you like and in what format?

Thank you for your help.

AmyJean McKeown  
Brownfields Project Officer  
USEPA - Region I  
5 Post Office Sq. Suite 100  
Mail Code OSRR07-3  
Boston, MA 02109-3912  
phone 617 918 1248  
fax 617 918 0248  
mckeown.amyjean@epa.gov







**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

REGION 1

5 POST OFFICE SQUARE, SUITE 100

BOSTON, MA 02109-3912

January 21, 2010

Chief Sachem Matthew Thomas  
Narragansett Indian Tribe  
PO Box 268  
Charlestown, RI 02813

Re: Request to Initiate Consultation, Chapachet Mill Site

Dear Chief Sachem Thomas:

In August 2009, the U.S. Environmental Protection Agency (EPA) awarded a \$200,000 Brownfields Cleanup grant to the Town of Glocester, Rhode Island to conduct a hazardous substance cleanup at the Chapachet Mill Site (the "Site").

The Site is located in the historic Chapachet Village, and is on the Chapachet River. Various mill activities occurred on this site from the early 1700s to the early 1900s. Most of the mill burnt down and/or was abandoned in the 1890s. Remediation is only associated with the locations of the former mill facilities, and will likely involve targeted removal of contaminated soil or capping of contaminants in place. Planning of the actual remediation methodology and the coordination with a co-located stormwater retention project is still ongoing and no final plans have been made at this time.

Attached is a technical memorandum including maps from an archeological survey conducted on behalf of RI Department of Environmental Management (RI DEM). RI DEM has initiated hazardous substance assessment activities on the site and is supporting the Town of Glocester in their efforts to remediate the contamination on the property. The memorandum focuses on resources associated with the mill complex and its significance to the Chapachet Village area as a property listed on the National Historic Register. However, this memorandum does not address the potential for tribal historic resources located within the mill facility.

EPA would like to initiate government-to-government consultation with the Narragansett Indian Tribe for this project. Among other things, we would like this consultation to address any cultural and historic resource issues, pursuant to the regulations implementing Section 106 of the National Historic Preservation Act (36 CFR Part 800). Your response to this letter, acknowledging your interest in participating in this undertaking as a consulting party, and in identifying any historic properties that may exist within the project's Area of Potential Effects (APE), is greatly appreciated. Please provide a response by February 22, 2010 so that we may discuss this undertaking and any of those identified areas of interest.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 1  
5 POST OFFICE SQUARE, SUITE 100  
BOSTON, MA 02109-3912

January 20, 2010

Jeffrey Emidy  
Project Review Coordinator  
Rhode Island Historic Preservation  
& Heritage Commission  
Old State House  
150 Benefit Street  
Providence, Rhode Island 02903

**Subject:** Providence - General Ice Cream Building, 485 Plainfield Street

Initiation of Section 106 Review and Request for Consultation for  
Hazardous Substances Cleanup

USEPA Brownfields Grant BF97186201

Dear Mr. Emidy:

In accordance with our telephone discussion on December 28, 2009, I am initiating Section 106 of the National Historic Preservation Act (36 CFR Part 800) review and asking for your consultation.

In 2007, the U.S. Environmental Protection Agency (EPA) awarded a \$200,000 Brownfields Cleanup grant to the Rhode Island Family Life Center (now known as OPENDOORS) to conduct a hazardous substance cleanup at the former General Ice Building located at 485 Plainfield Street, Providence (the "Site"). The Site was added to the National Register of Historic Places in 2008.

I am attaching a Site plan and a description of the cleanup activities that the property owner's consultant has prepared.

If you have any questions, I can be reached at 617 918 1248 or at [mckeown.amyjean@epa.gov](mailto:mckeown.amyjean@epa.gov).

Sincerely,

A handwritten signature in black ink that reads "Amy Jean McKeown".

Amy Jean McKeown  
Brownfields Project Officer





## Environmental Information - EPA Section 106 Historic Review:

Several environmental issues were identified during the implementation of appropriate environmental due diligence assessment efforts. The following paragraphs describe the contaminants identified and summarize the approach to manage the issues associated with each contaminant.

### INTERIOR:

Interior assessments identified the presence of asbestos-containing materials, lead-based paint, discarded drums, mercury-containing equipment, PCB –containing equipment and boiler ash with elevated concentrations of heavy metals. Each of the materials identified were commonly utilized in the construction these types of buildings and the management of these materials is straightforward. All of the identified materials shall be managed in accordance with local, state and federal regulations as further described below.

The inspection to identify asbestos-containing materials was conducted by a U.S. EPA accredited and RI Department of Health licensed asbestos inspector. Asbestos-containing materials identified at the Site are as follows: vinyl floor tiling, sheet flooring, mastic associated with flooring and cove base, boiler breach insulation, boiler insulation and gasketing, pipe insulation, roofing material and caulking and glazing on windows and doors. The boiler breach insulation, boiler insulation and gasketing and a majority of the pipe insulation was identified is found in the basement level of the building. Some additional pipe insulation is also found in other areas of the building, typically associated with the heating system or in plumbing chases. The majority of the asbestos-containing flooring materials and mastic are in the office area on the second floor of the building. The asbestos-containing caulking and glazing is located on windows and doors throughout the building. The roofing materials are present on the loading dock covering. All of the identified asbestos-containing materials shall be abated by licensed asbestos abatement contractor under the supervision of Resource Controls, with the exception of the roofing material. The roofing material is to be abated by a licensed asbestos abatement contractor under the supervision of the Bailey Group, the general contractor for the site redevelopment.

The inspection to identify lead-based paint was conducted by a licensed lead inspector for the State of Rhode Island. Lead-based paint was identified on several surfaces within the building. However, the majority of the surfaces where lead-based paint was identified are to be demolished as part of the site redevelopment. The lead-based paint present on the structural columns and basement walls that are not scheduled for demolition shall be stabilized and encapsulated by a licensed lead abatement contractor under the supervision of Resource Controls. The demolition debris from areas containing lead-based paint shall be disposed of off-site by the Bailey Group, based on appropriate TCLP analysis of the waste.

Other hazardous materials identified in the building included the following: transformers, light ballasts, fluorescent light bulbs, mercury switches, discarded drums of grease, above ground fuel storage tanks and boiler ash with elevated concentrations of heavy metals. The discarded drums, above ground fuel storage tanks and boiler ash are located in the basement level boiler room. The other hazardous materials identified are located throughout the building. The collection and disposal of these materials shall be conducted under the supervision of Resource Controls and the materials shall be transported off-site for disposal in accordance with applicable regulations.

### EXTERIOR:

Environmental Site Assessment activities identified concentrations of TPH, PAH and metals (lead and beryllium) above appropriate RIDEM standards. In addition, an existing, unregistered 5,000-gallon No. 2 fuel oil underground storage tank (UST) is located adjacent to the northwest corner of the building.

The Remedial Action Work Plan, prepared by IFC International, identified capping as the appropriate response action for the Site. Under the plans for redevelopment, the majority of the contaminated soil at the site will remain below a cap consisting of paved area or one to two feet of clean fill. Based on requirements for Site grading, some contaminated soil may be removed and disposed of off-site in accordance with local, state and federal regulations.

The UST present at the Site will be removed by a contractor associated with the RIDEM UST Program under their supervision.





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 1  
5 POST OFFICE SQUARE, SUITE 100  
BOSTON, MA 02109-3912

January 22, 2010

Robin Stancampiano  
Review & Compliance Coordinator  
Maine Historic Preservation Commission  
55 Capitol Street  
65 State House Station  
Augusta, ME 04333

**Subject:** Orono – Webster's Mill, 5 Shore Drive

Initiation of Section 106 Review and Request for Consultation for  
Hazardous Substances Cleanup

USEPA Brownfields Grant BF96112001

Dear Ms. Stancampiano:

In accordance with our telephone discussion on January 4, 2010, I am initiating Section 106 of the National Historic Preservation Act (36 CFR Part 800) review and asking for your consultation. The EPA has determined that the proposed Federal action of a partial demolition (complete description is attached) is an undertaking as described in § 800.16(y) and has the potential to cause effects on a historic property.

In 2009, the U.S. Environmental Protection Agency (EPA) awarded a \$200,000 Brownfields Cleanup grant to the town of Orono to conduct a hazardous substance cleanup at the former Webster's Mill located at 5 Shore Drive (the "Site"). The Site was determined to be eligible for nomination to the National Register of Historic Places by your office in September 2008.

I am attaching a Site plan and a description of the cleanup activities that the property owner's consultant – Ransom Environmental Consultants, Inc. - has prepared.

Consistent with § 800.2(d), Evan Richert, of the Planning Department placed an ad in the local paper announcing that a public meeting would be held. On January 13, 2010, the public meeting was held where I discussed the Section 106 process in relation to the proposed demolition of the southeast corner of the building. There were no questions asked or issues raised about this demolition. Additionally, Ransom and the developer – Developers Collaborative – made presentations about the cleanup and the future plans for the Site.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 1  
5 Post Office Square, Suite 100  
BOSTON, MA 02114-2023

✓  
2-11-10  
07

February 10, 2010

Chief Brenda Commander  
Houlton Band of Maliseet Indians  
Littleton, ME 04730

Chief Victoria Higgins  
Aroostook Band of Micmacs  
8 Northern Road  
Presque Isle, ME 04769

Re: Request to Initiate Consultation, Webster's Mill Site, Orono, Maine

Dear Chiefs:

In 2009, the U.S. Environmental Protection Agency (EPA) awarded a \$200,000 Brownfields cleanup grant to the Town of Orono, Maine to conduct a hazardous substances cleanup at the Webster's Mill Site (the "Site").

I have enclosed a Site Plan and a description of the cleanup activities that the property owner's consultant – Ransom Environmental – has prepared.

The Town anticipates beginning this demolition and cleanup project during the spring of 2010.

EPA would like to initiate government-to-government consultation with both of the aforementioned tribes. We would like this consultation to address any cultural and historic resource issues, pursuant to the regulations implementing Section 106 of the National Historic Preservation Act (36 CFR Part 800). Your response to this letter, acknowledging your interest in participating in this undertaking as a consulting party, and in identifying any historic properties that may exist within the project's Area of Potential Effects (APE), is greatly appreciated. Please provide a response by March 10, 2010 so that we may discuss this undertaking. We have already contacted the tribal historic preservation offices of the Passamaquoddy Tribe and the Penobscot Nation.

If you have any questions, please contact AmyJean McKeown, the EPA project officer for the Town of Orono's Brownfields grant. She can be reached at [mckeown.amyjean@epa.gov](mailto:mckeown.amyjean@epa.gov) or 617-918-1248.



Thank you for your time and consideration.

Sincerely,

*James T. Owens*  
James T. Owens, Director  
Office of Site Remediation and Restoration

- cc: Sharri Venno, Environmental Planner, Houlton Band of Maliseet Indians
- Fred Corey, Environmental Health Director, Aroostook Band of Micmacs
- Wilkes Harper, Maine DEP (w/o enclosures)
- Kwabena Kyei-Aboagye, EPA Region 1 (w/o enclosures)
- Evan Richert, Town of Orono Planning Department (w/o enclosures)
- Earl G. Shettlesworth, Jr., Maine State Historic Preservation Officer (w/o enclosures)
- Robin Stancampiano, Maine State Historic Preservation Office (w/o enclosures)

The Town anticipates beginning the demolition and cleanup project during the spring of 2010. EPA would like to initiate government-to-government consultation with both of the aforementioned tribes. We would like this consultation to address any cultural and historic resource issues pursuant to the regulatory implementing Section 106 of the National Historic Preservation Act (36 CFR Part 800). Your response to this letter, acknowledging your interest in participating in this undertaking as a consulting party, and in identifying any historic properties that may exist within the project's Area of Potential Effect (APE) is greatly appreciated. Please provide a response by March 16, 2010 so that we may discuss this undertaking. We have already completed the tribal historic preservation officer of the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs. If you have any questions, please contact Amy Jean McKee, the EPA project officer for the Town of Orono's Brownfields Grant. She can be reached at amy.jean.mckee@epa.gov or 202-566-1548.

## **Emergency Response Program Guidelines to Implement the National Programmatic Agreement on Protection of Historic Properties**

*(Checklist of Procedures is derived from, and is consistent with, the National Programmatic Agreement on Protection of Historic Properties, 1998)*

### **STEP 1: Receive Notification of Oil Spill or Hazardous Substance Release**

### **STEP 2: Determine if Categorical Exclusions Apply**

#### **Releases or Spills Categorically Excluded from Additional National Historic Preservation Act Section 106 Compliance**

- **Spills/releases onto (which stay on):**
  - Gravel pads.
  - Roads (gravel or paved, not including the undeveloped right-of-way).
  - Parking areas (graded or paved)
  - Dock staging areas less than 50 years old
  - Gravel causeways
  - Artificial gravel islands.
  - Drilling mats, pads, and/or berms
  - Airport runways (improved gravel strips and/or paved runways)
- **Releases/Spills into (that stay in):**
  - Lined pits (e.g., drilling mud pits and reserve pits)
  - Water bodies where the spill/release will not (1) reach land/submerged land; and (2) include emergency response activities with land/submerged land-disturbing components.
  - Borrow pits
  - Concrete containment areas.
- **Spills/releases of:**
  - Gases (e.g., chlorine gas)

**Important Note to Federal On-Scene Coordinators:** (1) If you are not sure whether a spill or release fits into one of the categories listed above; (2) if at any time, the specifics of a spill or release change so it no longer fits into one of the categories listed above; (3) if the spill is greater than 100,000 gallons; and/or (4) if the State Historic Preservation Officer or the representative of a Federally-recognized Tribe notifies you that a categorically-excluded spill or release may have the potential to affect a significant historic property, then these categorical exclusions may not apply.

### **STEP 3: If Categorical Exclusions do not apply, continue in accordance with the National Programmatic Agreement and activate Historic Properties Specialist.**

## HISTORIC PROPERTIES SPECIALIST CHECKLIST

<b>THE FOLLOWING STEPS NEED TO BE TAKEN AS APPROPRIATE BY THE HISTORIC PROPERTIES SPECIALIST FOLLOWING ACTIVATION BY THE FOSC*:</b>	
A.	Identify: (1) historic properties that have been listed in or determined to be eligible for inclusion in the National Register of Historic Places that might be affected by response to a release or spill; and/or (2) non-surveyed areas where there is a potential for the presence of historic properties.
B.	Notify/consult with (as appropriate): * State Historic Preservation Office Appropriate CHRIS Information Center Tribal Historic Preservation Officers, or other tribal land owners or officials Federal, state, and local landowner(s) and/or land manager(s).
C.	Review (if available) aerial photos or other documentation of the area affected or potentially affected by the spill or release (this could include digital photographs/videos taken by on-scene representatives).
D.	If necessary, conduct on-site inspection to determine presence of historic properties.
E.	Assess whether emergency response strategies have the potential to affect historic properties and advise the FOSC accordingly. The FOSC shall ensure that response strategies, including personnel and equipment, are developed to protect historic properties at risk.
F.	Assess potential effects of emergency response strategies on historic properties, in consultation with appropriate parties listed above in section B., as needed.
G.	Make arrangements for suspected artifact theft to be reported to the SHPO, law enforcement officials, and the land owner/manager.
H.	Arrange for disposition of records and collected materials. Make arrangements for suspected artifact theft to be reported to the SHPO, law enforcement officials, and the land owner/manager.
I.	Ensure the confidentiality of historic property site location information, consistent with applicable laws, so as to minimize opportunities for vandalism or theft.
J.	Following activation, brief written activity summaries need to be provided daily by the Historic Properties Specialist to the FOSC and to the SHPO.

\* It should be noted that the FOSC is responsible for ensuring timely notification to the SHPO or THPO and other notifications as needed (as described above) and should initiate such notifications if an historic property specialist has not yet been activated.

\*\* It should be noted that additional steps may be advisable in more complex incidents. In addition, the identified tasks may require additional qualified individuals working under the direction/oversight of the FOSC. Qualified individuals may include Historic Property Specialists working for the Responsible Party.

**DOCUMENTATION OF ACTIONS TAKEN THAT RESULTED IN UNAVOIDABLE INJURY TO HISTORIC PROPERTIES**

*This form should be completed and submitted, along with any additional supporting documentation in a reasonable and timely manner to the appropriate entities listed below:*

<p>Name of incident:</p> <p>Date/time of incident:</p> <p>Location of incident:</p>
<p>Brief description of response action approved (including the date) by Federal On-Scene Coordinator (FOSC) where protecting public health and safety was in conflict with protecting historic properties:</p>          <p>Brief description of why protecting public health and safety could not be accomplished while also protecting historic properties:</p>          <p>FOSC Name:</p> <p>FOSC Signature:</p> <p>Date of Signature:</p>
<p>Sent to: (Insert name and fax number of potentially affected resource managers/trustees)</p>