

Environmental Office, MaineDOT  
Standard Operating Procedure  
Section 106 of the National Historic Preservation Act  
Process for MaineDOT

## **1.0 APPLICABILITY.**

This standard operating procedure (SOP) pertains to all staff in the Maine Department of Transportation's (MaineDOT's) Environmental Office (ENV) charged with evaluating regulatory jurisdictions, requirements, and review for resources protected under Section 106 of the National Historic Preservation Act of 1966 (Section 106). This standard applies to the processing of Section 106 for MaineDOT's projects/undertakings.

## **2.0 PURPOSE.**

This SOP is to ensure that the MaineDOT is in compliance with historic preservation laws by incorporating historic preservation principles into project planning through consultation with federal agencies, the State Historic Preservation Officer, Native American Tribes, and local municipal officials and historians. The objective is to establish procedures to identify historic properties, assess the project's effects on them, and seek ways to avoid, minimize, and mitigate adverse effects.

## **3.0 RESPONSIBILITIES.**

### **3.1 Conformity**

All ENV personnel involved in coordinating and consulting on transportation projects proposed by MaineDOT are responsible for becoming familiar and complying with, the contents of this procedure. The attached flowchart serves as a reference throughout the regulatory review of a proposed project. ENV managers and supervisors are responsible for ensuring that appropriate ENV personnel are familiar with and adhere to the procedures outlined in this SOP.

MaineDOT is responsible for Section 106 under the NEPA Categorical Exclusion (CE) assignment program (23 U.S.C. 326). Any reference in the SOP to FHWA will be the responsibility of MaineDOT unless a project does not fall under NEPA assignment. All MaineDOT Historic Coordinators and qualified consultants meet the Secretary of Interior Professional Qualification Standards.

### **3.2 Maintenance**

The NEPA, Coordination, and Permits Division Manager and Historic Coordinators (HC) will ensure that this SOP reflects current needs and standards on an annual basis. Attachments will be updated as needed and the updated information provided to all parties.

## **4.0 SECTION 106 PROCESS FOR MAINEDOT**

### **4.1 Initiating Section 106 Process and Establish Undertaking (36 CFR 800.3)**

The MaineDOT NEPA, Coordination, and Permits Division's HC shall review all projects within the MaineDOT Work Plan, identified as a scoping project, or any other type of project to determine if there is an undertaking/project in accordance with 36 CFR § 800.3 (a) and § 800.16 (y).

- A. If there is no undertaking/project as defined in 36 CFR § 800.3 (a) and 36 CFR § 800.16 (y) (federal nexus), then the HC will document this determination in the MaineDOT ProjEx database. ProjEx will generate the final CE Report with this information for the CPD e-file. This will complete Section 106.

**B.** If there is an undertaking/project as defined in 36 CFR § 800.3 (a) and 36 CFR § 800.16 (y) (federal nexus), then the HC will apply the Section 106 Programmatic Agreement (PA), Appendix A (Projects exempted from further review).

#### **4.2 Applying the Section 106 Programmatic Agreement**

In the 2022 Section 106 Programmatic Agreement the Federal Highway Administration (FHWA) and the Federal Railroad Administration (FRA) delegated the Section 106 process and determination to the MaineDOT. Although the MaineDOT has this authority, 36 CFR Part 800 states that the lead federal agency still retains ultimate legal responsibility. [The MaineDOT will retain legal responsibility under NEPA Assignment, and the 2022 Section 106 Programmatic Agreement will be revised/amended accordingly]

The HC will determine if an undertaking/project is exempt from further Section 106 review based on the project scope, known resources (such as known National Register eligible bridges from the Bridge Management Plan and existing historic GIS data), and applying the Section 106 PA.

**A.** If the project meets one of the exemptions; the HC will document the determination in the MaineDOT ProjEx database. The project will also be documented in the annual PA report to FHWA, FTA, and SHPO.

**B.** If the project does not meet one of the PA exemptions, the HC establishes an area of potential effect (APE) and conducts an Above Ground Cultural Resources Survey in accordance with the Maine Historic Preservation Commission (MHPC) Above Ground Cultural Resources Survey Manual, February 2013 (MHPC Survey Guidelines) or the HC will assign the project to a MaineDOT Historic Architectural Consultant (consultant) for an above ground survey to be completed following the MHPC Survey Guidelines. The HC will also forward information on the project to the Archaeological staff at MHPC (This is not the SHPO) for existing data review. The Code of Maine Rules contains two chapters that regulate professional archaeological work in Maine. Chapter 100 sets forth the standards and procedures for access to archaeological site records. Chapter 812 contains the composition and functions of the Archaeological Advisory Committee, the credentials requirements from persons on the Commission's approved lists of archaeologists, the procedure for review of credentials, the procedure for removal from approved lists, and environmental impact project guidelines and procedures. The HC will send information on the project to the federally recognized Tribes and Tribal Historic Preservation Officer (THPO) as appropriate (see Section 106 SOP for more information on tribal consultation). The HC will invite other consulting parties (local government representatives, local historic groups) to participate in the Section 106 process. Invitations and responses will be documented in ProjEx and the CPD e-file.

#### **4.3 Consulting Parties Invitation**

The HC will identify and invite consulting parties in accordance with 36 CFR § 800.2 (a) (4) and (c) and (d), § 800.3 (e) and (f), and the Maine Section 106 Programmatic Agreement. Typically, the consulting parties include SHPO and/or THPO, Native American tribes, representatives of local governments, and local historical groups.

The HC will notify the SHPO and/or THPO of an undertaking/project and request their advice and assistance in carrying out MaineDOT's Section 106 responsibilities. The HC is responsible for consulting with the THPO in lieu of the SHPO regarding undertakings/projects occurring on or affecting historic properties on tribal lands. In Maine, the Passamaquoddy Tribe, Houlton Band of Maliseet Indians, Mi'kmaq Nation, and the Penobscot Nation have THPO status under Section 106 and are not currently signatories to the Section 106 Programmatic Agreement; the same is true of the Army Corps of Engineers. At any time if a Tribe requests Government-to-

Government consultation, the HC will notify FHWA Maine Division. FHWA Maine Division will then lead the Government-to Government consultation.

The HC will invite the appropriate town officials and any known local historical groups of the undertaking/project and request comments from these parties.

If no response is received from an invited consulting party after 30 days, the HC will assume that the party does not wish to participate and will not send future notices of determinations or invite them to participate in the resolution of adverse effects. The invited party can choose to participate at a later date, but their participation and involvement will not reset the clock – they can only make official comments and recommendations on actions that have not yet been resolved.

The HC will file all documentation in the CPD e-file and dates will be entered into ProjEx. There are drop-downs for all tribal and municipal coordination.

All consulting parties that participate in the Section 106 process will be provided information about the undertaking and its effects on historic properties, subject to confidentiality provisions of § 800.11(c).

Parties can also submit requests to be a consulting party and MaineDOT HC will review and approve the party.

#### **Tribal Consultation (Government -to Government)**

In accordance with 36 CFR 800, federal agencies must consult with federally recognized Indian Tribes that attach religious and cultural significance to historic properties that may be affected by an undertaking.

Tribal consultation is a federal government-to-government relationship. It cannot be delegated by a federal agency to a state or local agency. MaineDOT performs project-level tribal consultation on behalf of FHWA. This includes consultation for LPA projects that receive FHWA funding. The HC will invite the federally recognized tribes in Maine: Mi'kmaq Nation, Houlton Band of Maliseet Indians, Passamaquoddy Tribe-Indian Township, Passamaquoddy Tribe-Pleasant Point, and Penobscot Nation and request their comments. However, the tribes have the option to work directly with the FHWA division office if they choose. All direct project consultation is conducted by the HC on behalf of FHWA. LPAs and consultants shall not contact federally recognized tribes on MaineDOT/FHWA's behalf.

#### **4.4 Identification of Historic Properties (36 CFR 800.4)**

The HC will determine the Area of Potential Effect (APE) and then conduct an above-ground cultural resources Survey or assign projects to the consultant(s). MaineDOT obtains qualified consultants that meet the Secretary of Interior Professional Qualification Standards for architecture and archaeology. Archaeology consultants also have to meet the State code described in Section 4.2 B. The SHPO/THPO will concur or comment on the APE when reviewing MaineDOT's determination of eligibility. The identification and evaluation of historic properties must be performed by professionals who meet the professional standards established by the Secretary of the Interior [§ 800.2(a)(1)]. The Professional Qualification Standards are published in 36 CFR 61. The HC will provide topographic maps with the APE clearly identified and written project scope of work. The HC will enter dates into ProjEx indicating when the surveys were assigned and completed. The HC will also enter the name of the surveyor.

All above-ground surveys will be entered into the web-based historic properties database (Maine Historic Property Workbench) by the HC or the consultant. All surveys and determinations of eligibility and effects will meet the requirements of the MHPC Survey Guidelines.

The HC, (in accordance with 36 CFR § 800.4 (c) and MHPC Survey Guidelines, will evaluate and recommend whether properties within the APE are eligible for and/or listed on the National Register of Historic Places. The HC will make a final determination of eligibility for the SHPO's concurrence.

- A.** If there are no National Register eligible or listed properties within the APE, a survey report with eligibility recommendations will be supplied to the HC by the architectural consultant, and/or the MHPC archaeological staff, and/or the THPO (see MHPC Survey Guidelines for Architectural Survey Report guidelines). The report will include all properties surveyed and indicate (property by property) why they are not eligible for the National Register. The HC will make a final determination and forward the supporting documentation with a detailed cover memo and finding of **No historic properties affected** to the SHPO/THPO for concurrence. In accordance with § 800.4(d), all participating consulting parties will be notified and the documentation will be made available subject to confidentiality provisions of 800.11(c). Documentation will be in accordance with 36 CFR § 800.4(d) and § 800.11(d). All documentation will be filed in the CPD e-file and dates will be entered into ProjEx.
- i. If the SHPO/THPO does not object within 30 days of receipt of an adequately documented finding, a memo will be forwarded from the SHPO/THPO to the HC stating so. If no response is received after 30 days from the SHPO/THPO, concurrence will be assumed [see §800.4(d)(1)(i)]. This will complete Section 106. All documentation will be filed in the CPD e-file and dates will be entered into ProjEx.
  - ii. If the SHPO/THPO objects to the finding of no historic properties affected, then the HC and the SHPO will follow §800.4(d)(1)(ii) by meeting to resolve the disagreement, or the HC will forward the finding and supporting documentation to the Advisory Council on Historic Preservation (ACHP) and request that the ACHP review the finding pursuant to §800.4(d)(1)(iv)(C).
- B.** If there are National Register eligible or listed properties identified within the APE, a survey report with eligibility recommendations will be supplied to the HC by the architectural consultant, and/or the MHPC archaeological staff, and/or the THPO (see MHPC Survey Guidelines for Architectural Survey Report guidelines). The report will indicate under which National Park Service National Register Criteria (Criteria A, B, C or D) the property is eligible and which of the seven aspects of integrity (Location, Design, Setting, Materials, Workmanship, Feeling, and/or Association) the property retains to convey its significance. The HC will make a final determination of eligibility for the SHPO's concurrence. For nearly all projects, the determination of National Register above-ground boundaries will automatically default to the modern-day parcel boundaries. The need for more refined and individual assessments of boundaries beyond that will be assessed on a case-by-case basis.
- i. If the SHPO/THPO objects to the finding of National Register eligibility, then the HC, , and the SHPO will meet to resolve the disagreement, or the HC will forward the finding and supporting documentation to the Secretary of the Interior (specifically the Keeper of the National Register within the U.S. Department of Interior/National Park Service) pursuant to 36 CFR § 63 requesting a determination of eligibility. The Keeper of the National Register will respond within 45 days with a determination.

#### **4.5 Assessment of Effects to Historic Properties (36 CFR 800.4 (d))**

The HC will determine whether historic properties will be affected after sufficient project details or plans are provided by the MaineDOT ENV Team Leader. The HC will prepare

information for scheduled public meetings to inform the public about an undertaking and its effects on historic properties in accordance with § 800.2(d)(2). If the project is not scheduled to have a public meeting, then the HC will post the documentation to the MaineDOT website and provide public notice for review and comment. Documentation will be in accordance with § 800.11(e). All documentation will be filed in the CPD e-file and dates entered into ProjEx.

A. If the determination is the undertaking/project will have **no effect** on historic properties as defined in § 800.16(i), then the HC will forward a determination of effect report as outlined in MHPC's Survey Guidelines with a detailed cover memo and finding of **No historic properties affected** to the SHPO/THPO for concurrence. In accordance with § 800.4(d), documentation will be made available to consulting parties upon request and subject to confidentiality provisions of § 800.11(c). Documentation will be in accordance with 36 CFR § 800.4(d) and § 800.11(d). All documentation will be filed in the CPD e-file and dates will be entered into ProjEx. The HC will also put the type of determination on the ProjEx Permit page for tracking purposes.

i. If the SHPO/THPO does not object within 30 days of receipt of an adequately documented finding, a memo will be forwarded from the SHPO/THPO to the HC stating so. If no response is received after 30 days from the SHPO/THPO, concurrence will be assumed [see §800.4(d) (1)(i)]. This will complete Section 106. All documentation will be filed in the CPD e-file and dates will be entered into ProjEx.

ii. If the SHPO/THPO objects to the finding of no historic properties affected, then the HC and the SHPO will follow §800.4(d)(1) (ii) by meeting to resolve the disagreement, or the HC will forward the finding and supporting documentation to the Advisory Council on Historic Preservation (ACHP) and request that the ACHP review the finding pursuant to §800.4(d)(1)(iv). The ACHP has 30 days to review the finding and provide the HC with a determination.

B. If the determination is that the undertaking/project will have an effect on historic properties as defined in § 800.16(i), the HC, and/or consultant, and/or MHPC archaeological staff, and/or the THPO will then make an assessment of adverse effect in accordance with 36 CFR § 800.5. All documentation will be filed in the CPD e-file.

#### **4.6 Assessment of Adverse Effects (36 CFR 800.5)**

The HC in accordance with 36 CFR § 800.5, will apply the criteria of adverse effect to historic properties within the APE. The HC will provide a determination of effect report as outlined in MHPC's Survey Guidelines. The HC will make a final determination of the effect for the SHPO's concurrence.

A. If the determination is the undertaking/project will have no adverse effect on historic properties in accordance with § 800.5, then the HC will forward the supporting documentation in accordance with 36 CFR § 800.11(e) with a detailed cover memo and finding of **no adverse effect** to the SHPO for concurrence. The memo will also include language notifying the SHPO that a concurrence with a determination of no adverse effect will result in a finding of *de minimis* under Section 4(f) if property rights need to be acquired. The exact wording to be used is as follows: *"MaineDOT will be processing a Section 4(f) de minimis determination upon concurrence with this finding."* In accordance with § 800.5(c), all participating consulting parties will be notified and provided documentation as specified in § 800.11(e), subject to confidentiality provisions of 800.11(c). All documentation will be filed in the CPD e-file and dates in will be entered into ProjEx.

i. If the SHPO/THPO or participating consulting party does not object within 30 days of receipt of an adequately documented finding, a memo will be forwarded from the SHPO/THPO or consulting parties to the HC stating so. If no response is received after 30 days for a determination of no adverse effect from either the SHPO/THPO or participating

consulting party, concurrence will be assumed [see § 800.5(c)(1)]. This will complete Section 106. All documentation will be filed in the CPD e-file and dates will be entered into ProjEx.

ii. If within 30 days the SHPO/THPO or any consulting party notifies the HC in writing that it disagrees with the finding of no adverse effect and specifies the reason, then the HC, the lead federal agency (MaineDOT under NEPA assignment), and/or the SHPO, and/or consulting parties will follow §800.5(c)(2) by meeting to resolve the disagreement, or the lead federal agency will forward the finding and supporting documentation to the Advisory Council on Historic Preservation (ACHP) and request that the ACHP review the finding pursuant to §800.5(c)(3)(i) and (ii). The ACHP has 30 days to review the finding and provide the lead federal agency with a determination.

**B.** If the recommendation is the undertaking/project will have an **adverse effect** on historic properties in accordance with § 800.5, then the HC and the lead federal agency will follow 36 CFR § 800.5(d) (2) and § 800.6 - § 800.7. The HC will notify the SHPO, THPO, and any other participating consulting parties.

i. If the SHPO/THPO or participating consulting party does not object within 30 days of receipt of an adequately documented finding, a memo will be forwarded from the SHPO/THPO or consulting parties to the HC stating so. If no response is received after 30 days for a determination of no adverse effect from either the SHPO/THPO or participating consulting party, concurrence will be assumed [see § 800.5(c)(1)].

MaineDOT will be responsible for notifying the Advisory Council on Historic Preservation (ACHP) by providing documentation in accordance with § 800.11(e). The ACHP will have 15 days to comment (if no comment is received within 15 days, it is assumed that the ACHP is not participating). The HC will work with the Team Leaders, Project Managers, the SHPO and/or THPO, and other participating consulting parties to propose adequate minimization and mitigation measures for the adverse effect. These measures will be documented in a Memorandum of Agreement (MOA) developed by the HC pursuant to §800.6 (c). At a minimum, signatories will include MaineDOT, SHPO, and/or THPO, and the ACHP if they choose to participate. Additionally invited signatories or concurring parties may also be included. The HC will obtain all signatures. All documentation will be filed in the CPD e-file and dates will be entered into ProjEx.

a. In the failure to resolve adverse effects, the participating parties will follow § 800.7.

ii. If within 30 days the SHPO/THPO or any consulting party notifies the HC in writing that it disagrees with the finding of no adverse effect and specifies the reason, then the HC and/or the SHPO, and/or consulting parties will follow §800.5(c)(2) by meeting to resolve the disagreement, or the lead federal agency (MaineDOT under NEPA assignment) will forward the finding and supporting documentation to the Advisory Council on Historic Preservation (ACHP) and request that the ACHP

review the finding pursuant to §800.5(c)(3)(i) and (ii). The ACHP has 30 days to review the finding and provide the lead federal agency with a determination.

Final NEPA approval (and therefore the expenditure of federal funds and/or approval of federal permits) cannot be granted until the Section 106 process is completed [36 CFR § 800.1(c)]. All Section 106 determinations of eligibility and effect, and any required MOAs filed with the ACHP, must be completed before the approval of NEPA. The HC is responsible for Section 106 determinations and the development and implementation of all Section 106 MOAs.

#### **4.7 Archaeological Surveys**

In order to complete a historic archaeological review, it may be necessary to conduct surveys under project agreement contracts. It is the responsibility of the HC to obtain the scope and budgets as well as prioritize the work. Archaeological Reports will be filed in the ENV Office and a note will be placed in ProjEx by the HC. The HC will also forward information on the project to the Archaeological staff at MHPC (this is not the SHPO) for existing data review, and work closely with the archaeology staff and other qualified archaeology consultants. The Code of Maine Rules contains two chapters that regulate professional archaeological work in Maine. Chapter 100 sets forth the standards and procedures for access to archaeological site records. Chapter 812 contains the composition and functions of the Archaeological Advisory Committee, the credentials requirements from persons on the Commission's approved lists of archaeologists, the procedure for review of credentials, the procedure for removal from approved lists, and environmental impact project guidelines and procedures. The code of Maine Rules also contains Chapter 13 (Maine Antiquities Law) which directs excavation activities (<https://www.maine.gov/mhpc/programs/protection-and-community-resources/laws-and-regulations>).

#### **4.8 National Historic Landmarks (36 CFR 800.10)**

The HC will notify the Environmental Team Leader and the Senior Environmental Manager when an NHL may potentially be adversely affected by an undertaking/project. MaineDOT will avoid adverse impacts to the greatest extent possible. If adverse effects cannot be avoided, MaineDOT will follow 36 CFR 800.10, and invite the Advisory Council and the Secretary of the Interior to participate in the consultation.

#### **4.9 Emergency Situations (36 CFR 800.12)**

Emergencies are defined consistent with 36 C.F.R. § 800.12 as occurrences that require emergency highway system and facility repairs that are necessary to:

- (1) protect the life, safety, or health of the public;
- (2) minimize the extent of damage to the highway system and facilities;
- (3) protect remaining highway facilities; or
- (4) restore essential traffic.

The following stipulations apply to emergency situations:

A. Repairs to address emergency situations as defined above can occur regardless of funding category or declarations made by Federal, state, or local agencies. MaineDOT may take immediate remedial action without waiting for comment if such action is necessary to prevent further escalation of the emergency by the circumstances causing it. Immediate rescue and salvage operations conducted to preserve life or property are exempt from Section 106 review.

B. If the emergency repair project could affect historic properties, MaineDOT's HC will work with the Environmental Team Leader in these situations and shall notify the SHPO, FHWA, and Tribes within 48 hours, when feasible. If possible, the SHPO and any Tribe that may attach religious and cultural significance to historic properties likely to be

affected shall be given seven days to respond. If the HC determines that circumstances do not permit seven days for comment, the ACHP and SHPO/THPO will be notified and invited to comment within the time available.

C. For projects where the repair must be made within the first 30 days of the occurrence of the event that caused the emergency or the declaration of the emergency by an appropriate authority, the processing of environmental documentation will happen concurrently or after the fact. In these cases, MaineDOT will comply with the procedures to the extent possible, but the reviews will likely be conducted after the emergency work is completed.

D. For projects taking longer than 30 days for repair, MaineDOT will comply with the procedures in Sections 4.1 – 4.6.

#### **4.10 Post-Review Discoveries (36 CFR 800.13)**

In the event of post-review discoveries, the HC will work with the SHPO/THPO and Tribes in accordance with § 800.13. The HC will also work with the Senior Environmental Manager, Environmental Team Leader, Project Manager, and the Resident Engineer and Contractor if construction has begun in accordance with § 800.13 and the Department of Transportation Standard Specifications (12/2014) § 105.9.

#### **4.11 DOT State Funded Projects with Army Corps of Engineers (ACOE) as Federal Lead**

The HC will apply the process as laid out in this SOP (even applying the Programmatic Agreement exemptions). The DOT as an applicant for an ACOE Federal Permit will abide by the ACOE Programmatic General Permit (Historic Properties). All applicable Section 106 information will be documented on the ACOE permit cover sheet by the MaineDOT Environmental Team Leader when applying for an ACOE permit.

#### **4.12 DOT Locally Administered Projects (LAP)**

The HC will conduct the Section 106 process as laid out in this SOP for LAP Projects with federal funding. The municipality/ACOE will be responsible for Section 106 for projects with no federal funding.

#### **4.13 Cultural Architectural Resource Management Archive Database (CARMA)**

All above-ground surveys conducted by or for the MaineDOT will be completed via the Cultural Architectural Resource Management Archive (CARMA).

#### **4.14 National Environmental Policy Act (NEPA)**

When Section 106 has concluded the HC will check yes or no for Section 106 on the Maine Checklist in ProjEx.

Final NEPA approval (and therefore the expenditure of federal funds and/or approval of federal permits) cannot be granted until Section 106 review is complete [36 CFR § 800.1(c)]. Draft EA and EIS documents can be circulated prior to the completion of Section 106 review provided that a MOA has been executed allowing for phased identification and evaluation of properties. All Section 106 determinations of eligibility and effect, and any related MOAs, must be completed before the issuance of a FONSI or ROD. The HC is responsible for 106 determinations and the development and implementation of all 106 MOAs.



