



## NEPA Section 106 Guidance

---

### Introduction

Pursuant to 23 United States Code 327 and the implementing Memorandum of Understanding (MOU) executed on XX, the Maine Department of Transportation (MaineDOT) has assumed, and the Federal Highway Administration (FHWA) has assigned its responsibilities under the National Environmental Policy Act (NEPA) for highway projects and Local Agency Program (LAP). MaineDOT's assumption includes all highway projects in Maine with FHWA federal funding or other FHWA federal action. This assumption of FHWA responsibilities or NEPA Assignment includes responsibility for environmental review, interagency consultation, and approval of NEPA actions. MaineDOT will be the Lead Federal Agency for MaineDOT-sponsored highway projects.

The following provides guidance for Section 106 of the National Historic Preservation Act and provides for identifying historic property to determine the appropriate level of coordination that is required.

Section 106 of the National Historic Preservation Act (16 U.S.C. 470) requires Federal agencies to take into account the effects of their undertakings on historic properties. The procedures are laid out in 36 CFR 800 and the process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation.

This guidance document defines the process to determine the appropriate level of coordination that is required. All actions will be processed and documented in MaineDOT's ProjEx database and MaineDOT's Environmental CPD e-file with survey, property, tribal, town, public, eligibility, effects, consultation, and document information.

MaineDOT Cultural staff are responsible for assessing and ensuring compliance with Section 106 under NEPA Assignment. Section 106 information is provided to and discussed with the Team Leader. This information is incorporated into the overall NEPA decision.

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

The MaineDOT Cultural staff (CS) shall review all projects within the MaineDOT Work Plan, identified as a scoping project or Work Plan Candidate, 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), then the CS will document this determination in ProjEx. 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), then the CS will apply the October 2004 Section 106 Programmatic Agreement (PA), Section 2 (Projects exempted from SHPO, Federal Highway Administration [FHWA], and Federal Transit Administration [FTA] review).

### 2.0 Applying the Section 106 Programmatic Agreement



## NEPA Section 106 Guidance

---

In the 2022 Section 106 PA, the FHWA and FTA delegated the Section 106 process and determination to the MaineDOT. MaineDOT acts as FHWA under NEPA assignment.

The CS will make a determination 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 CS 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 CS 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 CS will assign the project to a MaineDOT Historic Architectural Consultant (consultant) for an above ground survey to be completed in accordance with the MHPC Survey Guidelines. The CS will also forward information on the project to the Archaeological staff at MHPC for review. The CS 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 CS will invite other consulting parties (local government representatives, local historic groups) to participate in the Section 106 process via mailed letters or email.

### 3.0 Consulting Parties Invitation

The CS 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 PA Section 4 (A). Typically, the consulting parties include SHPO and/or THPO, Native American tribes, representatives of local governments, and local historic groups.

The lead federal agency 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, Penobscot Nation, and Aroostook Band of Micmacs have THPO status under Section 106 and are not currently signatories to the Section 106 PA; the same is true of the Army Corps of Engineers (ACOE).

The CS will invite the federally recognized tribes in Maine: Aroostook Band of Micmacs, Houlton Band of Maliseet Indians, Passamaquoddy Tribe-Indian Township, Passamaquoddy Tribe-Pleasant Point, and Penobscot Indian Nation and request their comments. The tribal comments will be sent directly to the lead federal agency to complete the consultation. *There are no known “out-of-state” tribes with an interest or claim in Maine.*

The CS will invite the appropriate town officials and any known local historic groups to participate in the Section 106 process for the undertaking/project and request comments from these parties.



## NEPA Section 106 Guidance

---

If no response is received from an invited consulting party after 30 calendar days, the CS will assume that the party does not wish to participate and will not send future notices of determinations or invite their participation in the resolution of adverse effects, if necessary. 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 CS will file all documentation in the CPD e-file and dates will be entered into ProjEx.

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).

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

The CS will determine the Area of Potential Effect (APE) and then conduct an above-ground cultural resources Survey or assign projects to the consultant(s) and/or the MHPC archaeological staff. 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 CS will provide topographic maps with the APE clearly identified and written project scope of work. The CS will enter dates into ProjEx indicating when the surveys were assigned and completed. The CS will also enter the name of the surveyor.

All above-ground surveys will be entered into the web-based historic properties database and GIS layer by the CS or the consultant. All surveys and determinations of eligibility and effects will meet the requirements of the MHPC Survey Guidelines.

The following is a breakdown of responsibility for 36 CFR § 800.4:

§800.4 (a) (1) - MaineDOT/CS

§800.4 (a) (2) - MaineDOT/CS, consultant, MHPC archaeological staff, and Tribes

§800.4 (a) (3) - MaineDOT/CS

§800.4 (a) (4) - MaineDOT/CS and the lead federal agency

§800.4 (b), (c), and (d) - MaineDOT/CS, consultant, MHPC archaeological staff, and Tribes.

The CS, and/or the MHPC archaeological staff, and/or the THPO (as appropriate) 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 CS 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 CS 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 CS will make a final determination and forward the supporting documentation with a detailed cover



## NEPA Section 106 Guidance

---

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 CS 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 CS, the lead federal agency, and/or the SHPO will follow §800.4(d)(1)(ii) 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 §800.4(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 CS 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 CS will make a final determination of eligibility for the SHPO's concurrence. For nearly all projects, the determination of National Register 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 CS, the lead federal agency, and the SHPO will meet to resolve the disagreement, or the lead federal agency 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.

### **5.0 Assessment of Effects on Historic Properties (36 CFR 800.4 (d))**

The CS will provide National Register eligible and listed property information to the Environmental Team Leader and Project Manager at Baseline Complete. This will allow the design to consider measures to avoid and minimize. The CS will determine the effects on historic properties at the Preliminary Design Report Milestone (PDR), unless sufficient information is provided prior to PDR. The CS will prepare information for scheduled public meetings to inform the public about an undertaking and its effects on



## NEPA Section 106 Guidance

---

historic properties in accordance with § 800.2(d)(2). If the project is not scheduled to have a public meeting, then the CS 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 CS 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), 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 CS 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 CS, the lead federal agency (MaineDOT under NEPA assignment), and the SHPO will follow §800.4(d)(1)(ii) 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 §800.4(d)(1)(iv). The ACHP has 30 days to review the finding and provide the lead federal agency 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 CS, 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.

### 6.0 Assessment of Adverse Effects (36 CFR 800.5)

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



## NEPA Section 106 Guidance

---

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 CS 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 CS in writing that it disagrees with the finding of no adverse effect and specifies the reason, then the CS, 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 CS and the lead federal agency will follow 36 CFR § 800.5(d) (2) and § 800.6 - § 800.7. The CS 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 CS 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 CS 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 CS 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



## NEPA Section 106 Guidance

---

included. The CS will obtain all signatures. All documentation will be filed in the CPD e-file and dates will be entered into ProjEx.

This will complete Section 106. 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 CS in writing that it disagrees with the finding of no adverse effect and specifies the reason, then the CS 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 CS is responsible for Section 106 determinations and the development and implementation of all Section 106 MOAs.

Once MaineDOT assumes NEPA assignment, the CS will lead the consultation with all consulting parties including the ACHP. Any MOA requirements will also be led through final signatures by the CS.

### 7.0 Links

Section 106 of the National Historic Preservation Act  
[Advisory Council on Historic Preservation](#)

Protection of Historic Properties  
[36 CFR 800](#)

[MaineDOT Section 106 Programmatic Agreement](#)

**MaineDOT Environmental Office maintains a Standard Operating Procedure for Section 106.**