

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 assignment program (23 U.S.C. 327). Any reference in the SOP to FHWA will be the responsibility of MaineDOT unless a project does not fall under NEPA assignment (e.g., border projects).

3.2 Maintenance

The Coordination, Assessment, and Permits Division Manager and Cultural staff (CS) 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 MAINE DOT

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

The MaineDOT NEPA, Permits, and Coordination Division's CS shall review all projects within the MaineDOT Work Plan, identified as a scoping project, identified in the Annual Maintenance and Operations Work Plan, 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 CS will document this determination in the MaineDOT ProjEx database or Maintenance 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 CS will apply the July 2022 Section 106 Programmatic Agreement (PA), Appendix A (Projects exempted from State Historic

Preservation Officer [SHPO], Federal Highway Administration [FHWA], and Federal Railroad Administration [FRA] 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 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 Section VII of the Programmatic Agreement.

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, FRA, and SHPO [this will be revised under NEPA Assignment and the revised/amended PA]. All documentation will be filed in the CPD e-file and ProjEx.

B. If the project does not meet one of the PA exemptions, the CS conducts an Above Ground Cultural Resource Survey in accordance with the MHPC Above Ground Cultural Resource Survey Manual, February 2006 (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 the project to the Archaeological staff at Maine Historic Preservation Commission (MHPC) for review. The CS will send the project to the federally recognized Tribes and Tribal Historic Preservation Officer (THPO) as appropriate. The CS will invite other consulting parties (local government representatives, local historic groups) to participate.

4.3 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 Programmatic Agreement. Typically, the consulting parties include SHPO and/or THPO, Native American tribes, representatives of local governments, and local historical groups.

The CS 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 CS 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.

The CS 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 CS 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 CS 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 CS will review and approve the party.

Tribal Consultation

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 CS 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. *There are no known "out-of-state" tribes with an interest or claim in Maine.* 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 CS 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 CS will determine the Area of Potential Effect (APE) and then conduct an Above Ground Cultural Resource Survey or assign projects to the consultant(s) and/or the MHPC archaeological staff. 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 for Section 106 architectural survey and Section 106 archaeological survey for when the surveys were assigned and completed.

All above-ground surveys will be entered into the web-based historic properties database (Maine Historic Property Workbench) 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 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

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

The CS, and/or consultant, 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 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 and the SHPO will follow §800.4(d)(1)(ii) by meeting to resolve the disagreement, or the CS 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 and the SHPO will meet to resolve the disagreement, or the CS will forward the finding and supporting documentation to the Secretary of the Interior (specifically the Keeper of the National Register within the U.S. Dept 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 CS will determine whether historic properties will be affected after sufficient project details or plans are provided by the MaineDOT ENV Team Leader. The CS 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 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.

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), 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 CS 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 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 and the SHPO will follow §800.4(d)(1) (ii) by meeting to resolve the disagreement, or the CS 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 CS 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.

4.6 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 are required. The exact wording to be used is as follows: "*MaineDOT will be processing 4(f) de minimis documentation with FHWA 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 will be entered into ProjEx. The CS will also put the type of determination in ProjEx on the Permit page.

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, and/or the SHPO, and/or consulting parties will follow §800.5(c)(2) by meeting to resolve the disagreement, or the CS 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 CS 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 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. The CS 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 the SHPO and/or THPO and the ACHP if they choose to participate. Additional invited signatories or concurring parties may also be included. The CS will be responsible for obtaining all signatures. All documentation will be filed in the CPD e-file and dates will be entered into ProjEx.

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

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 CS 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 CS.

4.8 National Historic Landmarks (36 CFR 800.10)

The CS will notify the Environmental Team Leader and the NEPA Manager when an NHL may potentially be adversely affected by an undertaking/project. The CS will be responsible for following § 800.10. The CS will be responsible for inviting the Advisory Council and the Secretary of the Interior to participate in consultation.

4.9 Emergency Situations (36 CFR 800.12)

In accordance with 36 CFR § 800.12, an emergency undertaking/project is defined as an essential and immediate response to a disaster or emergency declared by the President, a tribal government, or the Governor of a State or another immediate threat to life or property. The CS will work with the NEPA Manager in these situations.

In emergency situations, as defined in § 800.12, the CS will notify the NEPA Manager and will notify the ACHP and the SHPO/THPO prior to the undertaking and afford them an opportunity to comment within seven days. If the CS 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. Immediate rescue and salvage operations conducted to preserve life or property are exempt from Section 106 review. Any action that extends beyond 30 days following the emergency is subject to the regular Section 106 review process unless an extension has been granted by the ACHP. The CS will also work with the Environmental Team Leader and Project Manager.

4.10 Post-Review Discoveries (36 CFR 800.13)

In the event of post-review discoveries, the CS will work with the SHPO/THPO and Tribes in accordance with § 800.13. The CS will also work with the NEPA 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 CS 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 CS 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 CS 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 CS is responsible for 106 determinations and the development and implementation of all 106 MOAs.

Section 106 Process for MaineDOT Projects – Process Flow Chart

