

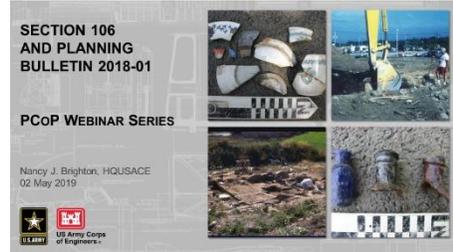
Cultural Resources Compliance Activities – What is Needed and When?

Planning CoP Webinar

May 2, 2019

Q&A Session

This webinar, presented by Nancy J. Brighton (Cultural Resources Sub-CoP Lead and Deputy Federal Preservation Officer), provided an overview of Planning Bulletin 2018-01, with a focus on the timing of cultural resources compliance activities. The presentation walked through each of the bulletin's decision points and product milestones, and discussed what cultural resources efforts should be done at each point.



For additional information on the National Historic Preservation Act (NHPA) Section 106 process, please visit the Advisory Council on Historic Preservation (ACHP) website, <https://www.achp.gov/>. The Council's webpage has a good overview of the steps – including decisions and documentation – federal agencies undertake under Section 106: <https://www.achp.gov/protecting-historic-properties/section-106-process/introduction-section-106>.

This summary of the Question / Answer session of the webinar is not a transcription; questions and responses have been edited and reordered for clarity.

Data and Information Collection under Section 106

What is the appropriate role of conducting surveys/inventory within this process? If there is no existing, adequate survey covering the Area of Potential Effect (APE), it's not possible to make an effects determination without inventory data.

This is why it is important to bring your cultural resources project delivery team (PDT) member to the table from Day One. Each project is different, but generally speaking the development of the project management plan (PMP) should allow each PDT member to discuss the information they feel is needed to get to the final report. If no data is initially available in the APE or study area, the team should discuss whether it makes sense for it to be collected during the feasibility phase, and if so what the specific justification is for a survey.

It's true that if the team waits until the tentatively selected plan (TSP) milestone to begin collecting data, then the information isn't being used as it's supposed to be to help guide the review and selection of alternatives. Therefore, it's up to the cultural resources PDT member to make the justification as to why the TSP shouldn't be selected without the information in question (i.e., what role the information would play and why it's needed). If funding isn't available for the survey or inventory, then the team should document it in the risk register and decision log, characterized with the appropriate risk level. If the risk level is high or medium, a risk mitigation strategy should also be defined.

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How should we respond if a State Historic Preservation Office (SHPO) "requires" the Corps to conduct a survey (at cost to the Corps) of structures within the APE that are not historic (e.g., trailers/mobile homes)?
This situation would be handled on a case-by-case basis. If the cultural resources PDT member determines this information really is not needed to go to the final report, you could write up an agreement document that says if it turns out the structures in question will be affected in the design, they will be studied/surveyed at a later point. Another option would be to conduct an abbreviated survey (as part of the agreement) if it's been determined that the structures will be within the project alignment. Finally, you may be able to determine that the structures are not historic by measuring against the [National Register of Historic Places criteria](#) (as required) without a larger, more formal survey, based on a reasoned argument about the significance of the structures.

Section 106 Guidance and Review Processes

If a feasibility study triggers an independent external peer review (IEPR) and there are considerable cultural resource considerations in the study, how important is it to have a cultural resources expert on the external panel?

It's important to consider the potential engagement of a cultural resources expert on the IEPR panel based on the specific IEPR charge and the project. The cultural resources sub-CoP is currently trying to better understand the situations in which IEPR with a cultural resources expert is needed, and when ATR alone is sufficient. The goal is to develop guidance in the near future outlining roles and responsibilities for cultural resources experts on IEPR panels and ATR teams.

How many reviewers are ATR certified for cultural resources? Is there a plan to expand on that critical expert reviewer pool?

There was a lull in ATR certification when the Cultural Resources sub-CoP lead/Deputy Federal Preservation Officer position was open. However, a call for certification applications was just put out. There are already quite a few certified cultural resources ATR reviewers with various technical and regional specialties in the Sub-CoP database. It is anticipated that the call for ATR certification will be put out either annually or every two years.

When will Table 1 in [Planning Bulletin 2018-01, Feasibility Study Milestones](#) be revised? It is still unclear how effects determinations will be made prior to having a TSP.

The content of Table 1 in Planning Bulletin 2018-01 will be clarified in the revisions to Appendix H of the [Planning Guidance Notebook](#), which is slated to be completed this summer.

National Historic Preservation Act, Section 106 Documentation

By "executed agreement" do you mean signed agreement?

Yes – "executed" means signed, according to the Advisory Council on Historic Preservation (ACHP). When an agreement that has been executed is carried out, it is referred to as "implemented."

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What is the correct date citation for a Memorandum of Agreement (MOA) or Programmatic Agreement (PA) to use in the Finding of No Significant Impact (FONSI)/Record of Decision (ROD) template when USACE and the SHPO (and the ACHP, if participating) have signed it? What is the correct date citation when there are invited signatories?

Section 106 consultation is complete when the last agreed upon party signs the either the MOA or PA, if executed, or when there is concurrence on the Corps determination of no historic properties affected or no historic properties present. If an agreement (MOA or PA) is being prepared and if it has been decided that only USACE and the SHPO are signing, then USACE generally signs the document first as a show of commitment, and the date on the document will be the date the SHPO signed it. If ACHP is participating and signs the document last, then the date on which they signed it is the correct date. If 20 individuals and/or groups have been invited to be signatories, then the date on the document should be the date on which the last signatory signed the document. Note: new ROD and FONSI templates are available on the [National Environmental Policy Act \(NEPA\) page of the Planning Community Toolbox](#) under the USACE NEPA Decision Document Guidance section.

Is there a legal distinction between “signatory” and “invited signatory”?

No – there is no legal distinction. The minimum signatories on any agreement document are USACE and the SHPO. Anyone else invited to sign the document is also a signatory and has the same ability as USACE and the SHPO to execute, amend, or terminate the agreement document. Invited signatories are those entities other than USACE and the SHPO that will have a role or assume responsibility in the implementation of an agreement (landowners, Tribes if on tribal lands or those that attach religious significance to historic properties off Tribal lands, etc.) and are asked by USACE to be a signatory to the document.

Are there instances in which doing *only* a PA would be appropriate?

Yes – there are cases when writing a PA is appropriate instead of writing an MOA. For planning studies, PAs should be used: when the team doesn’t have all of the information necessary to make a definitive adverse effect statement; or when the complexities of a project are such that the team cannot identify all of the historic properties that might be affected. An MOA should be written when the team has been able to fully identify all historic properties and has enough information to make a definitive adverse effect statement. There are other types of PAs, such as program alternatives for Section 106 or to manage the coordination and consultation of routine or recurring activities (such as those done for the maintenance of historic properties on an installation), but they are not typically done for planning studies.

It sounds like preliminary effects determinations should be considered prior to the TSP milestone, not during the consultation of effects determination of the TSP with the SHPO/Tribal Historic Preservation Office (THPO). Should the consultation of effects determination be made later?

There should be consideration of the preliminary effects of the alternatives on historic properties, etc. as part of the alternatives analysis for the NEPA document, but also because the rough order of magnitude mitigation costs based on the consideration of preliminary effects should be included in the economic analysis of construction costs. This discussion could be part of consultation as well discussed when other

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alternatives are analyzed. This would also be useful for the comparison of the alternatives usually included in the NEPA document.

We tend to focus on the TSP for consultation of effects because those with whom we are working usually want to know what the Corps is going to recommend before they comment. However, to provide the SHPO, Tribes, and others the greatest ability to comment and potentially influence the Corps' selection of alternatives where their comments could play a role in the determination of the TSP, consultation on the alternatives and preliminary effects – before the selection of the TSP – should be the goal. This would be particularly desirable in cases where alternatives involve Tribal or public lands or are very large, complex alternatives with likely significant effects.

Miscellaneous

Can you provide more information on how to deal with the differences among definitions of “resources” within NEPA and the requirement of a consideration of effects vs. determination of effects?

It was the intent of this webinar to discuss Section 106 timing and the planning process milestones, exclusively. To relate the Section 106 process to the NEPA process, I would recommend [NEPA and NHPA: A Handbook for Integrating NEPA and Section 106](#). NEPA references the consideration of effects to cultural resources where cultural resources include more than just historic properties. Historic properties refer to those resources that are listed on or eligible for the National Register of Historic Places; the artifacts, records, and material remains related to historic properties; and properties of traditional religious and cultural importance to a Tribe or Native Hawaiian organization. Cultural resources also include sacred sites and other properties that might be important to a community – such as a memorial to an event – that are not eligible for or listed on the National Register.

Consideration of effects under NEPA, then, would include the determination of effects to historic properties as well as effects to identified cultural resources that are not historic properties. There are likely not too many instances where there are features, structures, etc. that would be considered cultural resources that are not also historic properties. I have encountered a memorial to an airline disaster and local municipal landmarks that were not historic properties, but needed to be called out in the NEPA document due to their proximity to alternatives and the TSP. If there were adverse effects to cultural resources, any mitigation – such as moving the memorial – should be captured directly in the FONSI or ROD.

We tend to default to a discussion of the Section 106 process exclusively when providing input to the NEPA document, but we should also be notifying the PDT when there are cultural resources that may be affected.