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**FSME INTERIM STAFF GUIDANCE**  
**FSME-ISG-02**

**GUIDANCE FOR CONDUCTING THE  
SECTION 106 PROCESS OF THE NATIONAL  
HISTORIC PRESERVATION ACT FOR URANIUM  
RECOVERY LICENSING ACTIONS**

**Draft Report for Comment**

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**June 2014**

**Division of Waste Management and Environmental Protection  
Office of Federal and State Materials and Environmental Management Programs  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001**



## **Interim Staff Guidance for Conducting the Section 106 Process of the National Historic Preservation Act for Uranium Recovery Licensing Actions**

### **Draft Report for Comment**

#### **1 Background**

The U.S. Nuclear Regulatory Commission (NRC) is responsible for regulating the civilian use of nuclear materials and facilities in a manner that protects public health and safety from radiological hazards and protects common defense and security. The NRC has statutory authority to regulate and license uranium recovery facilities through the Atomic Energy Act of 1954, as amended (AEA)<sup>1</sup> and the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA)<sup>2</sup>, which established programs for the stabilization and control of mill tailings at uranium or thorium mill sites. In part, these statutes require that the NRC to ensure that the management of source material, as defined in AEA Section 11z., and byproduct material, as defined in AEA Section 11e.(2), conforms to applicable regulatory requirements. The NRC regulations that apply to uranium recovery facilities include Title 10 of the Code of Federal Regulations (10 CFR) Part 20, "Standards for Protection Against Radiation," 10 CFR Part 40, "Domestic Licensing of Source Material," and 10 CFR Part 40 Appendix A. Appendix A establishes the criteria for the operation of uranium mills and the disposition of tailings or wastes produced by the extraction or concentration of source material from ores processed primarily for their source material content.

License applicants initiate the proposed federal action by submitting an application to the NRC for projects or activities requiring an NRC license or approval. The NRC must then make a decision whether to grant or deny the applicant's request. The NRC, through its licensing process, reviews and evaluates the applicant's request to ensure that the proposed activities will be protective of the public health and safety, and the environment. In addition to performing a safety review, the NRC staff conducts an environmental review, as required under the National Environmental Policy Act of 1969, as amended (NEPA).<sup>3</sup> Through the environmental review, the NRC evaluates the potential environmental impacts from the applicant's proposal. The NRC's NEPA implementing regulations are in 10 CFR Part 51, "Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions."

Congress enacted the National Historic Preservation Act of 1966, as amended (NHPA),<sup>4</sup> to support and encourage the preservation of prehistoric and historic resources. Section 106 of the NHPA requires federal agencies to take into account the effects of their undertakings on historic properties and allow the Advisory Council on Historic Preservation (ACHP) an opportunity to review and comment on the undertaking.<sup>5</sup> The ACHP is an independent federal agency that promotes the preservation, enhancement, and productive use of our nation's historic resources. The NHPA implementing regulations are in 36 CFR 800, "Protection of Historic Properties."

Federal agencies carry out the Section 106 process in consultation as appropriate with the State Historic Preservation Officer (SHPO), Tribal Historic Preservation Officer (THPO), other federal,

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<sup>1</sup> See 42 U.S.C. 2011 et seq.

<sup>2</sup> See 42 U.S.C. 7901 et seq.

<sup>3</sup> See 42 U.S.C. 4321 et seq.

<sup>4</sup> See 16 U.S.C. 470 et seq.

<sup>5</sup> See 36 CFR 800.1(a).

state, and local governmental agencies, Tribal governments, other interested parties, and the public. In accordance with 36 CFR 800.1(c), the NRC must complete the Section 106 process prior to making its decision on the request for the licensing action.<sup>6</sup> The NRC is also legally responsible for the findings required by the NHPA implementing regulations.

## **2 Issue**

NUREG-1748, "Environmental Review Guidance for Licensing Actions Associated With Nuclear Material Safety and Safeguards Programs" (NUREG-1748), provides guidance to the NRC staff for conducting environmental reviews in support of the Office of Federal and State Materials and Environmental Management Programs (FSME) and Office of Nuclear Material Safety and Safeguards (NMSS) licensing and regulatory actions. NUREG-1748 also includes general guidance for complying with the NHPA Section 106 process.

Over the past several years, an increase in the number of licensing actions for *in situ* uranium recovery (ISR) facilities has resulted in an increase in the NRC's Section 106 activities. In addition, the complexity of the Section 106 reviews associated with the ISR licensing actions has grown significantly. As a result, the NRC staff has decided to supplement the Section 106 guidance contained in NUREG-1748 by providing specific guidance for the NRC's implementation of the Section 106 process in uranium recovery licensing actions. The purpose of this Interim Staff Guidance (ISG) is to assist the NRC staff in conducting the Section 106 process. While this guidance is primarily intended for the NRC staff, it also provides useful information for participants in the Section 106 process for uranium recovery licensing actions. This ISG, however, only provides guidance and does not impose regulatory requirements.

The NHPA implementing regulations at 36 CFR Part 800 have three subparts: Subpart A, "Purposes and Participants," Subpart B, "The Section 106 Process," and Subpart C, "Program Alternatives." Although an understanding of the information included in all these three subparts is essential, this guidance document focuses on Subpart B, "The Section 106 Process."

## **3 Applicability**

This ISG applies to uranium recovery license applications subject to the NHPA Section 106 process.

## **4 Regulatory Basis**

NHPA Section 106 requires federal agencies to take into account the effects of their undertakings on historic properties and allow the ACHP an opportunity to review and comment on the undertaking. The NRC conducts the Section 106 process as part of its reviews of license applications. The NRC must complete the Section 106 process before commencing or approving an undertaking.<sup>7</sup>

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<sup>6</sup> See 36 CFR 800.1(c), which allows the federal agency to authorize nondestructive project planning activities before completing compliance with Section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties.

See also 36 CFR 800.9(c), which notes that Section 110(k) of the NHPA "...prohibits a Federal agency from granting a loan, loan guarantee, permit, license, or other assistance to an applicant who, with intent to avoid the requirements of Section 106, has intentionally significantly adversely affected a historic property..."

<sup>7</sup> See 36 CFR 800.1(c).

## **5 Guidance Update/Revision**

The NRC staff plans to revise the applicable sections of NUREG-1748 to include the guidance in this ISG. Until then, the NRC staff will use this ISG, and revise and update the document as needed to clarify the content or incorporate subsequent modifications.

## **6 Guidance**

The Section 106 process, as described in Subpart B of 36 CFR 800, consists of four steps:

- (1) Initiation of the Section 106 Process (36 CFR 800.3)
- (2) Identification of historic properties (36 CFR 800.4)
- (3) Assessment of adverse effects (36 CFR 800.5)
- (4) Resolution of adverse effects (36 CFR 800.6)

### **6.1 Initiation of the Section 106 Process (Step 1)**

The NRC staff should begin the Section 106 process as soon as the NRC receives a license application. Early planning is central to the successful completion of the Section 106 process. The NRC staff anticipates completion of this step within six months after the NRC's receipt of a license application.

The NRC staff should take into consideration that, under 36 CFR 800.8, "Coordination with the National Environmental Policy Act," the NRC staff might coordinate its responsibilities under the Section 106 process with its NEPA process. The NRC staff's goal is to conduct the Section 106 process in coordination with the NEPA process, whenever possible. The Section 106 process, however, may proceed separately from the NEPA process. The key to coordinating these two reviews is early planning. In accordance with the NHPA regulations, the NRC staff will notify the ACHP, SHPO/THPO, and consulting parties that the NRC intends to coordinate the Section 106 process with the NEPA process. The NRC staff should plan and use the NEPA process and documents to facilitate Section 106 consultation and public participation.

The NRC staff should also consider whether the project involves other federal agencies and whether to designate a lead federal agency to carry out the Section 106 process.<sup>8</sup> The agencies should document such designation in writing. Because the U.S. Bureau of Land Management (BLM) and U.S. Environmental Protection Agency (EPA) could be involved in the licensing of uranium recovery facilities, the NRC staff should be prepared to discuss with these agencies the potential to coordinate the NRC's Section 106 process with their agency environmental reviews or other Section 106 activities required to issue relevant permits or approvals for the proposed licensing action.

The NRC staff's goal is to engage in meaningful dialogue early in the process. In order to facilitate the Section 106 process, the NRC staff may identify and communicate with potential consulting parties prior to receiving a license application. For example, in situations when a license applicant submits a letter of intent notifying the NRC staff of its plan to submit a license application that has the potential to affect historic properties, the NRC staff may notify potential consulting parties to inform them of the possible licensing request prior to receiving the license application. The notification would typically include:

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<sup>8</sup> See 36 CFR 800.1(a)(2).

- information about the expected submittal date of the license application,
- a brief description of the anticipated licensing action, and
- the NRC licensing review process, including the Section 106 review, which the NRC typically initiates soon after the NRC staff receives a license application.

Although this written notification does not initiate the Section 106 process, it serves as an advance notice to potential consulting parties.

#### *6.1.1 Establish Whether there is an Undertaking*

In accordance with the NHPA implementing regulations, the NRC staff first determines whether the proposed activities to be licensed by the NRC constitute an undertaking.<sup>9</sup> The regulations define an 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.”<sup>10</sup> Proposed uranium recovery projects or activities requiring an NRC licensing action meet the NHPA definition of an undertaking. The NRC, however, is not the project proponent and is not the entity that will construct or operate the proposed facility. As a result, the federal undertaking does not occur until the NRC receives an application requesting a licensing action.

The NRC staff then evaluates whether the undertaking has the potential to affect historic properties. If the NRC staff determines that the undertaking does not have the potential to cause effects (e.g., the undertaking is solely administrative or procedural in nature) on historic properties, assuming historic properties are present, no further consultation under Section 106 is necessary and the agency has complied with its Section 106 obligations.<sup>11</sup> The NRC staff should document this determination, and the basis for the determination, as part of its licensing review and administrative record. The documentation should clearly explain the reasons why the applicant’s proposed activities (including the scope, nature, and characteristics of the proposed activities) do not have the potential to cause effects on historic properties. When the Section 106 process is being coordinated with the NEPA review, the NRC staff should include this determination in the draft and final NEPA document.

If the NRC determines that the undertaking could affect historic properties, the NRC staff should proceed with the following efforts.

#### *6.1.2 Identification of Consulting Parties*

The NRC is responsible for the identification of the appropriate consulting parties, including the SHPO, THPO, Indian Tribes (Tribes)<sup>12</sup> and Native Hawaiian Organizations (NHOs),<sup>13</sup> ACHP,

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<sup>9</sup> See 36 CFR 800.3(a).

<sup>10</sup> See 36 CFR 800.16(y).

<sup>11</sup> See 36 CFR 800.3(a)(1).

<sup>12</sup> The term Indian Tribe refers to federally-recognized Indian Tribes. Indian Tribe means any American Indian or Alaska Native Tribe, Band, Nation, Pueblo or other organized group or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a). The NRC staff may, however, also invite state recognized Indian Tribes to participate in the Section 106 process based on a demonstrated interest in the undertaking’s effects on historic properties.

local governments, preservation organizations, applicants, landowners, and individuals who may be concerned with the possible effects of the undertaking on historic properties.<sup>14</sup> The NRC staff should identify the appropriate SHPO, THPO, and other potential consulting parties as early as possible.

The SHPO advises and assists federal agencies in carrying out their Section 106 responsibilities to ensure consideration of historic properties at all levels of planning and development.<sup>15</sup> The NRC staff should also determine whether the undertaking occurs on, or could affect, historic properties on tribal lands. When the undertaking occurs on, or could affect, historic properties on tribal lands, the federal agency consults with the THPO in lieu of the SHPO as long as the Tribe or NHO has been approved under Section 101(d)(2) of the NHPA to assume the responsibilities of the SHPO.<sup>16</sup> Tribes or NHOs that have not formally assumed the responsibilities of the SHPO under Section 101(d)(2) of the NHPA have the same rights of consultation and concurrence when the undertaking takes place on, or affects, historic properties on tribal lands, except that the consultation would be in addition to the consultation with the SHPO.<sup>17</sup>

In addition, the NHPA requires the federal agency to consult with any Tribe or NHO that attaches religious and cultural significance to historic properties that could be affected by the undertaking.<sup>18</sup> It is the responsibility of the federal agency to make a reasonable and good faith effort to identify Tribes and NHOs to consult in the Section 106 process.<sup>19</sup> The NRC recognizes that Tribes and NHOs possess special expertise in identifying historic properties of religious and cultural significance to them and assessing their eligibility. The NRC will ensure that consultation in the Section 106 process provides the Tribes and NHOs a reasonable opportunity to identify their concerns about historic properties, advise on the identification and evaluation of historic properties of religious and cultural significance, articulate their views on the undertaking's effects on such properties, and participate in the resolution of adverse effects. The NRC staff should be aware that Tribes and NHOs frequently find properties of religious and cultural significance located on ancestral, aboriginal, or ceded lands that could be far from the Tribe or NHO's current location. The NRC staff should also be aware that, when sharing religious or cultural information, Tribes and NHOs might have concerns about ensuring the confidentiality of that information. Section 6.2 of this ISG provides additional information about confidentiality.

Resources to identify Tribes and NHOs include, but are not limited to:

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<sup>13</sup> Native Hawaiian Organizations (NHOs) are participants in the Section 106 process as identified in 36 CFR 800.2(c)(2), and should be consulted during the NRC's licensing actions, as appropriate. Due to the geographical location of uranium recovery licensing actions the NRC staff does not anticipate interacting with NHOs during these licensing actions. Because the scope of this guidance document is limited to uranium recovery licensing actions, the remainder of this guidance document will not cover interactions with NHOs.

<sup>14</sup> See 36 CFR 800.2.

<sup>15</sup> See 36 CFR 800.2(c)(1)(i).

<sup>16</sup> See 36 CFR 800.2(c)(2)(i)(A). However, 36 CFR 800.2(c)(1)(ii) clarifies that the SHPO would participate as a consulting party in the Section 106 process if the undertaking takes place on tribal lands but affects historic properties off tribal lands, if requested in accordance with 36 CFR 800.3(c)(1), or if the Tribe agrees to include the SHPO in accordance with 36 CFR 800.3(f)(3).

<sup>17</sup> See 36 CFR 800.2(c)(2)(i)(B).

<sup>18</sup> See 36 CFR 800.2(c)(2)(ii).

<sup>19</sup> See 36 CFR 800.2(c)(2)(ii)(A).

- SHPO(s)
- The Department of Interior, Bureau of Indian Affairs (BIA) maintains a list of federally-recognized Tribes: [www.bia.gov](http://www.bia.gov)
- Department of Interior, National Park Service, National NAGPRA - Native American Consultation Database, which provides information about Tribes that have processed NAGPRA claims within a specific area:  
[http://www.nps.gov/history/nagpra/onlinedb/land\\_cessions/index.htm](http://www.nps.gov/history/nagpra/onlinedb/land_cessions/index.htm)
- BIA Tribal leaders directory:  
<http://www.bia.gov/WhoWeAre/BIA/OIS/TribalGovernmentServices/TribalDirectory/>
- NRC'S Intergovernmental Liaison Branch, Division of Intergovernmental Liaison and Rulemaking, FSME

Public views also inform the Section 106 process and findings. In accordance with NHPA implementing regulations, the NRC staff will seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties.<sup>20</sup> Taking into consideration confidentiality concerns, discussed in more detail in section 6.2 of this ISG, the NRC staff should provide the public with information about the undertaking and its effects on historic properties throughout the Section 106 process. When the Section 106 process is being coordinated with the NEPA review, the NRC staff should plan and coordinate the Section 106 and NEPA public involvement.

### *6.1.3 Letters Initiating Consultation*

As previously discussed, the NRC staff typically initiates the Section 106 process shortly after receipt of the license application. The NRC staff should send a letter notifying the SHPO/THPO and potential consulting parties of its initiation of the Section 106 process and inviting potential consulting parties to participate in the Section 106 process. The letter should include:

- a description of the undertaking,
- a description of the NRC's licensing review process,
- the proposed area(s) of potential effects (APE),
- relevant maps,
- as appropriate, information about any actions taken by the license applicant to identify historic properties, and
- encourage potential consulting parties to provide information on historic properties, including those of religious and cultural significance to Tribes, which could be affected by the undertaking.

If the NRC staff does not receive a response to the letter inviting participation in the Section 106 consultation, the NRC staff will make a reasonable effort to reach out to and follow-up with the potential consulting parties. The follow-up can include contacting the potential parties by e-mail and/or phone to verify receipt of the invitation, explain the purpose of the invitation, and answer any questions the parties may have regarding the NRC licensing review process. The NRC staff should document these efforts and outreach activities as part of its licensing review and administrative record. If a Tribe that attaches religious and cultural significance to historic properties requests in writing to be a consulting party, the NRC staff will designate the Tribe as one.<sup>21</sup> If a party responds that it does not want to participate in the Section 106 process, or

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<sup>20</sup> See 36 CFR 800.2(d) and 800.3(e).

<sup>21</sup> See 36 CFR 800.3(f)(2).

does not respond for an extended period, the NRC would discontinue sending it further information until the NRC staff receives a request (e.g., an e-mail or phone call from an official to an NRC project manager) indicating the party wants to be a consulting party. In such cases, the NRC staff would start consulting with the party from the current step of the Section 106 process at the time of its request.

## 6.2 Identification of Historic Properties (Step 2)

The NRC staff anticipates completion of this step, when appropriate, within 14 months after completion of Step 1 or prior to the issuance of the draft NEPA document.

The NHPA implementing regulations define “historic property” as any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places (NRHP or National Register). The term includes artifacts, records, and material remains related to and located within such properties as well as properties of traditional religious and cultural importance to a Tribe that meet the National Register criteria.<sup>22</sup> A federal agency shall make a reasonable and good faith effort in carrying out its efforts to identify historic properties, including those of religious and cultural significance to Tribes.<sup>23</sup> The Department of Interior’s “Standards and Guidelines for Archaeology and Historic Preservation”<sup>24</sup> provide guidance on identification activities to gather information about historic properties. The NRC staff should also take into consideration other applicable state and local standards and guidelines.

As part of its identification process, the NRC staff first determines the scope of its identification efforts, which includes defining and documenting the APE, reviewing existing information (including information provided in the license application such as the historic and cultural resource report), and gathering information from consulting parties (including information about historic properties of religious and cultural significance to Tribes).

In complying with Section 106 requirements, the consulting parties may provide the NRC staff sensitive information about historic properties as part of written documentation submitted to the NRC or discussed orally during meetings with consulting parties. Early in the consultation process, the NRC staff should discuss confidentiality concerns with consulting parties prior to their submittal of their information regarding historic and cultural resources.

Confidentiality concerns will be respected and associated information will remain confidential to the extent permitted by law, in compliance with 36 CFR 800.11(c), which permits withholding from public disclosure information about “the location, character, or ownership of a historic property when the disclosure may cause a significant invasion of privacy; risk harm to the historic property; or impede the use of a traditional religious site by practitioners.”<sup>25</sup> The NRC staff should also consider the Freedom of Information Act (FOIA)<sup>26</sup> requirements. If the NRC staff determines the information meets the withholding criteria in 36 CFR 800.11(c) and receives a request for information, the NRC staff will consult with the Keeper of the National Register (Keeper) to make a determination whether the agency can withhold the information regarding cultural and historic resources that meet the historic property criteria under the NHPA.

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<sup>22</sup> See 36 CFR 800.16(l)(1).

<sup>23</sup> See 36 CFR 800.4(b)(1).

<sup>24</sup> See 48 Federal Register (FR) 44716.

<sup>25</sup> See 36 CFR 800.11(c).

<sup>26</sup> See 5 U.S.C. 552.



However, this limited basis for withholding information for certain properties under the NHPA may not permit withholding of information regarding other historic and cultural resources. Other statutes may protect this information if the historic and cultural resources are located on federal lands.

The NRC staff should also contact the SHPO to understand the state's specific confidentiality policies, standards, or guidelines. The National Park Services' National Register Bulletin 29, "Guidelines For Restricting Information About Historic and Prehistoric Resources," provides guidance for determining which resources should have information restricted from general distribution.

#### *6.2.1 Area(s) of Potential Effects*

NHPA implementing regulations define the APE as "...the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking."<sup>27</sup>

Identification and determination of the APE is the responsibility of the federal agency in consultation with the SHPO/THPO.<sup>28</sup> The NRC staff in consultation with the SHPO/THPO should define the APE early in the process. The NRC staff should consider the following factors (including but not limited to) in defining the APE:

- The scope of the applicant's proposed activities to be licensed by the NRC (e.g., license application to construct and operate a new facility, license renewal for an operating facility, or a license amendment to expand an operating facility)
- The proposed facility's footprint
- The proposed license boundary and controlled areas
- The proposed construction and ground disturbing activities
- The proposed operations or changes to the current operations
- Areas and extent of ground disturbance resulting from the proposed facility construction and operations
- The topography of the surrounding area
- The introduction of visual, auditory, or other sensory elements that could diminish the integrity of historic properties through, for example, negative impacts on the setting, feeling, or association of the historic property. A viewshed analysis can facilitate the evaluation of visual impacts.
- Documentation regarding surveys of historic and cultural resources conducted in and around the proposed project site
- Information in the applicant's environmental report, including the historic and cultural resource report, results of surveys, maps, graphics, drawings, or photographs

The NRC staff should review and incorporate information gathered from its research of existing records and from consulting parties in defining or redefining the APE, as necessary.

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<sup>27</sup> See 36 CFR 800.16(d).

<sup>28</sup> See 36 CFR 800.4(a)(1).

The NRC staff should document the APE and describe the factors used in defining the APE, including the methodology, photographs, maps, and drawings. This documentation becomes part of the NRC licensing review and administrative record.

### *6.2.2 Reviewing and Gathering Information on Historic Properties*

As previously discussed, a federal agency shall make a reasonable and good faith effort in identifying historic properties.<sup>29</sup> Activities to identify historic properties can include, but are not limited to, background research, record searches at the SHPO's/THPO's office, oral history interviews, ethnographic studies, information gathered through consultation, site visits, field surveys, and reviewing the information provided in the license applicant's environmental report.

The NRC staff should consider holding information-gathering meetings with consulting parties, as necessary. Confidentiality concerns regarding the information gathered through these meetings will be respected and associated information will remain confidential and protected from public disclosure to the extent permitted by law, including compliance with 36 CFR 800.11(c). Section 6.2 of this ISG provides additional information about confidentiality.

The NRC staff may coordinate with the license applicant to arrange site visits for consulting parties. Site visits provide an opportunity for consulting parties to observe, for example, the location of the proposed project site and areas of potential ground disturbances to help identify historic properties, assess adverse effects, and identify measures to address adverse effects. After participating in site visits, consulting parties may be able to inform the NRC staff of the presence of historic properties within the APE and provide information to assist the NRC in making eligibility determinations, especially for properties of religious and cultural significance to consulting Tribes.

When seeking the views of Tribes, the NRC should consider the timing and location of the meetings, the potential for face-to-face meetings, the use of teleconferences or webinars, and confidentiality considerations in order to facilitate tribal participation.

### *6.2.3 Surveys*

Identification efforts may include field surveys. The type of survey to be conducted should be informed by: 1) the scope and complexity of the proposed activities to be licensed by the NRC, 2) the history of the area and extent of surveys previously conducted in and around the proposed project site, 3) NRHP-listed or NRHP-eligible historic properties (including the documentation of eligibility), and 4) the potential for the presence of properties of religious and cultural significance to Tribes.

The NRC staff should also consider the number of individuals that would conduct the fieldwork, the scope and level of effort of fieldwork, and factors that may affect the scheduling of the fieldwork. Weather will influence the time of year when the parties can conduct the fieldwork. In determining the scope of work and level of effort for the fieldwork, the NRC staff should work with consulting parties who plan to participate in the survey to identify the equipment, vehicles, maps, and tools needed to conduct the fieldwork. The NRC staff should also consult with the SHPO to identify state survey standards.

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<sup>29</sup> See 36 CFR 800.4(b)(1).

The NRC staff will determine the need for a field survey and the appropriate methodology to use, after consultation with the parties. The NRC staff has used an open-site approach for conducting field surveys for tribal site identification. Other federal agencies have also used the open-site approach. This approach involves providing access to the proposed project site during a specific period for the purpose of site identification. Each consulting party may choose its surveyors to conduct the fieldwork and would prepare and submit a survey report documenting the survey's findings. The NRC staff, however, should use the open-site approach as a starting point and begin communication with the consulting parties on the survey approach to be used.

Documenting the results of the surveys is particularly important. The survey results should be documented in sufficient detail to support the NRC staff's determinations. The documentation should include, but is not limited to, a description of the physical extent of the survey, the basis for selecting the surveyed areas, a description of and basis for the survey methodologies and techniques used, and the findings of the survey. Survey reports should also be developed to appropriately protect sensitive information, consistent with the criteria of 36 CFR 800.11(c). This can include developing a redacted version of a survey report which contains sensitive information.

Tribal recommendations on the eligibility of tribal sites for listing on the NRHP are of great value to the NRC staff in making its NRHP-eligibility determinations. Tribal survey teams can also provide recommendations on possible measure(s) to limit adverse effects on historic properties.

The Department of Interior's "Standards and Guidelines for Archaeology and Historic Preservation"<sup>30</sup> provide technical information about archeological and historic preservation activities including methods used for identification of historic properties (e.g., field survey techniques). The Department of Interior's "Professional Qualification Standards" presents information about the qualifications for individuals performing identification, evaluation, registration, and treatment activities.<sup>31</sup>

#### 6.2.4 *Determination of Eligibility*

NHPA implementing regulations require a federal agency to consult with the SHPO/THPO and Tribes that attach religious and cultural significance to previously unevaluated historic properties within the APE when applying the National Register criteria.<sup>32</sup> The criteria for eligibility are found in 36 CFR 60.4, "Criteria for evaluation." The criteria for eligibility are:

- (A) association with events that have made a significant contribution to the broad patterns of history
- (B) association with the lives of persons significant in the past
- (C) embodiment of 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
- (D) have yielded, or may be likely to yield, information important in prehistory or history.<sup>33</sup>

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<sup>30</sup> See 48 FR 44716.

<sup>31</sup> See 48 FR 22716.

<sup>32</sup> See 36 CFR 800.4(c)(1).

<sup>33</sup> See 36 CFR 60.4.

To be eligible for listing, the property must meet one of the National Register criteria and exhibit integrity of location, design, setting, materials workmanship, feeling, and association. The site condition is an important factor in the assessment of site integrity. The U.S. National Park Service's Bulletin 15, "How to Apply the National Register Criteria for Evaluation," provides guidance in applying the criteria. The NRC staff should also contact the SHPO to understand if the state has specific requirements to consider when making its determinations.

After consulting with the parties on the eligibility of identified properties within the APE, the NRC will provide its eligibility determinations to the SHPO and/or THPO (when an undertaking occurs on tribal land or affects historic properties on tribal land) for review and concurrence.<sup>34</sup> The NRC will also provide copies of this correspondence to the consulting parties. Eligibility determinations should include a description of each a property and the characteristics that qualify or disqualify it as a historic property for potential listing on the National Register. When the SHPO and/or THPO (when an undertaking occurs on tribal land or affects historic properties on tribal land) concur with the NRC eligibility determinations, the determinations are final.

However, where there is a disagreement between the NRC and the SHPO and/or THPO (when an undertaking occurs on tribal land or affects historic properties on tribal land) regarding the eligibility determinations and the disagreement cannot be resolved after further consultation, the NRC will request a formal determination of eligibility from the Keeper of the National Register. The ACHP may also request that the NRC seek the Keeper's determination of eligibility. The Keeper's decision is final. If a Tribe that attaches religious and cultural significance to a property off tribal lands is in disagreement with the eligibility determination, it may ask the ACHP to request the NRC to obtain an eligibility determination from the Keeper.<sup>35</sup>

When the NRC staff determines that no historic properties are present or that the undertaking would not affect them, the NRC staff will document the findings in accordance with the documentation standards in 36 CFR 800.11(d) and provide the documentation to the SHPO and/or THPO (when an undertaking occurs on tribal land or affects historic properties on tribal land) for review and concurrence and copy the consulting parties on the correspondence. The NRC staff will also make the documentation available for public inspection prior to making a licensing decision, subject to the confidentiality provisions in 36 CFR 800.11(c).

If the SHPO/THPO, and ACHP if it has joined the Section 106 process, does not object to the NRC's findings within 30 days of receipt of an adequately documented finding, the NRC staff fulfills its Section 106 obligations.<sup>36</sup> When coordinating the Section 106 process with the NEPA review, the NRC staff should include the final decision and supporting documentation in the draft and final NEPA document.

When the SHPO/THPO objects to the NRC staff's finding within 30 days of receipt of the finding, the NRC staff may consult with the objecting party to resolve the matter or request the ACHP review the finding.<sup>37</sup> When the NRC requests ACHP review, the NRC staff will copy the consulting parties on the correspondence to ACHP and make the correspondence publicly available,<sup>38</sup> subject to the confidentiality provisions in 36 CFR 800.11(c). The ACHP has 30 days from receipt of the request to provide the NRC with its opinion regarding the NRC's finding.

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<sup>34</sup> See 36 CFR 800.4(c)(1) and (2).

<sup>35</sup> See 36 CFR 800.4(c)(2).

<sup>36</sup> See 36 CFR 800.4(d)(1)(i).

<sup>37</sup> See 36 CFR 800.4(d)(1)(ii).

<sup>38</sup> See 36 CFR 800.4(d)(1)(ii).

The Section 106 process is complete if the ACHP does not provide its opinion on the agency finding within 30 days.<sup>39</sup> Otherwise, the NRC will consider the ACHP's opinion before making a final decision on the finding. The NRC will provide the ACHP, SHPO/THPO, and consulting parties a summary of the NRC's final decision and explain how the NRC considered the ACHP's opinion. If the NRC revises its decision, the staff will proceed in accordance with the revised finding. If the NRC reaffirms its initial finding, the NRC fulfills its Section 106 obligations after the NRC sends the summary of its decision to the ACHP, SHPO/THPO, and all consulting parties.<sup>40</sup>

If the NRC staff determines that there are historic properties that could be affected by the undertaking, the NRC staff will notify the consulting parties and begin consulting on the assessments of effects on these historic properties.

### 6.3 Assessment of Adverse Effects (Step 3)

The NRC staff anticipates completion of this step, when appropriate, within six months after completion of Step 2 or within six months after the issuance of the draft NEPA document.

NHPA implementing regulations require consultation with the SHPO and/or THPO (when an undertaking occurs on tribal land or affects historic properties on tribal land) and any Tribe that attaches religious and cultural significance to historic properties within the APE on the assessment of adverse effects.<sup>41</sup> 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.<sup>42</sup> NHPA implementing regulations provide examples of adverse effects in 36 CFR 800.5(a)(2). These include physical destruction to all or part of the property, removal of the property from its historic location, and change of the character of the property's use or physical features or use within the property's setting that contribute to its historic significance. The NRC staff should consider whether the undertaking would create visual effects (e.g., whether the introduction of new visual changes has the potential to alter those characteristics that qualify the historic property for inclusion in the National Register).

The NRC staff will consider the information and input gathered during consultation concerning effects when making determinations of adverse effects. If the NRC staff proposes a finding of no adverse effect (that is, the undertaking's effects do not meet the criteria in 36 CFR 800.5(a)(1)), the NRC staff will document its findings in accordance with the documentation standards in 36 CFR 800.11(e) and provide it to the SHPO and/or THPO (when an undertaking occurs on tribal land or affects historic properties on tribal land) for a 30-day review and concurrence period and send a copy of the correspondence to all consulting parties. The NRC staff should also make the correspondence publicly available, subject to the confidentiality provisions in 36 CFR 800.11(c).

If the SHPO/THPO agrees with the finding or does not provide a response and no consulting party objects within the specified review period, the NRC staff can proceed to make its licensing

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<sup>39</sup> See 36 CFR 800.4(d)(1)(iv)(A).

<sup>40</sup> See 36 CFR 800.4(d)(1)(iv)(C).

<sup>41</sup> See 36 CFR 800.5(a).

<sup>42</sup> See 36 CFR 800.5(a)(1).

decision in accordance with 36 CFR 800.5(d)(1)<sup>43</sup> and complete the Section 106 process. When coordinating the Section 106 process with the NEPA review, the NRC staff should include this determination of no adverse effect in the final NEPA document.

The SHPO and/or THPO (when an undertaking occurs on tribal land or affects historic properties on tribal land) or any consulting party may notify the NRC in writing of a disagreement with the NRC staff's finding on adverse effects within the 30-day review period. In the case of a disagreement, the NRC staff will consult with the party. If the disagreement cannot be resolved, the NRC will request the ACHP's review of the finding and follow the process discussed in 36 CFR 800.5(c)(3)(i) and (c)(3)(ii). The NRC staff will provide the documentation specified in 36 CFR 800.11(e) to ACHP and copy the consulting parties on the NRC staff's request to ACHP. The NRC staff will also make the documentation publicly available subject to the confidentiality provisions in 36 CFR 800.11(c).

The NRC staff will notify the consulting parties and start consulting on developing measures to avoid, minimize or mitigate adverse effects on historic properties if historic properties will be adversely affected.<sup>44</sup>

#### 6.4 Resolution of Adverse Effects (Step 4)

The NRC staff anticipates completion of this step, when appropriate, within six months after completion of Step 3 or prior to the issuance of the final NEPA document. When the NRC staff identifies adverse effects on historic properties, the resolution of adverse effects will follow the process prescribed by 36 CFR 800.6.

NHPA implementing regulations require the NRC staff to continue consultation with the SHPO and/or THPO (when an undertaking occurs on tribal land or affects historic properties on tribal land), Tribes, and other consulting parties to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.<sup>45</sup> The NRC staff will notify the ACHP of an adverse effects finding by providing the documentation specified in 36 CFR 800.11(e).<sup>46</sup> The NRC staff will invite the ACHP to participate in the consultation when: (i) the NRC wants the ACHP's participation, (ii) a National Historic Landmark will be adversely affected, or (iii) a PA will be prepared.<sup>47</sup> The NRC staff will also provide the consulting parties with copies of the documentation specified in 36 CFR 800.11(e) and any other documents developed during consultation to resolve adverse effects.

The NRC staff should make this documentation publicly available subject to the confidentiality provisions in 36 CFR 800.11(c). The NRC staff should also provide an opportunity for the public to provide its views on resolving adverse effects using appropriate mechanisms, taking into account the magnitude of the undertaking and the nature of its effects upon historic properties, the likely effects on historic properties, and the relationship of the federal involvement to the undertaking to ensure that the public's views are considered in the consultation.<sup>48</sup>

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<sup>43</sup> See 36 CFR 800.5(c)(1).

<sup>44</sup> See 36 CFR 800.5(d)(2).

<sup>45</sup> See 36 CFR 800.6(a).

<sup>46</sup> See 36 CFR 800.6(a)(1).

<sup>47</sup> See 36 CFR 800.6(a)(1)(i).

<sup>48</sup> See 36 CFR 800.6(a)(4).

The parties may also develop a Memorandum Of Agreement (MOA) to memorialize how they will resolve adverse effects on historic properties. A MOA documents the measures and activities that the parties will carry out to avoid, minimize, or mitigate the identified adverse effects of the undertaking on historic properties and the parties responsible for implementing these measures and activities. The MOA should be developed in accordance with 36 CFR 800.6(b)(1), or (b)(2) if the ACHP joined the consultation, and 800.6(c). The NRC staff will submit a copy of the executed MOA and the documentation specified in 36 CFR 800.11(f) to the ACHP prior to making a licensing decision in order to meet the requirements of the Section 106 process.<sup>49</sup> The executed MOA would support a finding that the NRC completed the Section 106 process.

The NRC staff should request the ACHP to join the consultation if there is disagreement between the NRC and the SHPO/THPO on the terms of the MOA. The NRC should provide the documentation identified in 36 CFR 800.11(g) in support of the request. If the ACHP joins the consultation, the NRC staff should follow the process discussed in 36 CFR 800.6(b)(2). If the ACHP does not join the consultation, the ACHP will inform the NRC and proceed to comment in accordance with 36 CFR 800.7(c).<sup>50</sup>

The signatories execute the MOA and have sole authority to execute, amend, or terminate the agreement. Signatories typically include the SHPO/THPO, federal agency, and the ACHP, if the ACHP joined the consultation. The NRC may also invite other parties to be signatories (i.e., invited signatories). The invited signatory would have the same rights with regard to seeking an amendment or termination of the agreement. Invited signatories typically include those parties that have assumed a responsibility under the agreement such as the license applicant. The NRC staff may invite consulting parties to concur in the agreement (i.e., concurring parties). The refusal of an invited signatory or concurring party to sign the agreement does not invalidate the agreement. The NRC, however, requires the license applicant to be an invited signatory on the agreement to complete the Section 106 process.

In some instances, a Programmatic Agreement (PA) may be used. Early in the Section 106 process, the NRC staff should consider and evaluate whether to use a phased identification and evaluation approach.<sup>51</sup> Phased identification is suitable when the undertaking involves large land areas or areas of restricted access. When the NRC staff defers final identification and evaluation of historic properties, the NRC can execute a PA, pursuant to 36 CFR 800.14(b), that protects not only those historic properties that may be affected during the initial phase of an undertaking, but establishes a process to identify historic properties, evaluate adverse effects, and develop options to resolve adverse effects affected by future phases of the undertaking. The NRC must invite the ACHP to participate in the development of PAs. The NRC staff should consider and evaluate the use and development of a PA on a case-by-case basis. The PA should be developed in accordance with 36 CFR 800.14(b) and must be completed before making the licensing decision. The PA would complete the Section 106 process but would require the parties to conduct the additional activities as established in the PA.

When appropriate, the NRC staff should plan to publish the PA or MOA for public review and consider public comments before finalizing the agreement. When coordinating the Section 106 process with the NEPA review, the NRC staff should reference the final MOA or PA in the final NEPA document.

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<sup>49</sup> See 36 CFR 800.6(b)(iv).

<sup>50</sup> See 36 CFR 800.6(b)(1)(v).

<sup>51</sup> See 36 CFR 800.4(b)(2).

After consulting to resolve adverse effects, the NRC, the SHPO and/or THPO (when an undertaking occurs on tribal land or affects historic properties on tribal land), or ACHP may determine that further consultation will not be productive and terminate consultation. In this case, the NRC staff will follow the process in 36 CFR 800.7, "Failure to Resolve Adverse Effects," to complete the Section 106 process.

## **7 References**

10 CFR Part 51. *Code of Federal Regulations*, Title 10, *Energy*, Part 51, "Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions."

36 CFR Part 800. *Code of Federal Regulations*, Title 36, *Parks, Forests, and Public Property*, Part 800, "Protection of Historic Properties."

National Environmental Policy Act of 1969 (NEPA). 42 USC 4321, et seq.

National Historic Preservation Act of 1966 (NHPA). 16 USC 470, et seq.

U.S. Nuclear Regulatory Commission. NUREG-1748, "Environmental Review Guidance for Licensing Actions Associated With NMSS Programs—Final Report." ML032540811. Washington, DC. August 2003.

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## **Appendix A: How Applicants Can Facilitate the Section 106 Process Prior to U.S. Nuclear Regulatory Commission (NRC) License Application Submittal**

This appendix informs license applicants of activities and actions they may take to facilitate the implementation of the Section 106 process of the National Historic Preservation Act of 1966, as amended (NHPA) for uranium recovery licensing actions.

The Section 106 process can vary significantly in duration and complexity due to different factors. For example, the siting of proposed uranium recovery facilities in areas known to be the aboriginal homelands of federally-recognized Indian Tribes (Tribes) or near sites sacred to Tribes can affect the Section 106 process duration and complexity. A large number of parties interested in participating as consulting parties due the proposed project location can also affect the Section 106 process duration and complexity.

License applicants are advised to consider gathering information on historic and cultural resources of significance to Tribes, in addition to archaeological resources, when developing the license application. License applicants should document their efforts.

### General Factors to Consider Prior to the Submittal of the License Application

- Review historic and cultural resource information contained in published supplemental environmental impact statements, environmental assessments, memoranda of agreements, and programmatic agreements for uranium recovery licensing actions.
- Contact and engage the State Historic Preservation Officer (SHPO), Tribal Historic Preservation Officer (THPO), other federal (e.g., Bureau of Land Management), state, and local governmental agencies, and Tribal governments, to gather information about historic and cultural resources, as appropriate.
- Review documentation of historic and cultural resources surveys previously conducted in and around the proposed project site.
- Review information on known tribal sites, ethnographic information, and oral histories, if available.
- Facilitate site visits, information-gathering meetings, and tribal surveys for parties, whenever possible.

### Factors to Consider when Determining the Survey Boundary

- Location of known historic properties listed or eligible for listing on the National Register of Historic Places (NRHP).
- Whether the proposed project location is within the aboriginal homelands of Tribes and may contain sites sacred to these Tribes.
- Scope of the proposed NRC licensed activities (e.g., license application to construct and operate a new facility, license renewal for an operating facility, or a license amendment to expand an operating facility).
- Proposed construction and ground disturbing activities.
- Proposed operations or changes to the current operations.
- Clearly define all areas of proposed ground disturbance.
- Introduction of visual, auditory, or other sensory elements. A viewshed analysis can facilitate the evaluation of visual effects.

- Develop maps, graphics, or photographs, as necessary, that show the boundaries of the area(s) surveyed and survey results.

#### Surveys Conducted Prior to License Application Submission

- Contact and engage potential consulting parties, including but not limited to the SHPO and/or THPO (when an undertaking occurs on tribal land or affects historic properties on tribal land), other federal, state, and local governmental agencies, and Tribal governments.
- Whenever possible, coordinate with tribal representatives to identify properties of religious and cultural significance to Tribes at the project siting stage and when planning and conducting pre-application-submittal surveys (e.g., archaeological surveys).
- Provide maps showing proposed project activities and known historic properties listed or eligible for listing in the NRHP.
- If archaeological and tribal surveys will be conducted on private land, work with the landowners to obtain access to these areas in advance of the scheduled fieldwork.
- When applying for license renewal, indicate whether surveys were previously performed, provide a summary of all survey work, and include any supplemental information. If no additional survey work is planned, provide a justification for this decision.
- Survey reports should describe the physical extent of the survey, the reasons for selecting the areas surveyed, the survey techniques used and why these techniques were used, and present the findings of the survey.
- Survey reports should describe the methodology used in a viewshed analysis and explain why the methodology was selected.
- An applicant can, based on results of the surveys conducted prior to the submittal of the application, consider in the project design measures to avoid, minimize, or mitigate any potential adverse effects. For example, avoidance measures may include, but are not limited to, redefining the license boundary, relocation of pipelines, roads, facilities, monitoring wells, and other disturbances in such a way as to avoid adverse effects to identified properties.

#### Confidential Information

- Discuss confidentiality concerns with potential consulting parties prior to their submittal of their information regarding historic and cultural resources, inform them of the limitations on protecting confidential information, and discuss the need to withhold certain sensitive information prior to engaging in related discussions.
- Understand that information of religious and cultural significance to Tribes may be considered confidential by Tribes and should be protected from public disclosure to the extent permitted by law. Ascertain whether the license application contains any confidential information that meets the criteria in 36 CFR 800.11(c). However, this limited basis for withholding information for certain properties under the NHPA may not permit withholding of information regarding other historic and cultural resources. Other statutes may protect this information if the historic and cultural resources are located on federal lands.
- Contact the SHPO and/or THPO (when an undertaking occurs on tribal land or affects historic properties on tribal land) to identify state and tribal -specific confidentiality policies, standards, or guidelines.
- Provide the NRC with a redacted and a non-redacted version of these documents (e.g., the historic and cultural resource report) and include a statement of the reason for withholding the information.