

* * * Draft 6/25/04 * * *

Region 10 Environmental Cleanup Office

National Historic Preservation Act Guide for State-Lead Site Investigations

The Environmental Protection Agency, Region 10, has developed draft guidance to assist staff in complying with the requirements of the National Historic Preservation Act (NHPA). This guidance has two parts: a flowchart and this support document for the NHPA flowchart providing more detailed information about the process.

EPA's Environmental Cleanup Office (ECL) working on non-Federal-lead Preliminary Assessments/Site Investigations (PA/SI) funded through Superfund cooperative agreements, will use this guidance to ensure that relevant requirements of the NHPA are met. EPA has such a Superfund cooperative agreement with the Oregon Division of Environmental Quality to conduct PA/SIs.

The flowchart and this support document are intended to be used as interim Region 10 guidance. We expect this guidance will be appropriate for most situations. ECL may, however, update these documents at any time to improve their usefulness or correct any inaccuracies that become apparent during the course of implementation.

The NHPA

Section 106 of the NHPA, 16 U.S.C. 470 *et. seq.*, requires that federal agencies take into account the effect of any proposed federal or federally assisted undertaking on historic properties that are listed on, or eligible for listing on, the National Register of Historic Places. The NHPA also provides the Advisory Council On Historic Preservation (ACHP) a reasonable opportunity to comment on such undertakings. Section 106 regulations, issued by the ACHP, at 36 C.F.R. Part 800 detail the process through which federal agencies consult with relevant state and tribal historic preservation offices and other tribal representatives with opportunities under various circumstances for direct ACHP involvement.

NHPA is an Applicable or Relevant and Appropriate Requirement (ARAR)

Under Superfund, a PA/SI is conducted under the removal authority of Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The National Contingency Plan (NCP) at 40 C.F.R. § 300.415(i), establishes that a Fund-financed removal action, such as a PA/SI, must attain the applicable or relevant and appropriate requirements (ARARs) to the extent practicable considering the exigencies of the situation.

Therefore, the NCP requires that Fund-lead PA/SI activities must comply with the **substantive requirements** of ARARs to the extent practicable under the circumstances, but is not required to comply with the **procedural** requirements of ARARs.

EPA considers the NHPA to be an ARAR in the context of PA/SI work. EPA guidance on meeting the NHPA as an ARAR (CERCLA Compliance with Other Laws Manual, Volume II, section 4.1) (Compliance Manual) indicates that consultation and coordination with the State Historic Preservation Officer (SHPO), Tribal Historic Preservation Officer (THPO) or the Tribe, and the ACHP are procedural requirements that are not ARARs for on-site activities. However, the Manual strongly encourages compliance with such procedures based on reasoning that it is much easier to identify historic and cultural resources and achieve the goals of the NHPA if consultation and coordination takes place. For more detailed information about the NHPA process, the regulations can be viewed online at:
http://www.access.gpo.gov/nara/cfr/waisidx_01/36cfr800_01.html

The Role of EPA Region 10

The ACHP regulations establish various steps for compliance with the NHPA. These include:

- determining whether an action constitutes a federal “undertaking” within the meaning of the statute;
- determining whether an undertaking has the potential to affect historic properties;
- identifying and involving appropriate consulting parties and the public;
- determining the area of potential effects (APE) of an undertaking;
- determining whether historic properties exist in the APE (including determinations of eligibility of particular properties for the National Register);
- if such properties exist, determining whether they will be adversely affected; and
- considering development of measures to mitigate any adverse effects.

As noted in the Compliance Manual, EPA generally retains responsibility for certain final decisions regarding the impact of activities under CERCLA on historic properties even where a state is in the lead role for an action. As the Compliance Manual states, formal determinations regarding eligibility of a property for listing on the National Register, “no adverse effect” evaluations, and consultation with the ACHP are reserved to EPA. Consistent with the Compliance Manual, and in furtherance of achieving the goals of the NHPA, **EPA Region 10 will retain responsibility for final determinations regarding the following matters:**

- Whether the action has the potential to cause effects on historic properties;
- Identification of appropriate “consulting parties” under the NHPA and regulations and ensuring that appropriate consultation and public outreach is conducted;
- The Area of Potential Effects (APE);
- Whether a property is eligible for the National Register; and
- Whether the action will adversely affect historic properties.

As the Region proceeds, it will:

- Ensure appropriate public outreach is conducted.
- Ensure that NHPA decisions made by EPA are properly documented and supported.

As noted below, the non-federal lead environmental agency will be involved in these steps to the maximum extent possible. EPA Region 10 will provide funding to undertake appropriate surveys and evaluations, will review relevant recommendations from lead agency in making final determinations, and will participate directly in consultations as necessary or appropriate.

Note: The CERCLA Compliance with Other Laws Manual states:

If at any point, the conclusion is reached that cultural resources are not present or will not be affected, no further investigation is necessary.

The Role of the (non-SHPO) State Environmental Agency (e.g., Oregon Department of Environmental Quality)

EPA will look to the non-federal lead agency, such as a State or a Tribe, to do as much of the NHPA work as possible when it is the lead agency for the Fund-lead PA/SI. NHPA provides that EPA can use grant or cooperative agreements to address NHPA requirements, or to prepare information, analyses, and recommendations to EPA. Using federal funds, the lead agency can undertake a number of activities, such as conducting historic resource surveys, engaging in front-line consultation activities with SHPO's, providing recommendations on whether particular properties are eligible for inclusion on the National Register and whether the action has potential or actual effects on historic properties, or developing potential mitigation measures in consultation with appropriate historic preservation entities.

The lead agency's recommendations to ECL should be supported with a clearly articulated rationale consistent with NHPA documentation standards (see 36 C.F.R. § 800.11).

The Role of the SHPO

From Section 101(3) of the NHPA: It shall be the responsibility of the State Historic Preservation Officer to administer the State Historic Preservation Program and to...

(E) advise and assist, as appropriate, Federal and State agencies and local governments in carrying out their historic preservation responsibilities;

(I) consult with the appropriate Federal agencies in accordance with this Act on -

(i) Federal undertakings that may affect historic properties; and

(ii) the content and sufficiency of any plans developed to protect, manage, or to reduce or mitigate harm to such properties

Where state-lead PA/SI activities are undertakings having the potential to affect historic properties, the lead agency, working in coordination with EPA Region 10, should involve the SHPO and draw upon the SHPO's expertise in evaluating the APE of the activities, the existence of historic properties and the nature of any effects. See the discussion below about involving Tribal Historic Preservation Officers (THPOs) and Tribes. Where there are adverse effects, the SHPO should be involved in assessing potential measures to mitigate such effects. It may be appropriate to contact the SHPO about sites within Indian Lands, as discussed below.

The Role of the Tribes

Tribes have specific consultation rights under NHPA and ACHP regulations in addition to the usual government-to-government consultation consistent with the federal government's trust responsibility to tribes. The NHPA was amended in 1992 to specifically provide Indian tribes the authority to fill the statutory role of an Historic Preservation Officer on their reservations. The 1992 amendments also established that the term "historic property" includes properties of traditional religious and cultural importance to an Indian tribe and meet the National Register criteria.

The role of Tribes depends on whether the area impacted by the action is on- or off- Tribal Land:

"Tribal lands" means all lands within the exterior boundaries of any Indian reservation; and all dependent Indian communities. 36 C.F.R. § 800.16(x)

On Tribal Lands, Tribes can assume the functions of a State Historic Preservation Officer (SHPO). The decision to participate in the program as a Tribal Historic Preservation Officer (THPO) rests with the Tribe.

A list of the Region 10 THPOs is attached.

For sites that are on or impact Tribal Lands, such as an Indian Reservation, appropriate consultation is with the THPO, if there is one, in lieu of the SHPO. In certain circumstances, the SHPO may be an additional appropriate consulting party for sites on Tribal Lands (*e.g.*, where the activities are also impacting historic properties outside of Tribal lands or where a non-Tribal member who owns land within the Tribal lands requests SHPO participation). If the Tribe does not have a THPO, appropriate consultation is with a designated representative of the Tribe in addition to the SHPO.

Note: It is unlikely that a State environmental agency will be the lead agency for conducting a Fund-lead PA/SI on Tribal Lands. It is possible, however, that state agencies may be the lead for PA/SI activities outside of Tribal Lands but having effects within Tribal Lands or on

other areas where Tribes have recognized interests (see below).

For sites not on or impacting Tribal Lands, the federal government must consult with Indian tribes about undertakings in places that have already been placed on the National Register or are otherwise known by the SHPO. In addition, the 1992 amendments to the NHPA specifically encompass sites that Tribes attach religious and cultural significance, regardless of their location. In that case, Tribes are included as consulting parties in the consultation taking place with the SHPO.

Properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register. Section 101(d)(6)(A) of the NHPA

When conducting Fund-lead work outside of Indian reservations where Tribal interests are implicated, the State as a lead agency, will work with the Tribal governments and request EPA's assistance and involvement if consultation is planned.

PROCESS OVERVIEW

There are three principal decisions relevant to achieving the goals of the NHPA for state-lead PA/SI activities that qualify as federal undertakings:

1. Does the action involve a property on the National Register of Historic Places, or one that's eligible?

Note: If the action that will be taken is of the type that has no potential to cause an adverse effect historic properties even if they are located in the action area, it is not necessary to investigate whether particular properties are eligible for the National Register or whether historic properties otherwise exist in the action area. See the next section, "Are these adverse effects?"

Historic property is defined in the ACHP regulations:

"Historic property" means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and material remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register Criteria.
36 C.F.R. § 800.16(l)

To identify **known** historic resources that are present and may be of National Register

significance, consult the following informative sources:

- “National Register Information System,” www.nr.nps.gov
- Appropriate State or Tribal Historical Preservation Offices or tribes or their websites;
- Local (city or county) historical society (obtain the contact name and number from the SHPO or the local library).

If a property is **not on the Register**, it may be eligible for listing and needs to be evaluated if there’s reason to believe it may be historic. The following are the criteria established by the

National Park Service for listing a property on the National Register:

Criteria for Evaluation

The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and:

- A. That are associated with events that have made a significant contribution to the broad patterns of our history; or
- B. That are associated with the lives of persons significant in our past; or
- C. That embody the 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; or
- D. That yielded or may be likely to yield, information important in prehistory or history.

Note: The NPS criteria above do not specifically address properties of traditional religious and cultural importance to an Indian tribe

It may be necessary to do a **Cultural Resource Survey (CRS)** to help answer a question of whether properties eligible to be added to the Register are located within the area affected by PA/SI activities. A CRS is usually done by qualified contractors who specialize in this sort of work. Cost may depend on the type of site and whether, for instance, there may be archaeological resources in the area. The State environmental agency should contact the SHPO, and any Tribes that historically used the area, and ask if there’s reason to believe the site may qualify historic properties may be located in the area or that particular properties may be eligible for inclusion in the National Register.

Working together, the lead agency and EPA will involve and consult with other parties as EPA develops a better understanding of NHPA implications for the action at this site. Under the ACHP regulations, appropriate consulting parties can, among others, include the SHPO;

THPOs; Indian Tribes; representatives of local governments; and Applicants for Federal assistance, permits, licenses, and other approvals. See 36 CFR 800.2(c). In addition, appropriate public involvement is important to achieving the goals of the NHPA. 36 CFR 800.2(d).

2. Are there Adverse Effects?

The term “effect” is defined as an...

“...alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.” See 36 CFR 800.16(i).

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.” See 36 CFR 800.5(a)(1).

If an action by its nature has no potential to affect historic properties even if they are located in the area, then no further investigation under NHPA is required, and it is generally appropriate to proceed with the action without evaluating whether historic properties are present:

Actions that generally	
Actions that could have an effect	would not have an effect
Test pits in native soil Deep drill rig core samples Hand auger for subsurface soil Geoprobe Monitoring wells Pizometers Gore-sorbers (tubes pushed into the ground and removed - for sampling volatiles) Van Veen - (clamshell-type sample mechanism for sediments) Core samples for sediments	Surface soil grab samples Hand shovel for subsurface soil Surface water samples Wipe samples Air sampling Surface sediment sampling

This table is not intended to provide final guidance on whether a particular type of activity might, or might not, be capable of causing effects to historic properties in any specific circumstance. Though it may be useful in most situations, Site Assessment Managers should consider the history of the site and apply common sense as to whether proposed actions are capable of having an effect.

For actions that may affect historic properties, an assessment should be undertaken of whether such effects actually exist and, if so, whether there would be adverse effects. SHPO's and THPO's/Tribes should be consulted on this assessment.

3. How can any adverse effects be mitigated?

Where adverse effects are identified, alternatives or modifications to the PA/SI should be evaluated to avoid, minimize or mitigate such effects. The NHPA does not automatically require the preservation of historic properties at all costs, and methods of mitigating for the impact include minimizing the impact and properly documenting site conditions prior to the action. A Region 10 example is the demolition of the historic ASARCO smelter complex. The structures were ultimately demolished; the mitigation was to take photos of them prior to demolition. EPA's experience is that in the context of PA/SI activities, it should generally be possible to perform the work in a manner that minimizes adverse effects to historic properties.

Appropriate SHPO's and THPO's/Tribes should be consulted in developing mitigation measures. The non-federal lead agency, working with ECL, has the lead for reaching agreement with the consulting parties on appropriate mitigation. As appropriate, EPA will execute a Memorandum of Agreement (MOA) to clarify agreement.

Confidentiality

The Freedom of Information Act will govern EPA authority to withhold documents claimed confidential by a submitted. EPA will fully consider its legal authority to withhold from disclosure information that relates to historic properties if that information has been appropriately identified in a request for confidentiality:

The head of a Federal agency, after consultation with the Secretary, shall withhold from disclosure to the public, information relating to the location, character or ownership of a historic resources if the disclosure may cause a significant invasion of privacy, risk harm to the resources, or impede use of a traditional religious site.
16 U.S.C. § 470w

NHPA Resource Impacts

Congress has not provided any additional funds to federal agencies to assist them in complying with NHPA. Funding language in the Act suggests that NHPA requirements are expected to be met with existing resources. EPA has not been given any NHPA-specific funds to pass along to States.

EPA and the State should be judicious in spending federal resources to comply with NHPA. For

example, depending on the nature of the site and the planned activities, in certain circumstances it may not be reasonable to conduct cultural resource surveys for a particular PA/SI site. With respect to particular properties, if, after a reasonable effort has been made to assess historic significance, and based on discussions with all of the appropriate entities, there is no substantial reason to believe that the property is historic, then it may be unnecessary to retain outside contractors or conduct further investigations.

Existing cultural resource expertise:

- NHPA directs the SHPO and the THPO to advise and assist federal and state agencies in fulfilling their NHPA responsibilities. The law envisions the SHPO and THPO serving as a resource to other agencies and as a valuable source of expertise with specific roles in the decision-making process.
- Region 10's National Environmental Protection Act (NEPA) staff have extensive experience with NHPA compliance that ECL could work to tap into, and Michael Fagen is the Region 10 lead staff assigned for NHPA oversight.
- The EPA headquarters Office of Federal Activities is the national program manager for NHPA, and Pat Haman can provide assistance.
- The Office Tribal Specialist for ECL, Denise Baker, can provide assistance in using this guidance and providing other support in addressing NHPA issues at sites.
- For the Office of Regional Counsel, Rich McAllister handles Indian law and the NHPA, and can obtain assistance from OGC and the Dept. of the Interior.
- Staff working on the McCormick & Baxter site and the Portland Harbor site can be consulted about their experience with NHPA investigations at a Fund-lead site and a PRP-lead RI/FS.

Note: This document does not substitute for the requirements of federal statutes or regulations, nor does it establish any requirements itself. This document is not intended to create any right or responsibility enforceable in any cause of action by any party against the United States, its agencies, officers or any other person, and it cannot impose legally binding requirements on EPA. EPA Region 10 may, as necessary or appropriate, alter its approach to any issue raised in this document without public notice.