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**OFFICE OF NUCLEAR MATERIAL SAFETY AND  
SAFEGUARDS INTERIM STAFF GUIDANCE  
NMSS-ISG-02**

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

**Final Report**

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September 2019

Office of Nuclear Material Safety and Safeguards  
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

## Final Report

### 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 activities through the Atomic Energy Act of 1954, as amended (AEA)<sup>1</sup> and also through the Uranium Mill Tailings Radiation Control Act of 1978<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 that ensure 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 of 10 CFR Part 40 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 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 found 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 found in 36 CFR 800, “Protection of Historic Properties.”

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

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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).

and local governmental agencies, tribal governments, additional consulting 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.

On January 9, 2017, the NRC published its Tribal Policy Statement in the *Federal Register* (FR) establishing the principles to be followed by the NRC staff to promote effective government-to-government interactions with federally-recognized Indian Tribes, and to encourage and facilitate tribal involvement in the areas over which the NRC has jurisdiction (82 FR 2402). The Tribal Policy Statement also specifically recognizes the NRC's additional obligations consistent with other applicable treaties and statutory authorities, such as the NHPA. The NRC staff also revised its Tribal Protocol Manual (NUREG-2173, Revision 1, July 2018). The Tribal Protocol Manual is a reference tool that includes further information to assist the NRC management's and staff's understanding of the unique governmental relationship with tribal governments and provides advice for their interactions, outreach and consultation activities. The manual also includes specific information for setting up meetings and tribal etiquette. The NRC staff's interactions and outreach activities with Indian Tribes will be informed by the Tribal Policy Statement and this Interim Staff Guidance (ISG).

## 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 Nuclear Material Safety and Safeguards (NMSS) licensing and regulatory actions. NUREG-1748 also includes general guidance for complying with the NHPA Section 106 process.

Between 2007 and 2017, the NRC experienced an increase in the number of licensing actions for in situ uranium recovery facilities that also resulted in an increase in the NRC's Section 106 reviews.<sup>7</sup> In addition, the complexity of the Section 106 reviews associated with the in situ uranium recovery licensing actions grew significantly over these years. As a result, the NRC staff decided to supplement the Section 106 guidance contained in NUREG-1748 by providing additional guidance for the NRC's implementation of the Section 106 process for uranium recovery licensing actions. The purpose of this Interim Staff Guidance 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

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<sup>6</sup> 36 CFR 800.1(c) 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. Also, Section 110(k) of the NHPA states that each federal agency "...will not grant 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> In September 2018, the State of Wyoming entered into a limited agreement under Section 274 of the AEA for the authority to regulate source material involved in uranium or thorium recovery or milling facilities and byproduct material as defined in section 11e.(2) of the AEA.

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 licensing actions subject to the NHPA Section 106 process.

### **4. 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>8</sup>

### **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)**

It is the NRC staff’s goal to complete Step 1 within six months after the NRC’s receipt of a license application.

Early planning is central to the successful completion of the Section 106 process. The NRC staff should begin the Section 106 process as soon as possible after receiving a license application. The NRC staff, however, should consider whether outreach to potential consulting parties before the receipt of a license application is feasible.<sup>9</sup>

The NRC staff should take into consideration that under 36 CFR 800.8, “Coordination with the National Environmental Policy Act,” the NRC staff is encouraged to coordinate its

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

<sup>9</sup> As discussed in Appendix A of this ISG, license applicants and licensees can reach out to potential consulting parties, including Tribal governments, to gather information about historic and cultural resources that could be included in the license application. Whenever possible, license applicants and licensees can work with Tribes to gather information to help identify potential resources of religious and cultural significance at the project siting stage. These activities could include planning and conducting surveys to support the development of the license application.

responsibilities under the Section 106 process with its NEPA process. The NRC staff's goal should be to conduct the Section 106 process in coordination with the NEPA process whenever possible. Coordination of both reviews can facilitate a more efficient and effective licensing review. Accordingly, the NRC staff should plan and use the NEPA process and NEPA documents to facilitate Section 106 consultation and public participation. 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 and SHPO/THPO that the NRC intends to coordinate the Section 106 process with the NEPA process.<sup>10</sup> As part of its outreach efforts, the NRC staff should also notify potential consulting parties of its plan to coordinate these two processes. The ACHP and Council on Environmental Quality (CEQ) have published a handbook that may provide useful guidance on coordinating the NEPA and Section 106 compliance procedures, "NEPA and NHPA: A Handbook for Integrating NEPA and Section 106."<sup>11</sup>

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>12</sup> The agencies should document such designation in writing and inform potential consulting parties. Because the U.S. Bureau of Land Management (BLM)<sup>13</sup> and U.S. Environmental Protection Agency could be involved in the licensing and permitting process of uranium recovery activities, the NRC staff should be prepared to discuss the opportunity to coordinate the NRC's Section 106 process with the agencies' environmental or 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. To facilitate the Section 106 process, the NRC staff may conduct outreach by identifying and communicating with potential consulting parties prior to receiving a license application. For example, in situations in which a licensee or 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, or the requests pre-application interactions, the NRC staff may conduct outreach by notifying potential consulting parties to inform them of the possible licensing request prior to receiving the license application. The notification would typically include:

- information about the expected submittal date of the license application,
- a brief description of the anticipated licensing action, and
- information about the NRC's licensing review process, including the NEPA and Section 106 reviews.

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

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<sup>10</sup> See 36 CFR 800.8(c).

<sup>11</sup> ACHP and CEQ. *NEPA and NHPA: A Handbook for Integrating NEPA and Section 106*. Washington, DC. March 2013.

<sup>12</sup> See 36 CFR 800.2(a)(2).

<sup>13</sup> Memorandum of Understanding between NRC and BLM (78 FR 19540). Agencywide Documents Access and Management System (ADAMS) Accession Number ML13072A778.

### **6.1.1 Establish Whether There is an Undertaking with the Potential to Affect Historic Properties**

In accordance with the NHPA-implementing regulations, the NRC staff first determines whether the proposed activities to be licensed or approved by the NRC constitute an undertaking and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.<sup>14</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>15</sup> Proposed uranium recovery projects or activities requiring an NRC licensing action or approval 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. Rather licensees and license applicants initiate the federal action by submitting an application to the NRC. Therefore, there is no federal undertaking until the NRC receives an application requesting a licensing action.

Once an undertaking has been established, 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 affect historic properties (e.g., the undertaking is solely administrative or procedural in nature), no further consultation under Section 106 is necessary and the agency has complied with its Section 106 obligations.<sup>16</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 licensee or applicant's proposed activities (including the scope, nature, and characteristics of the proposed activities) do not have the potential to affect historic properties. When the Section 106 process is conducted in coordination with the NEPA review, the NRC staff should include any such determination, and the basis for the determination, in the draft and final NEPA documents. Although not required, the NRC staff can notify the SHPO/THPO and other potential consulting parties upon making this determination. The notification should describe the undertaking and the basis for the NRC staff's determination.

### **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<sup>17</sup> and Native Hawaiian Organizations (NHOs),<sup>18</sup> ACHP, local

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<sup>14</sup> See 36 CFR 800.3(a).

<sup>15</sup> See 36 CFR 800.16(y).

<sup>16</sup> See 36 CFR 800.3(a)(1).

<sup>17</sup> Indian Tribe as defined in 36 CFR 800.16(m) refers to an Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation or village corporation, as those terms are defined in Section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. The NRC staff may 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 in accordance with 36 CFR 800.2(c)(5).

<sup>18</sup> 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 facilities, 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 address interactions with NHOs.

governments, and applicants.<sup>19</sup> In addition to these parties, additional consulting parties can include certain individuals and organizations with a demonstrated interest in an undertaking<sup>20</sup> (e.g., state-recognized Indian Tribes and landowners). The NRC staff should identify the appropriate SHPO, THPO, Tribes, 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>21</sup> The NRC staff should also determine whether the undertaking occurs on, or could affect, historic properties on tribal lands.<sup>22</sup> 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 has been approved under Section 101(d)(2) of the NHPA to assume the responsibilities of the SHPO.<sup>23</sup> Tribes 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>24</sup>

In addition, the NHPA requires the federal agency to consult with any Tribe that attaches religious and cultural significance to historic properties that could be affected by the undertaking.<sup>25</sup> It is the responsibility of the federal agency to make a reasonable and good faith effort to identify Tribes and to consult in the Section 106 process.<sup>26</sup> The NRC recognizes that Tribes 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 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.<sup>27</sup> The NRC staff should be aware that Tribes frequently find properties of religious and cultural significance located on ancestral, aboriginal, or ceded lands that could be far from the Tribe current location. The NRC staff should also be aware that, when sharing religious or cultural information, Tribes might have concerns about ensuring the confidentiality of that information.<sup>28</sup>

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<sup>19</sup> See 36 CFR 800.2.

<sup>20</sup> 36 CFR 800.2(c)(5) states that certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties or their concern with the undertaking's effects on historic properties.

<sup>21</sup> See 36 CFR 800.2(c)(1)(i).

<sup>22</sup> Tribal lands refers to all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities. See 36 CFR 800.16(x).

<sup>23</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>24</sup> See 36 CFR 800.2(c)(2)(i)(B).

<sup>25</sup> See 36 CFR 800.2(c)(2)(ii).

<sup>26</sup> See 36 CFR 800.2(c)(2)(ii)(A).

<sup>27</sup> See 36 CFR 800.2(c)(2)(ii)(A).

<sup>28</sup> Confidentiality and Section 304 of the NHPA are addressed in section 6.2 of this ISG.

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

- SHPO(s)
- The U.S. Department of Interior, Bureau of Indian Affairs maintains a list of federally-recognized Tribes at [www.bia.gov](http://www.bia.gov)
- The U.S. Department of Interior, National Park Service - Online Databases at [http://www.nps.gov/history/nagpra/onlinedb/land\\_cessions/index.htm](http://www.nps.gov/history/nagpra/onlinedb/land_cessions/index.htm)
- U.S. Department of Housing and Urban Development's Tribal Directory Assessment Tool at <https://egis.hud.gov/tdat/>
- NRC'S Federal, State, and Tribal Liaison Branch, Division of Materials Safety, Security, State, and Tribal Programs, in NMSS
- Other tribal organizations and THPOs

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>29</sup> Taking into consideration confidentiality concerns, the NRC staff should provide the public with information about the undertaking and its effects on historic properties.<sup>30</sup> 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,
- area(s) of potential land disturbance, and areas where construction and operation activities would take place,
- relevant maps,
- information about any activities (e.g., archaeological surveys) taken by the licensee or license applicant to identify historic properties, as appropriate, and
- encourage potential consulting parties to provide information on historic properties that could be affected by the undertaking, including those of religious and cultural significance to Tribes.

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 or telephone to verify receipt of the invitation, explain the purpose of the invitation, and answer 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 shall designate the Tribe as

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<sup>29</sup> See 36 CFR 800.2(d) and 800.3(e).

<sup>30</sup> Confidentiality and Section 304 of the NHPA are addressed in section 6.2 of this ISG.

one.<sup>31</sup> If a party responds that it does not want to participate in the Section 106 process, or does not respond for an extended period, the NRC would discontinue sending further information until the NRC staff receives a request (e.g., an email or telephone call from an official representative to NRC staff) 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 ongoing Section 106 process occurring at the time of its request.

## **6.2 Identification of Historic Properties (Step 2)**

The NRC staff's goal is to complete this step within 14 months after completion of Step 1 or prior to the issuance of the draft NEPA document.

The NHPA-implementing regulations define a "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>32</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>33</sup> The Department of Interior's "Standards and Guidelines for Archaeology and Historic Preservation"<sup>34</sup> may provide useful 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, in consultation with the SHPO/THPO, as appropriate,<sup>35</sup> which includes defining and documenting the area of potential effect (APE), reviewing existing information (including information provided in the license application such as the archaeological survey or investigation reports), 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) and Section 304 of the NHPA, which permits, after consultation with the National Park Service, to withhold 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>36</sup> The NRC staff should also consider the Freedom of Information Act<sup>37</sup> requirements. The NRC staff guidance on this matter

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<sup>31</sup> See 36 CFR 800.3(f)(2).

<sup>32</sup> See 36 CFR 800.16(l)(1).

<sup>33</sup> See 36 CFR 800.4(b)(1).

<sup>34</sup> See 48 FR 44716.

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

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

<sup>37</sup> See 5 U.S.C. 552.

is available in a memorandum titled “Staff Guidance for Withholding Sensitive Information about Historic Resources in Accordance with the National Historic Preservation Act.”

If the NRC staff determines the information meets the withholding criteria in 36 CFR 800.11(c) and receives a request for information, in accordance with Section 304 of the NHPA, the NRC staff will consult with the Keeper of the National Register of Historic Places (Keeper) to make a determination whether the agency can withhold the information. However, the basis for withholding information under the NHPA only applies to properties that are listed or have been determined to be eligible for listing in the NRHP and 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 and guidelines. The National Park Service’s National Register Bulletin 29, “Guidelines for Restricting Information about Historic and Prehistoric Resources,” may provide useful 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>38</sup>

Identification and determination of the APE is the responsibility of the federal agency in consultation with the SHPO/THPO.<sup>39</sup> Early alignment with the SHPO/THPO on the definition of the direct and indirect APE will facilitate the efforts to identify historic properties.<sup>40</sup> The NRC staff should document the APE and describe the factors used in defining the APE, photographs, maps, and drawings. This documentation will become part of the NRC licensing review and administrative record.

The NRC staff should consider the following factors in defining the direct APE (such as destruction, damage, or alteration of all or part of a property) and indirect APE (such as visual, audible, and atmospheric changes that affect the character or setting of a property):

- 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.
- The proposed construction and ground disturbing activities.
- The proposed operations or changes to the current operations.

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<sup>38</sup> See 36 CFR 800.16(d).

<sup>39</sup> See 36 CFR 800.4(a)(1).

<sup>40</sup> As discussed in Appendix A of this guidance document, license applicants and licensees can facilitate the definition of the APE by providing information that clearly identifies where project activities (construction and operation) will take place (e.g., access roads, wellfields, buildings).

- Areas and extent of ground disturbance resulting from 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. 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.
- Any other factors the NRC staff considers relevant to determining the APE.

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.

### **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 that may be affected by the undertaking.<sup>41</sup> The ACHP's "Meeting the *Reasonable and Good Faith* Identification Standard in Section 106 Review" may provide useful guidance regarding what constitutes a reasonable and good faith effort in identifying historic properties.<sup>42</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 reviews of information provided in the licensee's or license applicant's environmental report. The NRC staff will consider confidentiality concerns raised, 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) and Section 304 of the NHPA.

The NRC staff may coordinate with the licensee or license applicant to conduct 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, 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 Tribes. The NRC staff may also consider holding informational meetings (for example, via webinars and teleconference calls) before conducting a site visit to provide information about the scope of the licensing action in order to familiarize consulting parties with the proposed project area, license application, landscape, potential areas of disturbance, etc., before the site visit.

When organizing meetings and site visits with Tribes, the NRC should consider the timing and location of the meetings (e.g., weather, tribal ceremonies), the potential for face-to-face

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<sup>41</sup> See 36 CFR 800.4(b)(1).

<sup>42</sup> *Meeting the "Reasonable and Good Faith" Identification Standard in Section 106 Review*. Washington, DC. November 2011.

meetings, the use of teleconferences or webinars, and confidentiality considerations in order to facilitate tribal participation. The NRC's Tribal Protocol Manual (NUREG 2173, Rev 1.) can provide additional information concerning meetings with tribal governments and etiquette on tribal reservations.

### **6.2.2.1 Field Surveys**

Identification efforts may include field surveys. The NRC's determination to conduct a field survey and the type and scope of survey should be informed by: (i) the scope and complexity of the proposed activities to be licensed by the NRC, (ii) the history of the area and extent of surveys previously conducted in and around the proposed project site, (iii) NRHP-listed or NRHP-eligible historic properties, (iv) the potential for the presence of properties of religious and cultural significance to Tribes, (v) information provided in the license application (including the environmental report), (vi) information provided by Tribes and other consulting parties, and (vii) information gathered through meetings and site visits.

If it is determined that a survey will be conducted, the NRC staff should consider the number of individuals participating in the fieldwork, the scope and level of effort of fieldwork, the duration, 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, level of effort for the fieldwork, and duration, the NRC staff should work with the parties who plan to participate in the survey to identify the methodology, equipment, vehicles, maps, and tools needed to conduct the fieldwork. The NRC staff should also consider state survey standards and guidelines.

Documenting the results of 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 and the basis for selecting the surveyed areas,
- a description of and basis for the survey methodologies and techniques used,
- a brief description of each individual site recorded,
- a NRHP evaluation of each individual site recorded using the NRHP Criteria for Evaluation as described in 36 CFR 60.4, and
- recommendations for appropriate avoidance buffers or possible mitigation measures, should any of the sites recommended as eligible for listing in the NRHP be adversely affected by the project.

Field survey and reports should also be developed to appropriately protect sensitive information, consistent with the criteria of 36 CFR 800.11(c) and Section 304 of the NHPA. This can include developing a redacted version of a survey report by removing sensitive information.

## **6.2.3 Determination of Eligibility**

### **6.2.3.1 Applying the National Register Criteria**

NHPA-implementing regulations require a federal agency to consult with the SHPO/THPO and Tribes that attach religious and cultural significance to previously unevaluated<sup>43</sup> historic properties within the APE when applying the National Register criteria.<sup>44</sup> As defined 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.

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. Additionally, the NRC staff will consider unevaluated properties as eligible properties for listing in the NRHP until the evaluation is completed. The U.S. National Park Service’s Bulletin 15, “How to Apply the National Register Criteria for Evaluation,” may provide useful guidance in applying the criteria.

In accordance with 36 CFR 800.4(c)(1), the NRC will seek the expertise of Tribes on the eligibility of sites of religious and cultural significance to them. Tribal survey participants can also provide recommendations on possible measure(s) to limit adverse effects on historic properties. The National Register Bulletin 38, “Guidelines for Evaluating and Documenting Traditional Cultural Properties,” may provide useful guidance about evaluating properties being considered as traditional cultural properties.<sup>45</sup>

### **6.2.3.2 Eligibility Determination**

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 for review and concurrence.<sup>46</sup> The NRC will also provide copies of this correspondence to the consulting parties, as appropriate. Confidentiality concerns regarding eligibility determinations will be considered, 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) and Section 304 of the NHPA.

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<sup>43</sup> Properties previously determined eligible or ineligible may have to be re-evaluated based on the passage of time, changing conditions, or incomplete prior evaluations.

<sup>44</sup> See 36 CFR 800.4(c)(1).

<sup>45</sup> Per the National Register Bulletin 38, a traditional cultural property can be defined generally as one that is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community.

<sup>46</sup> See 36 CFR 800.4(c)(1) and (2).

Documentation supporting the NRC's eligibility determination(s) should include a description of each property, the characteristics that qualify it as a historic property for potential listing on the NRHP, statement(s) of significance, photographs, and maps. The NRC staff should also consider SHPO and state documentation guidelines.

When the SHPO and/or THPO 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 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. The ACHP or the Secretary of Interior<sup>47</sup> may also request that the NRC seek the Keeper's determination of eligibility. If a Tribe that attaches religious and cultural significance to a property located off tribal lands is in disagreement with the eligibility determination, the Tribe may ask the ACHP to, in turn, request that the NRC obtains an eligibility determination from the Keeper.<sup>48</sup>

Requests to the Keeper for a determination of eligibility must be submitted in accordance with the regulations found at 36 CFR Part 63. The request to the Keeper should include a description of the property(ies), statement(s) of significance, photographs, and maps, as well as any information that was provided to the SHPO and/or THPO. The request should also include the opinion of the SHPO and/or THPO on the eligibility of the property, if available. The Keeper will respond in writing within 45 days of receipt of a documented request submitted in accordance with 36 CFR 63.2(d). The Keeper's decision would be final.

### **6.2.3.3 Results of Identification Efforts**

When the NRC staff determines that no historic properties are present (e.g., no properties were found eligible for listing in the NRHP), 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 for review and concurrence<sup>49</sup> 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) and Section 304 of the NHPA.

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>50</sup>

When the SHPO/THPO objects to the NRC staff's finding within 30 days of receipt of the finding, the NRC staff shall either consult with the objecting party to resolve the matter or request the ACHP review the finding pursuant to paragraphs (d)(1)(iv)(A) through (d)(1)(iv)(C).<sup>51</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>52</sup> subject to the confidentiality provisions in 36 CFR 800.11(c) and Section 304 of the NHPA. The ACHP has 30

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<sup>47</sup> The Secretary of the Department of Interior acting through the Director of the National Park Service. See 36 CFR 800.16(u).

<sup>48</sup> See 36 CFR 800.4(c)(2).

<sup>49</sup> See 36 CFR 800.4(d)(1).

<sup>50</sup> See 36 CFR 800.4(d)(1)(i).

<sup>51</sup> See 36 CFR 800.4(d)(1)(ii).

<sup>52</sup> See 36 CFR 800.4(d)(1)(ii).

days from receipt of the request to provide the NRC with its opinion regarding the NRC's finding. The Section 106 process is complete if the ACHP does not provide its opinion on the agency finding within 30 days.<sup>53</sup> Otherwise, the NRC will consider the ACHP's opinion before making a final decision on the finding. In this case, 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 sending a summary of its decision to the ACHP, SHPO/THPO, and all consulting parties.<sup>54</sup>

When coordinating the Section 106 process with the NEPA review, the NRC staff should include, as appropriate, the final determination and supporting documentation in the draft and final NEPA documents. The NRC staff can consider, however, publishing the Section 106 review findings for the public's review in a stand-alone document separate from the NEPA documents. The comment period should be no less than 30 days. The NRC staff should notify the SHPO/THPO and Tribes of the availability of the document(s) for public review and comment and seek their comments.

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 effects on these historic properties.

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

The NRC staff's goal is to complete this step within six months after completion of Step 2.

NHPA-implementing regulations require consultation with the SHPO and/or THPO and any Tribe that attaches religious and cultural significance to historic properties within the APE on the assessment of adverse effects.<sup>55</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>56</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 also consider whether the undertaking could 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).

#### **6.3.1 No Historic Properties Adversely Affected**

The NRC staff will consider the information 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),

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<sup>53</sup> See 36 CFR 800.4(d)(1)(iv)(A).

<sup>54</sup> See 36 CFR 800.4(d)(1)(iv)(C).

<sup>55</sup> See 36 CFR 800.5(a).

<sup>56</sup> See 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). The NRC will then provide its findings to the SHPO and/or THPO for a 30-day review and concurrence period. The NRC will also provide the findings to all consulting parties.<sup>57</sup> The NRC staff should also make the findings and correspondence publicly available, subject to the confidentiality provisions in 36 CFR 800.11(c) and Section 304 of the NHPA. When coordinating the Section 106 process with the NEPA review, the NRC staff should include, as appropriate, the final determination and supporting documentation in the draft and final NEPA documents. The NRC staff can consider, however, publishing the Section 106 review findings for the public's review in a stand-alone document separate from the NEPA documents. The comment period should be no less than 30 days. The NRC staff should notify the SHPO/THPO and Tribes of the availability of the document(s) for public review and comment and seek their comments.

If the SHPO/THPO agrees with the finding or does not provide a response and no consulting party objects in writing within 30-day review period, the NRC staff can proceed to make its licensing decision in accordance with 36 CFR 800.5(d)(1). In that case, the NRC will have fulfilled its Section 106 obligations.

The SHPO and/or THPO 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 an ACHP 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 this documentation publicly available subject to the confidentiality provisions in 36 CFR 800.11(c) and Section 304 of the NHPA. If ACHP provides the NRC with a written opinion objecting to the finding within the 30-day review period, the NRC staff will follow the process discussed in 36 CFR 800.5(c)(3)(ii).

When coordinating the Section 106 process with the NEPA review, the NRC staff should include, as appropriate, the final decision and supporting documentation in the draft and final NEPA document.

### **6.3.2 Historic Properties Adversely Affected**

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>58</sup>

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

The NRC staff's goal is to complete this step 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.

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<sup>57</sup> The NRC staff should seek concurrence from Tribes that have made known to the agency that it attaches religious and cultural significance to a historic property. See 36 CFR 800.5(c)(2)(iii).

<sup>58</sup> See 36 CFR 800.5(d)(2) and 800.6(a).

NHPA-implementing regulations require the NRC staff to continue consultation with the SHPO and/or THPO, 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>59</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>60</sup> The NRC staff will invite the ACHP to participate in the consultation when: (1) the NRC wants the ACHP's participation, (2) a National Historic Landmark will be adversely affected, or (3) a Programmatic Agreement (PA) will be prepared.<sup>61</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 parties may develop a Memorandum of Agreement (MOA) or PA to establish how they will resolve adverse effects on historic properties.<sup>62</sup> An MOA documents the agreed-upon 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 36 CFR 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>63</sup> The executed MOA documents the NRC's fulfillment of 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>64</sup>

In some instances, a PA may be used. For example, a PA would establish a process for identification and evaluation of historic properties (including the eligibility determinations), evaluation of adverse effects, or resolution of adverse effects because these activities cannot be completed in advance of approval of the undertaking and, thus, would be deferred because the undertaking consists of future phases, which have not been fully developed. The NRC staff shall invite the ACHP to participate in the development of a PA.<sup>65</sup> The NRC staff should consider and evaluate the use of PAs on a case-by-case basis. The PA should be developed in accordance with 36 CFR 800.14(b). Execution of the PA documents NRC's compliance with its Section 106 obligations; therefore, a PA must be executed before making the licensing action. The PA, however, must be implemented to remain in compliance with the Section 106. The PA could require the parties to conduct the additional activities after the NRC makes the licensing decision.

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<sup>59</sup> See 36 CFR 800.6(a).

<sup>60</sup> See 36 CFR 800.6(a)(1).

<sup>61</sup> See 36 CFR 800.6(a)(1)(i).

<sup>62</sup> The only alternative to development of an MOA or PA to complete the Section 106 review, or receiving ACHP formal comments under 36 CFR 800.7 and responding to them, is provided through the NEPA substitution process addressed in 36 C.F.R. § 800.8(c). The NRC staff should reach out to the ACHP to discuss using the NEPA substitution process in 36 CFR 800.8(c) as early as possible.

<sup>63</sup> See 36 CFR 800.6(b)(iv).

<sup>64</sup> See 36 CFR 800.6(b)(1)(v).

<sup>65</sup> See 36 CFR 800.6(a)(1)(i)(C).

The signatories to the MOA or PA have sole authority to execute, amend, or terminate the MOA or PA.<sup>66</sup> Signatories typically include the SHPO/THPO, federal agency, and the ACHP, if it joined the consultation. The NRC may also invite other parties sign the agreement (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 licensee or 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 remains in compliance with the Section 106 process as long as the terms of the MOA or PA are implemented.

The NRC staff should plan to publish the PA or MOA, and documentation specified in 36 CFR 800.11(e), for public review and consider public comments before finalizing the agreement, subject to the confidentiality provisions in 36 CFR 800.11(c) and Section 304 of the NHPA. The NRC staff can publish the documents and requests the public's views on the resolution of adverse effects in the NRC's external web site. 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.

After consulting to resolve adverse effects, the NRC, the SHPO and/or THPO, 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."

Advisory Council on Historic Preservation. *Section 106 Applicant Toolkit*. Washington, D.C.

Advisory Council on Historic Preservation. *Meeting the "Reasonable and Good Faith" Identification Standard in Section 106 Review*. Washington, D.C. November 2011.

Advisory Council on Historic Preservation. *Guidance on Section 106 Agreement Documents*. Washington, D.C. August 2015.

Advisory Council on Historic Preservation. *Frequently Asked Questions on Protecting Sensitive Information about Historic Properties under Section 304 of the National Historic Preservation Act*. Washington, D.C. August 2016.

Advisory Council on Historic Preservation. *A Citizen's Guide to Section 106 Review*. Washington, D.C. December 2016.

Advisory Council on Historic Preservation. *Section 106 Consultation between Federal Agencies and Indian Tribes Regarding Federal Permits, Licenses, and Assistance Questions and Answers*. Washington, D.C. March 2008.

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<sup>66</sup> The process for amending an MOA or a PA would be typically discussed in the MOA or PA itself.

Advisory Council on Historic Preservation. *Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions*. Washington, D.C. January 2017.

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U.S. Department of Interior. Secretary of Interior's *Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act*. April 24, 1998. 63 FR 20496.

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U.S. Department of Interior, National Park Service. National Register Bulletin 29, *Guidelines for Restricting Information about Historic and Prehistoric Resources*.  
[http://www.blm.gov/pgdata/etc/medialib/blm/wo/Planning\\_and\\_Renewable\\_Resources/coop\\_agencies/data\\_sharing/guidance\\_standards.Par.76487.File.dat/access\\_nps29.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Planning_and_Renewable_Resources/coop_agencies/data_sharing/guidance_standards.Par.76487.File.dat/access_nps29.pdf).

U.S. Department of Interior, National Park Service. National Register Bulletin 36, *Guideline for Evaluating and Registering Archeological Properties*.

U.S. Department of Interior, National Park Service. National Register Bulletin 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties*.

U.S. Nuclear Regulatory Commission. NUREG-1748, *Environmental Review Guidance for Licensing Actions Associated with NMSS Programs—Final Report*. Washington, D.C. August 2003. ADAMS Accession No. ML032540811.

U.S. Nuclear Regulatory Commission. *Staff Guidance for Withholding Sensitive Information about Historic Resources in Accordance with the National Historic Preservation Act*. Memorandum. Washington, D.C. June 7, 2011. ADAMS Accession No. ML111080735.

U.S. Nuclear Regulatory Commission. *Tribal Policy Statement*. Washington, D.C. January 9, 2017. 82 FR 2402.

U.S. Nuclear Regulatory Commission. NUREG-2173, Revision 1, *Tribal Protocol Manual*. Washington, D.C. July 2018. ADAMS Accession No. ML18214A663.

## **Appendix A: How License Applicants Can Facilitate the National Historic Preservation Act Section 106 Process Prior to the Submittal of the License Application to the U.S. Nuclear Regulatory Commission**

This appendix provides information to licensees and license applicants about activities and actions they may take to facilitate the implementation of the Section 106 process of the National Historic Preservation Act (NHPA) for uranium recovery licensing actions. The Advisory Council on Historic Preservation (ACHP) developed a toolkit that provides information about the Section 106 process to parties applying for federal licenses, permits, assistance, or approvals available at the ACHP's web site [www.achp.gov](http://www.achp.gov). This toolkit may provide useful guidance for licensees and license applicants as they prepare applications for NRC 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 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.

Licensees and license applicants can consider gathering information on historic and cultural resources of significance to Tribes, in addition to archaeological resources, when developing the license application. Licensees and license applicants should document these efforts in the license application.

### 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 SHPO, THPO, other federal (e.g., U.S. 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, when 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 (e.g., wellfields, access roads, buildings, etc.).
- 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, 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.
- Consider state survey standards and guidelines.
- Survey reports should describe the physical extent of the survey, the reasons for selecting the areas surveyed, the survey methodology used and why the methodology was chosen, 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 section 800.11(c) of Title 36 of the *Code of Federal Regulations* and Section 304 of the NHPA. 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 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.