

From: [Jacobs, Sara](#)
To: [Waldron, Ashley](#)
Cc: [Brooks, Janet](#); [Applegate, Nathaniel](#); [Hogan, Sean](#)
Subject: [External_Sender] RE: Church Rock Programmatic Agreement
Date: Tuesday, July 07, 2020 8:16:04 AM
Attachments: [Site-Wide Operating Procedure NHPA Compliance at Bonita Peak.pdf](#)

Hi Ashley,

Thank you for your email. I have consulted with our EPA Region 6 and Region 9 counsel, Office of General Counsel, and my management and am responding to your request that EPA be identified as the lead agency for implementation of a Programmatic Agreement (PA) under the National Historic Preservation Act.

While CERCLA does not require USEPA to comply with the administrative requirements of NHPA, we agree that the path forward, as recommended by NRC and the Advisory Council, to enter into a PA is appropriate. Similarly, as the primary agency overseeing the removal activities at the Northeast Church Rock Mine Site as well as jointly overseeing remedial actions on the United Nuclear Mill Site with NRC, pending a license amendment approval, we agree that it is also appropriate for EPA to be identified as the lead agency for NHPA compliance. You may find it helpful to read EPA's recent Site-Wide Operating Procedure on NHPA Compliance for Bonita Peak attached since Section III describes EPA's NHPA obligations under CERCLA.

We appreciate NRC leading the recent consultation efforts with the Navajo THPO and New Mexico SHPO and look forward to your continued expertise, leadership, and engagement in helping to facilitate drafting of the Programmatic Agreement.

Please let me know if you have any questions or concerns.

Sara

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From: Waldron, Ashley <Ashley.Waldron@nrc.gov>
Sent: Monday, June 22, 2020 10:52 AM
To: Jacobs, Sara <Jacobs.Sara@epa.gov>
Cc: Brooks, Janet <Brooks.Janet@epa.gov>; Applegate, Nathaniel <Applegate.Nathaniel@epa.gov>; Diaz Toro, Diana <Diana.Diaz-Toro@nrc.gov>; Pineda, Christine <christine.pineda@nrc.gov>
Subject: Church Rock Programmatic Agreement

Greetings,

The U.S. Nuclear Regulatory Commission (NRC) is currently conducting a National Historic Preservation Act (NHPA) Section 106 review for the proposed Church Rock License Amendment requested by General Electric/United Nuclear Corporation (UNC or the licensee) in September 24, 2018 (ADAMS Accession No. ML18267A235). The NRC staff has identified cultural resources that could be affected by this undertaking. As explained further below, because the undertaking would involve both the NRC and the U.S. Environmental Protection Agency (EPA), coordination between agencies is essential for an effective NHPA process.

UNC requested a license amendment to allow approximately 1 million cubic yards of uranium mine tailings from the Northeast Church Rock (NECR) Mine Site to be placed on top of UNC's existing uranium mill tailings impoundment at the UNC Mill Site. The NECR Mine Site is on Navajo Nation trust land and is regulated by the EPA under its Superfund program. The UNC Mill Site is on privately-owned land and is regulated by the NRC. The sites are essentially adjacent and are located near Gallup, New Mexico. The direct area of potential effect (APE) for this project consists of the area that could be directly affected by excavation and other ground-disturbing activities and waste transfer activities. For this project, the direct APE is approximately 370 acres, encompassing large areas of both the NECR Mine Site and the UNC Mill Site. Given the nature of the undertaking, with limited permanent alteration to the present grade and appearance of the landscape, the indirect APE consists of the area within 1 mile of the direct APE, where potential visible, audible, or other effects could impact previously documented historic properties. In total, the indirect APE covers 6,703 acres surrounding both the Mine Site and the Mill Site.

During the Section 106 review, the NRC staff has been consulting with the EPA, Navajo Nation, New Mexico State Historic Preservation Officer (SHPO), the Advisory Council on Historic Preservation (ACHP), and the licensee. Through this consultation, the NRC staff has identified five cultural resources as eligible for listing on the National Register of Historic Places (NRHP) and are situated within the direct APE that is described above. Four of these resources are located on the EPA-regulated NECR Mine Site and one is located on the NRC-regulated UNC Mill Site. The NRC has received concurrence on its determination of eligibility for the five cultural resources from the New Mexico SHPO and the Navajo Nation Tribal Historic Preservation Officer (THPO).

Additionally, through this consultation and as discussed with the ACHP and EPA, the NRC has determined that a programmatic agreement (PA) would offer the best path for resolving adverse effects. The primary purpose of the PA would be to delineate the NRC and EPA obligations with regard to preservation activities for the cultural resources on the UNC Mill Site and the NECR Mine Site, respectively. While the NRC's licensing review will conclude upon issuance of a Record of Decision and Safety Evaluation Report, EPA will continue to oversee NECR Mine Site cleanup activities. As discussed with EPA, the NRC is confirming by this email that EPA will serve as the lead agency in developing a PA.

The NRC is proposing that NRC and EPA staff hold a conference call with likely signatories to the PA and consulting parties to describe the purpose of the PA, describe agencies' roles, and agree on next steps for developing the PA.

The NRC staff will separately provide the information above to the Navajo Nation THPO, the New Mexico SHPO, BIA, ACHP, and GE/UNC.

Please let us know if you have any questions or would like to discuss any information above.

Thank you,

Ashley Waldron
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Site-Wide Operating Procedure: Compliance with the National Historic Preservation Act at the Bonita Peak Mining District Superfund Site

I. Purpose:

The EPA recognizes the importance of cultural resources within the Bonita Peak Mining District (BPMD) Superfund Site and the surrounding area. The purpose of this Site-Wide Operating Procedure (SOP) is to document and outline the baseline approach that EPA will take when it is carrying out response actions at the BPMD Site (Site) to ensure that response actions attain the standards, requirements, criteria, or limitations set forth in section 106 of the National Historic Preservation Act (NHPA).

Implementation of the NHPA at Superfund sites differs from implementation elsewhere, given that the NHPA is incorporated as an Applicable or Relevant and Appropriate Requirement (ARAR) into the Superfund process. This means that only the substantive provisions of the NHPA must be complied with. This is explained in greater detail below. In certain circumstances, the EPA may deem it appropriate to go beyond the process outlined in this SOP.

II. CERCLA ARARs:

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) section 121(d), the National Contingency Plan (NCP), and EPA guidance require, and provide a framework for, development of site-specific ARARs that pertain to the particular chemicals, location characteristics, and activities addressed by the response action. Although the CERCLA process sets acceptable risk-based goals for cleanups, it does not impose specific restrictions on the various activities (such as treatment, storage, and disposal of waste) that may occur during a response. The EPA instead relies on other federal and state environmental laws and regulations to inform response activities through the ARARs selection process.¹

CERCLA sections 121(d)(2) and (d)(4) establish a process for how federal and state environmental laws should apply to on-site CERCLA response actions (i.e., the ARARs

¹ Pursuant to CERCLA section 121(d) (*Degree of cleanup*), any remedial action selected by the EPA must meet two threshold requirements. The remedy: (1) must attain a degree of cleanup which, at a minimum, assures protection of human health and the environment and (2) shall require a level or standard of control, at the completion of the action, which at least attains (or justifies a waiver of) all ARARs with respect to any hazardous substance, pollutant or contaminant that will remain onsite. 42 U.S.C. § 9261(d)(1); *see also* 40 C.F.R. §§ 300.430(f)(5)(ii)(A); 300.430(f)(5)(ii)(A)—(b). Further, the NCP requires remedies to attain (or waive) ARARs during the course of a remedial action. 40 C.F.R. § 300.435(b)(2).

process).² Pursuant to the NCP, “applicable requirements” means those promulgated cleanup standards, standards of control, and other substantive requirements, criteria, or limitations that specifically address a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance found at a CERCLA site.³ “Relevant and appropriate” means those promulgated cleanup standards, standards of control, and other substantive requirements, criteria, or limitations that, while not “applicable” to a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance found at a CERCLA site, address problems or situations sufficiently similar to those encountered that their use is well suited to the particular site.

At Superfund sites the EPA Administrator, pursuant to Executive Order 12580, has been delegated the authority to select remedies where the facility is not under the jurisdiction custody or control of another federal agency. In the relevant decision document, the EPA will typically identify the ARARs that have been deemed applicable or relevant and appropriate to the response action.⁴

III. The NHPA as an ARAR

Importantly, CERCLA section 121(e) provides that “[n]o Federal, state, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section.”⁵ This exemption applies to all administrative requirements, whether or not they are actually referred to as “permits.”⁶ Accordingly, only the substantive requirements of ARARs must be complied with at a Superfund site. As specified in EPA guidance, substantive requirements “are those requirements that pertain directly to actions or conditions in the environment.” Conversely, administrative or procedural requirements “are those mechanisms that facilitate the implementation of the substantive requirements of a statute or regulation.”⁷ Therefore, only the substantive requirements—and not the administrative requirements—of the NHPA must be complied with at BPMD.

The EPA’s ARARs guidance specifically addresses which components of the NHPA are considered to be substantive and which components are considered to be administrative.⁸ According to EPA guidance, the substantive aspects of the NHPA include identification of cultural resources and mitigation or avoidance of impacts to cultural resources associated with

² *National Oil and Hazardous Substances Pollution Contingency Plan*, 55 Fed. Reg. 8666, 8742 (Mar. 8, 1980).

³ 40 C.F.R. § 300.5.

⁴ *Id.*

⁵ 42 U.S.C. § 9621(e)(1).

⁶ *Compliance with Other Laws Manual Part I: Interim Final*, § 1.2.2.1 (Aug. 8, 1988) [hereinafter *Compliance with Other Laws Part I*].

⁷ *Id.* (including “approval of, or consultation with administrative bodies, consultation, issuance of permits, documentation, reporting, recordkeeping, and enforcement”).

⁸ See U.S. Environmental Protection Agency, Office of Emergency and Remedial Response, *Compliance with Other Laws Manual Part II: Clean Air Act and Other Environmental Statutes and State Requirements Interim Final* § 4.1 (Aug. 1989) [hereinafter *Compliance with Other Laws Part II*].

on-site CERCLA response actions.⁹ Conversely, EPA guidance identifies consultation and coordination between the lead agency, the State Historic Preservation Officer (SHPO), and the Advisory Council on Historic Preservation (ACHP) to be an administrative requirement for on-site actions.¹⁰ Therefore, while NHPA coordination and consultation with SHPO, ACHP, and state and local government is the EPA's goal with respect to response actions taken at BPMD, the EPA is not required to follow these administrative requirements. For all the BPMD projects, where the EPA is exercising its delegated authority under CERCLA, the agency will evaluate the significance of the cultural resources in the area of potential effect and engage the community interested in the potential impacts of on-site CERCLA response actions.

Moreover, formal determinations regarding eligibility of a cultural resource for the National Register of Historic Places (National Register), adverse effect evaluations, consultation with the ACHP (where deemed appropriate), and mitigation decisions are reserved to the discretion of the EPA for on-site actions for which the EPA is lead agency.¹¹ However, it remains the EPA's goal to consult and coordinate with SHPO and local authorities with regard to on-site CERCLA response actions that may impact cultural resources.¹² Accordingly, in the sections that follow, the EPA has outlined the site-wide operating procedures that it will follow to ensure NHPA compliance, within the ARARs framework, for on-site response actions at the BPMD Site.

IV. Compliance with the NHPA at the BPMD Site:

The EPA has identified the NHPA as a potentially applicable requirement for response actions taken within the BPMD Site. CERCLA response actions taken by the EPA at the BPMD Site are considered to be a federal undertaking within the meaning of Section 106 of the NHPA.¹³ These undertakings, collectively or individually, have the potential to affect historic properties.¹⁴ The area of potential effects will be defined for each individual mining-related source area or on-site response action contemplated by the EPA at the BPMD Site.

Throughout the lifespan of the Superfund cleanup at BPMD, the EPA will carry out, or oversee a potentially responsible party (PRP) that is carrying out, a number of CERCLA response actions.¹⁵ These response actions may be carried out on a site-wide basis, or at individual mining-related source areas. These response actions fall into two categories: removal actions and

⁹ See U.S. Environmental Protection Agency, Office of Emergency and Remedial Response, *ARARs Q's & A's: General Policy, RCRA, CWA, SDWA, Post-ROD Information, and Contingent Waivers* 3 (July 1991) (stating that the NHPA is a potential ARAR, but "administrative requirements such as consultation or obtaining approval are not required for on-site actions."); See also *Compliance With Other Laws Part II*, § 4.1.4.1.

¹⁰ *Compliance With Other Laws Part II*, § 4.1.

¹¹ *Id.*

¹² EPA's guidance makes clear that coordination and consultation are procedural requirements that do not constitute ARARs for on-site activities. See *Compliance With Other Laws Part II*, § 4.1. EPA will nonetheless seek to coordinate and consult with the appropriate entities as appropriate.

¹³ 54 U.S.C. § 300320.

¹⁴ Within the meaning of 54 U.S.C. 300320 and regulations set forth at 36 C.F.R. Part 800.

¹⁵ A PRP, as defined by 40 C.F.R. §304.12(m) is any person who may be liable pursuant to section 107(a) of CERCLA, 42 U.S.C. 9607(a), for response costs incurred and to be incurred by the United States not inconsistent with NCP.

remedial actions. *Removal actions* are immediate, short-term responses intended to protect people from immediate threats posed by hazardous waste sites. *Remedial actions* are long-term cleanups designed to prevent or minimize the release of hazardous substances and to reduce the risk and danger to public health or the environment.

The EPA will follow the following site-wide operating procedures outlined below when carrying out response actions in the BPMD.

V. Process for Interim Remedial Actions and Final Remedial Actions:

Upon selecting an interim remedial action or final remedial action at the BPMD Site, the EPA will identify the NHPA as an ARAR in the associated decision document. Prior to carrying out any remedial actions in the BPMD, the EPA, through a contracted, qualified archeologist will conduct cultural resource surveys, resource evaluations, and provide guidance at the project area (which can include a mine or mining-related source area) in the manner provided for in this SOP to ensure compliance with the NHPA:¹⁶

1. Conduct a Literature Search and Sensitivity Study

- a. The EPA will conduct documentary research designed to identify any known or potential historical, architectural, archaeological, or culturally significant resources within the project area.¹⁷ This evaluation will include:
 - i. Evaluation of the nature and extent of the proposed project
 - ii. Assessment to determine whether the area has been disturbed in such a way that has rendered resources not eligible for the National Register.
 - iii. Assessment of the potential for unidentified resources through a synthesis of land use patterns and prehistoric and historic cultural development in the project area.
- b. If the literature search and sensitivity study yield either of the following results, then the EPA will proceed as indicated:
 - i. The Southern Ute Indian Tribe (SUIT), Ute Mountain Ute Tribe, and Northern Ute Tribe have historically utilized land in and around the BPMD. The EPA is aware that the 1874 Brunot Agreement with the United States grants hunting, fishing, and gathering rights within the BPMD Site. In addition, the BPMD Site continues to be an area to which

¹⁶ Where the EPA is overseeing work carried out by a PRP, the EPA will make clear in the relevant enforcement instrument that the PRP is responsible for complying with ARARs. NHPA compliance for PRP-lead work will be achieved in one of two ways. The EPA may require that the PRP carry out the cultural resource survey which will then be reviewed for adequacy by the EPA's qualified archeologist. In carrying out the work in question, the PRP will then be required to avoid, minimize, or mitigate adverse effects to identified cultural resources. Alternatively, the EPA may conduct the cultural resource survey and then direct the PRP to avoid, minimize or mitigate adverse effects to identified cultural resources in carrying out the work in question.

¹⁷ The literature review may be conducted before or after the field investigation.

these Ute tribes attach cultural, historical, and other significance. As a result, historic properties identified within the BMPD Site could be affected by the Undertaking. The EPA recognizes that these Ute tribes possess special expertise regarding the religious and cultural significance that historic properties located within the BMPD may have. The EPA, through its qualified archaeologist, will investigate the prehistoric use of lands where an onsite action is occurring. Where prehistoric resources are found, the EPA will consult with the Tribal Historic Preservation Officer (THPO) for the SUIT.

- ii. Mining sites with compromised integrity rarely qualify as eligible for the National Register. Instead of full site documentation and archival research, the EPA will work with a qualified archaeologist, who will gather enough information to characterize the site and clearly demonstrate its lack of integrity. If an individual mine or mining-related source area fails to satisfy the National Register standards, then the site is determined to be not eligible. The EPA will record its rationale for foregoing full documentation, emphasizing the lack of integrity, and communicate that to the local stakeholders (note: A field investigation is often necessary to document disturbance).
- iii. Previously evaluated historical resource:
A qualified archaeologist, experienced with mining, will verify accurate eligibility determinations and quality of documentation by reviewing previous documentation and screening for quality of work, and defensible eligibility determination. Reevaluation of previous work may occur in the field, according to standard procedures.
 1. For those sites whose records might be insufficient, or the eligibility determination questionable, the archaeologist will use discretion to decide level of effort to update a site's record (if needed). It should be noted that although some work is more than 10 years old, its quality is still sufficient and relevant today. In these cases, a site need not be recorded again.
 2. If the previous work is insufficient, then reevaluation will fill in data gaps for a defensible eligibility determination. During reevaluation, changes in a site's condition and preservation will be noted. In some cases, sites currently listed as eligible may no longer qualify due to deterioration or other major changes. If an eligible site has lost sufficient integrity, its eligibility determination will be reversed. Conversely, some sites currently listed as not eligible might be eligible, which can be demonstrated through sufficient documentation and research.
 3. If the previous work is wholly inadequate, then the site might be recorded again.

4. The results of work with sites lacking integrity (noted above), and previously recorded sites, will be produced in a cultural resource report including SHPO site forms, structured according to SHPO's standard format. The report will present site information, eligibility recommendations, and discussions of project effects. The results will also be shared with local stakeholders.

2. Field Investigation

- a. Where the EPA has reason to believe that a field investigation would resolve uncertainty as to whether cultural resources are present, recently disturbed, or eligible for the National Register, a field investigation will be conducted through the EPA's qualified archeologist.¹⁸
- b. Where necessary, the EPA Remedial Project Manager will send a Consent for Access form to the owner of the property in question so that the field investigation can occur.
- c. If the field investigation indicates that the project area or mining-related source area has been significantly disturbed in the recent past (within the last 50 years) to the point where the integrity of the mining feature is compromised, then no further action will be taken with regard to the NHPA requirements.

3. Cultural Resource Survey Report:

- a. Where a cultural resource is identified through a literature review and sensitivity study and a field investigation, the EPA will develop a detailed evaluation of the identified cultural resource that may be affected by the remedial alternative likely to be selected.
- b. Adequate data is gathered, using the criteria listed in 36 C.F.R. Part 60.4, to allow a determination of the resource's eligibility for listing in the National Register, including boundaries, integrity, significance of the resource, and an evaluation of the effect of the proposed project.
- c. The EPA, through its qualified archeologist, will draft a detailed report.
- d. The report will be submitted to SHPO. In the event that prehistoric resources are identified, a cultural resource survey report will also be sent to THPO.

4. Eligibility Determinations, Project Effects, and Mitigation:

Where the EPA, through its qualified archeologist, identifies resources in a project area, the EPA will first make a determination as to whether the given resource is eligible for inclusion on the National Register. Part of this determination will include identifying which features within a

¹⁸ The field survey may be conducted before or after the literature review.

given resource are contribute elements, supporting eligibility.¹⁹ The EPA will then determine whether the resource will be adversely affected by the work being considered. If a conclusion is reached that the work will adversely affect an eligible cultural resource, and that it is not feasible to avoid the specific action or implement an alternative, the EPA will seek to mitigate the adverse effect. The following processes will govern eligibility determinations, impact evaluations, and development of mitigation measures.

a. Determination of Eligibility

- i. Upon making an eligibility determination for a given resource, the EPA will document in a letter to the SHPO its rationale for determining that a resource is, or is not, eligible for the National Register.²⁰ The EPA will transmit its Cultural Resource Survey Report along with the letter . The rationale will indicate which resources contribute to the overall eligibility, or integrity, of the cultural resource.
- ii. Local stakeholders will receive a courtesy copy of the letter that will be sent to the SHPO. In the event that prehistoric resources are identified, a cultural resource survey report will also be sent to THPO.

b. Impact Evaluations

Upon determining that an eligible cultural resource is present in a given area the EPA, in consultation with the SHPO and THPO where prehistoric resources are identified, will determine the effect that the response action will have on National Register-listed and/or eligible resources.

- i. If the EPA determines that the response action will have no effect, or no adverse effect, then the EPA will document this in a letter to the SHPO. In the event that prehistoric resources are identified, a letter will also be sent to THPO. A courtesy copy of the letter will be provided to the local stakeholders. The EPA will make every effort to engage local stakeholders prior to issuing the final determination.
- ii. Where the EPA determines that it is feasible to avoid an adverse effect on a cultural resource, it will seek to do so and document this decision in a letter to the SHPO. In the event that prehistoric resources are identified, a letter will also be sent to THPO. A courtesy copy of the letter will be provided to the local stakeholders. The EPA will make every effort to engage local stakeholders prior to issuing the final determination.

¹⁹ In some instances, a number of resources may be present in a given area. In these instances, the EPA will need to assess each resource to determine whether it contributes to the overall National Resource eligibility of a given cultural resource.

²⁰ While this letter constitutes an administrative process, and is therefore not required for on-site response actions under the ARARs process, the EPA nonetheless intends to keep the SHPO and other stakeholders informed about eligibility determinations that it has made.

- iii. Where the EPA determines that it is not feasible to implement an alternative to avoid an effect on National Register-listed or eligible resource, EPA will develop measures to mitigate the effect.

c. Mitigation

Where mitigation is necessary, the EPA will develop mitigation alternatives. In developing mitigation measures, the EPA will seek input from the SHPO, ACHP, THPO (in the event that prehistoric resources will be impacted), and local stakeholders.

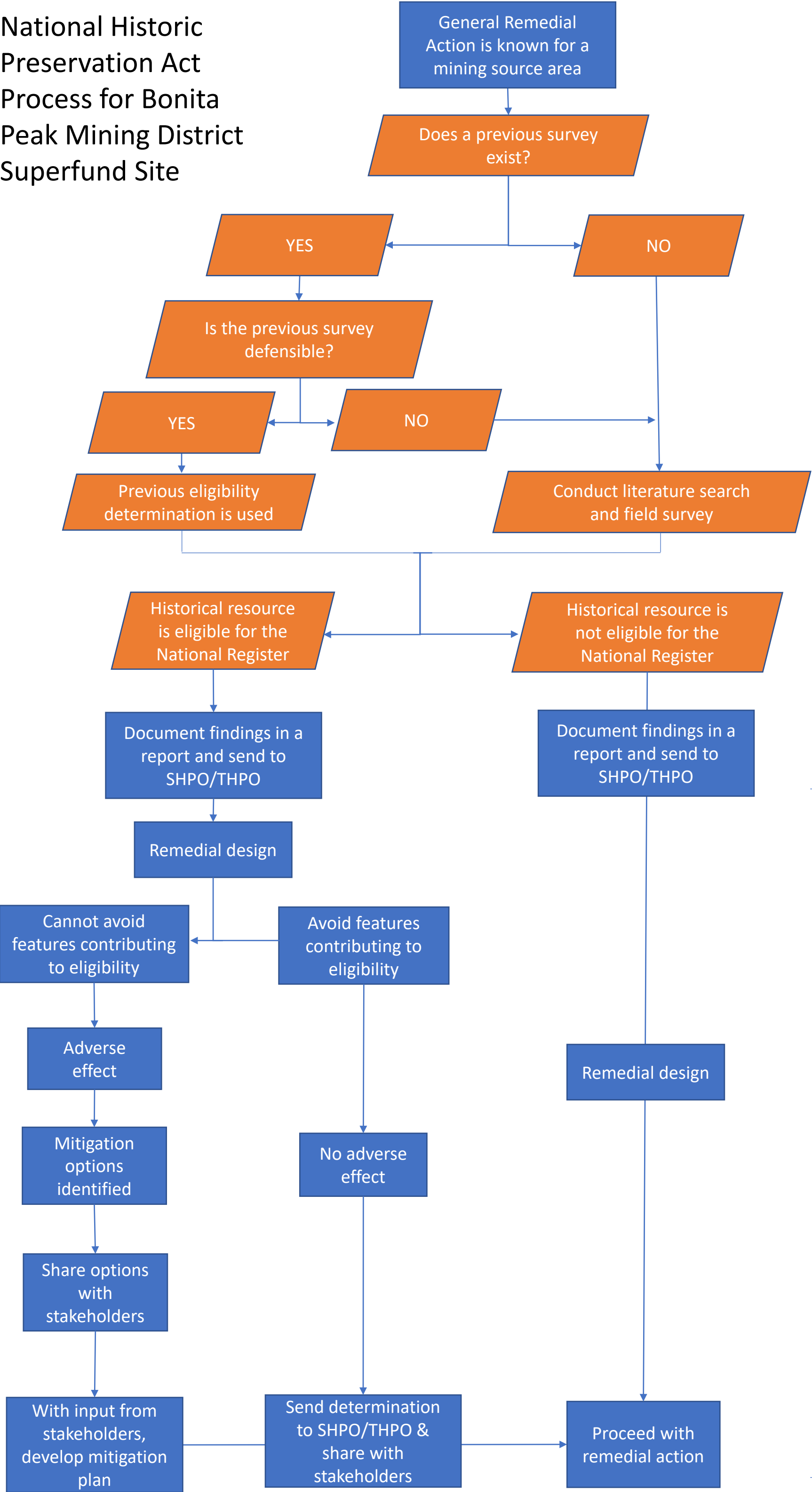
VI. Process for Removal Actions

The NCP requires on-site CERCLA removal actions to identify and comply with federal and state ARARs to the extent practicable considering both the urgency of the situation and the scope of the removal action.²¹ As specified in CERCLA, remedial investigation activity is classified as a removal action.²² Thus, for removal actions, including remedial investigation work, the EPA will follow the same process outlined for remedial actions, to the extent that the EPA finds, taking into account the urgency and the scope of the work envisioned, that it is practicable to do so. Where remedial investigation work is determined by the EPA to be invasive enough to potentially impact eligible cultural resources, the EPA will, to the extent practicable, carry out the process outlined in this SOP for remedial actions prior to initiation of the invasive remedial investigation work.

²¹ See CERCLA § 9621 (d); see also 40 C.F.R. §§ 300.415(j).

²² See 24 U.S.C. §9601(23), which defines “removal” to include “action taken under section 9604(b) of this title.” CERCLA section 104(b) includes provisions for “planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations . . . deem[ed] necessary or appropriate to plan and direct response actions . . .”

National Historic
Preservation Act
Process for Bonita
Peak Mining District
Superfund Site



Archaeologist advises EPA on these decisions

EPA makes these decisions
in consultation with the archaeologist