

Cultural Resources Confidentiality Guidelines

Department of Transportation and Public Facilities

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Introduction

These guidelines apply to Department of Transportation and Public Facilities (DOT&PF) sponsored projects receiving federal funds, as well as to State funded Alaska Capital Improvement Program (CIP) and Maintenance and Operations (M&O) projects.

Cultural resources are taken into account during project development and construction, pursuant to 36 CFR 800 (implementing regulations for Section 106 of the National Historic Preservation Act as amended) and/or the Alaska Historic Preservation Act (AHPA) (AS 41.35), specifically AS 41.35.070 Preservation of Historic, Prehistoric and Archaeological Resources Threatened by Public Construction.

Compliance with these laws involves gathering information about cultural resources in a project's Area of Potential Effect (APE), as well as consultation with Tribes, the State Historic Preservation Officer (SHPO) and other consulting parties. Documentation of this compliance results in the creation of records, some of which may contain sensitive information.

These DOT&PF guidelines are provided to ensure confidentiality and protection of those cultural resources while ensuring that compliance with 36 CFR 800, AHPA 41.35.070, National Environmental Policy Act (NEPA) [42 USC. 4321 et seq.], and Section 4(f) of the U.S. Department of Transportation Act of 1966 [codified in 49 USC 303 and 23 USC 138] can be documented appropriately.

General Issues on Confidentiality

Privileged treatment is extended to information containing location, character, and ownership about cultural resources. Access to documents that disclose the locations of sensitive cultural resources, including information that a Tribe or landowner has asked to keep confidential, is to be restricted. (However, unless otherwise noted in the project file, documentation pertaining solely to architectural records or resources should not pose concerns of a sensitive nature and access to that type of information is unrestricted.)

Laws that protect cultural resources by restricting dissemination of certain information about them include:

- National Historic Preservation Act (NHPA) (16 USC 470 et seq.)
- Archaeological Resources Protection Act (ARPA) (16 USC 470 aa-mm)
- National Environmental Policy Act (NEPA) (42 USC 4321 et seq.)
- Alaska Public Records Act (APRA) (AS 40.25)

Further guidance is also provided in the National Park Service *National Register Bulletin 29 Guidelines for Restricting Information about Historic and Prehistoric Resources*. In addition, the

Alaska Heritage Resource Survey (AHRS) user agreement requires additional steps to secure AHRS data. These include secure storage of AHRS data, withholding data from unauthorized use, and deletion of downloaded AHRS data after a project is constructed. (See the DOT&PF Records Retention Schedule discussion below in *Environmental Documents and Project Files*.)

Sensitive material is to be handled so that the confidential information is not inadvertently included in public release documents such as management plans, environmental documents (State Checklists and federal Categorical Exclusions [CEs], Environmental Assessments [EAs], Environmental Impact Statements [EISs], and Section 4(f) Evaluations), or advertised Requests for Proposals (RFPs) for construction projects.

Note on roles and general access: The DOT&PF Regional Environmental Managers (REMs) oversee and are responsible for the environmental requirements of projects developed within their regions. In each region and at the statewide level Environmental Analysts perform numerous functions in the environmental documentation process and file maintenance. The DOT&PF environmental staff who meet the professional qualifications standards established by the Secretary of the Interior, referred to as Professionally Qualified Individuals (PQIs), assist the project development team with Section 106 and AHPA compliance.

Individuals who may have access to confidential information include those authorized to approve the project environmental document (i.e., DOT&PF REM and as appropriate the NEPA Manager or Statewide Environmental Program Manager, FHWA, FAA, or FTA); the DOT&PF project Environmental Analyst, PQI, Engineering Project Manager and engineering design team; SHPO staff; Tribal officials, and qualified cultural resource consultant(s) under contract for the project. On a case-by-case basis, this may also include the Project Engineer who is in charge of a construction project. Qualified cultural resource consultants conducting research that involve DOT&PF confidential files should coordinate access and approval through the PQI. Access to Tribal documentation may be determined as being more restricted depending on the confidential nature of the documents.

General Filing Principles

Cultural resource documents determined by project environmental team in consultation with the PQI to contain confidential or restricted information should be filed with a cover sheet indicating:

“[Restricted or Confidential] information on X to X pages – do not reproduce. Do not include in bid or public distribution documents. Do not include in electronic document retrieval systems unless access is restricted to [list positions].”

It is helpful to mark all restricted pages with a “Restricted or Confidential” margin stamp.

Special procedures when a Tribe requests confidentiality of a site – this could be its location, or the reason for its use, or both. This information is not to be included in a NEPA document. In some cases a site may have such high sensitivity to a Tribe that detailed

information is not placed in project files either – only the resolution of the issue, and resulting commitments, are retained.

Further guidance is also provided in the National Park Service *National Register Bulletin 29 Guidelines for Evaluating and Documenting Traditional Cultural Properties*. Additional information regarding legality issues can be found in: Ethan Plaut, *Tribal-Agency Confidentiality: A Catch-22 for Sacred Site Management?*, *Ecology Law Quarterly*, Volume 36, Number 1, 2009, pp. 137-166.

Principles for Avoidance Areas on Plan Sets

Environmentally Sensitive Place (ESP): An archaeological site within a construction project's APE can be protected from adverse effects by establishing a surrounding buffer and designating the location on the plan sheet(s) as an ESP. The contractor does not need to know the nature of the resource being protected. Specific contract provisions may be employed to physically protect the ESP (e.g., installation of protective construction fencing) and by precluding work at that location.

On a case-by-case basis, it may be necessary to disclose more detailed information about the ESP and its location to the Project Engineer in charge of the construction project so that area can be monitored to ensure protection of the ESP. This briefing can be accomplished during a pre-construction meeting with DOT&PF environmental staff assigned to the project (e.g., the REM, PQI, or Environmental Analyst). Such information is to remain off the plan sets.

Section 106/AHPA Consultation and Compliance Record

Per Section 304 of NHPA and Section 9(a) of ARPA, specific archaeological site locations should not be included in documentation made available to the general public or certain consulting parties. For example, map details or text with explicit site locations may be withheld from the public to protect and prevent looting or desecration of cultural resources.

Potentially sensitive project material may include Section 106 and AHPA processing submittals (letters or emails with location figures/maps and associated reports), cultural resource survey field notes, AHRS data, recordings or transcripts of interviews with Tribal members/other consulting parties, records of consultation meetings during which confidential information was discussed, and project plans that contain restricted site locations. Unless otherwise noted in the project file, documentation pertaining solely to architectural records or resources should not pose concerns of a sensitive nature and access to that type of information is unrestricted.

Project concurrences received from the State Historic Preservation Officer (SHPO) for Section 106 processing or the Office of History and Archaeology (OHA) Chief for AHPA processing generally do not include site sensitive information, but coordinate with the PQI in case of any uncertainty.

General considerations:

1. During consultation: It is recommended that for all recipients, Section 106 and AHPA submittals exclude sensitive site location information from the text of the letters.
 - a. SHPO and Tribes: Letters can reference the supporting enclosures that provide the details. This allows public dissemination of the letters without disclosure of site location data by simply removing the supportive enclosures. Providing location data in the enclosures to SHPO and Tribes is usually allowed, unless a Tribe has indicated that particular information should not be disclosed.
 - b. Other consulting parties: Supporting enclosures that provide sensitive site location details would only be enclosed with these letters when they are directly addressed to cultural resources staff who understand and maintain site confidentiality, or when similar safeguards are available. Other consulting parties should not receive restricted site location information, but may receive public versions of supporting enclosures. Location maps used to illustrate the general presence of cultural sites within letter or document narratives made available to the public should be at a scale and resolution so as to preclude the map's use for relocating individual sites in the field.
2. When filing consultation documents in the project file: If confidential information is included in the text of any document, remove or redact (i.e., obscure those portions) from the document. Location maps used to illustrate the general presence of cultural sites within letter or document narratives made available to the public should be at a scale and resolution so as to preclude the map's use for relocating individual sites in the field.

Environmental Documents and Project Files

An environmental project file (“environmental file”) refers to those portions of the larger project file developed and maintained by the project environmental team during the NEPA or State environmental review process. The environmental file includes the environmental document (CE, EA, EIS, State checklist, etc.) and all supporting documentation associated with the environmental analysis.

Information in a project file could be subject to public records laws, such as the federal Freedom of Information Act (FOIA) (5 USC 552), and may also serve as part of the legal administrative record demonstrating compliance with State and federal laws. An administrative record refers to the documents from the project file submitted by an agency upon request of another party. When documents considered part of the project file/administrative record are withheld on the basis of that they contain privileged confidential information, an agency will typically submit a list of those documents and describe the basis on which they are being withheld. The American Association of State Highway and Transportation Officials (AASHTO) Center for Environmental Excellence practitioner’s handbook *Maintaining a Project File and Preparing an Administrative Record for a NEPA Study* provides useful information on this subject.

Information about cultural resources that were taken into account for the project is generally considered part of the environmental file. The following Section 106 and AHPA consultation material is retained in the environmental file:

- Internal review forms, such as Direct to Findings (DTF) form, Interim Guidance (IG) form, or Section 106 Streamlined Project Review form, and any attachments
- Initiation and findings letters, as applicable, with enclosures
- Consultation documentation such as:
 - incoming responses to consultation letters from consulting parties (including Tribes and SHPO/OHA Chief) and DOT&PF/FHWA/FAA/FTA replies
 - meeting summaries/minutes
 - telephone logs
 - public comments relating to cultural resources

However, some of this material could be sensitive and protected depending on its contents. See the previous *General Filing Principles* discussion regarding protected status filing. It may be that tribally restricted or confidential information is stored separately from the environmental file. There are time limitations for project records retention pursuant to the provisions of AS 40.21. The DOT&PF Records Retention Schedule (#254000) indicates that Capital Project Files (Environmental, Design, Construction, and Review files for highway, aviation, harbor, and building projects) are generally retained at the respective DOT&PF office for three years after administrative closure of a project before they are destroyed (unless they are identified as files of historic significance in which case they are permanently archived at the Alaska Department of Education, Division of Libraries, Archives and Museums, Archives and Records Management Services).

Cultural Resources Documentation in Environmental Documents

The following list identifies the cultural resources documentation to be included and excluded within the environmental documents that are contained within the environmental file: State Checklists and federal CEs, EAs, EISs, and Section 4(f) Evaluations (including Programmatic and Full Section 4(f) Evaluations). Also refer to the *Project Documentation Matrix: Cultural Resources Information*.

➤ **For Project Scoping Letters:**

Exclude

- Any figures or documents containing locations of archaeological sites, restricted AHRS information, or properties of religious and cultural significance to Tribes

➤ **For State Checklists:**

Include

- OHA Chief concurrence letter

- APE figure (exclude locations of sensitive information) from AHPA correspondence
- Any site avoidance measures or other compliance commitments (such as from a Memorandum of Agreement [MOA]) (If the MOA contains sensitive material, it is to be placed in a MOA appendix that is excluded and kept confidential.)

Exclude

- Initiation and Findings letters if they contain sensitive site location information
- Any figures or documents containing locations of archaeological sites, restricted AHRS information, or properties of religious and cultural significance to Tribes

➤ **For CEs:**

Include

- Section 106 Programmatic Agreement (PA) Streamlined Project Review form or SHPO concurrence letter, whichever applies (If the Project Review form contains sensitive material it is to be placed in a Review form appendix that is excluded and kept confidential.)
- APE figure (that excludes locations of sensitive information) from Section 106 correspondence
- Any site avoidance measures or other commitments (such as from a MOA) (If the MOA contains sensitive material, it is to be placed in a MOA appendix that is excluded and kept confidential.)

Exclude

- Initiation and Findings letters if they contain sensitive site location information
- Any figures or documents containing locations of archaeological sites, restricted AHRS information, or properties of religious and cultural significance to Tribes

➤ **For EAs and EISs:**

Include in the body of document

- Consultation summary, including study area or APE (that excludes locations of sensitive information), list of consulting parties, identification efforts, and analysis of effects for various alternatives (with specific archaeological site location information and tribally sensitive information removed), any site avoidance measures or other commitments (such as from an MOA)

Include in an appendix

- Section 106 PA Streamlined Project Review form or SHPO concurrence letter, whichever applies
- The MOA (If the MOA contains sensitive material, it is to be placed in a MOA appendix that is excluded and kept confidential.)

Include in a restricted access appendix (see previous General Filing Principles discussion)

- Initiation and Findings letters, with enclosures (SHPO version)

- If NEPA is substituting for Section 106, substitution correspondence and identification results

➤ **For Section 4(f) documentation of historic sites:**

Include in the Section 4(f) analysis

- Description of the project finding, with SHPO’s concurrence

Include in a restricted access appendix

- Initiation and Findings letters, with enclosures (SHPO version)
- Any figures or documents containing locations of archaeological sites, restricted AHRS information, or properties of religious and cultural significance to Tribes

Project Documentation Matrix: Cultural Resources Information

Item	State Cklist	CE	EA/EIS	Project File	Comments
“No Potential” NEPA Manager agreement		X		X	If applicable. (Will not apply after Section 106 PA goes into effect.)
Use of State-funded Minor Project MOA				X	If applicable.
106 PA Streamlined Project Review form		X	Appendix*	X	If applicable.
Direct to Findings (DTF) form and supportive documentation		X		X	If applicable. If sensitive information is included on the DTF Form or its backup, do not attach to environmental document. Indicate on the state checklist or CE Form that the documentation is on file, and the Regional Cultural Resource Specialist should be contacted.
Roads PA Interim Guidance (IG) form and supportive documentation		X	Appendix	X	If applicable.
Consultation Summary		X	X	X	If applicable.
Initiation letter, with enclosures		X	Appendix*	X	SHPO version will suffice in NEPA document. All versions with distribution lists should be retained in project file. If enclosures have maps that include sensitive information, indicate that these are on file, but do not include the maps as part of the env. doc. attachment.

Findings letter, with enclosures		X	Appendix*	X	Same as above.
Location/vicinity and APE figures	X	X	Appendix*	X	Do not include restricted site information on these figures. Not needed for Tier 1 streamlined reviews.
Survey report(s)			Appendix*	X	
Consulting party replies and DOT&PF, FHWA, or FAA responses			Appendix*	X	May include in a restricted appendix, although inclusion depends on confidentiality of content. Do not include information on properties that a Tribe has indicated are properties of religious and cultural significance.
Other 106 consultation documentation: meeting minutes, etc.			Appendix*	X	Same as above, though some coordination material that should be retained in project file may be unnecessary in NEPA document.
SHPO concurrence	X	X	Appendix*	X	(Not applicable when Streamlined Project Review is used.)
Site avoidance measures adopted	X	X	X	X	If applicable. Address site avoidance measures in body of NEPA document, in a manner that protects confidential details about the site. For example, indicate with terms such as “environmentally sensitive place-no work zone”. A cultural resources professional should review the boundaries of the no-work zone.
MOA			Appendix*	X	If applicable, and restrict only if the MOA contains sensitive information.
Section 4(f) Applicability Determination consultation for historic properties (to also include archaeological sites)		X	Appendix	X	Address in NEPA document in a manner that protects confidential details. If Section 4(f) consultation includes sensitive information, only provide the NEPA Mgr. response; do not attach the entire consultation.

Section 4(f) De Minimis Impact Finding					Address in NEPA document in a manner that protects confidential details. If Section 4(f) de minimis impact finding includes sensitive information, do not attach the finding.
Section 4(f) Programmatic Evaluations <ul style="list-style-type: none"> • Minor Use of a Historic Site • Historic Bridges • Net Benefit 					Address in NEPA document in a manner that protects confidential details. If Section 4(f) Programmatic Evaluation includes sensitive information, do not attach the evaluation. Note: information on historic bridges is not considered confidential.
Section 4(f) Individual Evaluations					Address in NEPA document in a manner that protects confidential details. FHWA has NEPA and 4f approval authority for these projects-- coordinate with FHWA regarding sensitive information.

* Appendix for cultural resources is to be restricted and not part of public document.