

 <p>NEW YORK STATE OF OPPORTUNITY.</p> <p>Parks, Recreation and Historic Preservation</p> <p>Section: Historic Preservation</p>	<p>Policy Title: Consultation on Historic Properties with Indian Nations and Tribes</p> <p>Directive: HP-POL-005</p> <p>Effective Date: 11/01/2016</p>
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Summary

Historic preservation carried out by federal and state agencies is a collaborative process that encourages communities to be involved in decisions affecting their history. The New York State Office of Parks, Recreation and Historic Preservation and its State Historic Preservation Office (collectively in this document referred to as SHPO) have developed this Policy for incorporating the knowledge and concerns of Indian Nations and Tribes (collectively in this document referred to as Indian Nations) into reviews of projects affecting their historic properties.

Policy

The SHPO process includes reviews under Section 106 of the National Historic Preservation Act of 1966 (Section 106), as amended;¹ Section 14.09 of the NYS Parks, Recreation and Historic Preservation Law (Section 14.09);² and Article 8 of the NYS Environmental Conservation Law—the State Environmental Quality Review Act, and implementing regulations.³ The Office of Parks, Recreation and Historic Preservation consults with Indian Nations when it undertakes, funds or approves its own projects that may affect historic property. In its other role as SHPO, it consults with federal and State agencies that are undertaking, funding or approving projects that may affect Indian Nation historic properties. Identification of Native American historic property generally occurs during the Phase IA/IB Archaeological Reconnaissance investigation described in Attachment A. Recommendations for treating potential human remains and associated funerary objects that are inadvertently encountered or discovered during a construction project or archaeological investigation are contained in the Human Remains Protocol described in Attachment B.

SHPO recognizes that many state and federal agencies have established comprehensive procedures and policies to encourage appropriate government-to-government cooperation

¹ 54 U.S.C. §306108 (2014); 36 C.F.R. pt. 800 (2010).

² N.Y. Parks Rec. & Hist. Preserv. Law § 14.09 (McKinney 1984); N.Y. Comp. Codes R. & Regs. tit. 9, pt. 426-428 (2010).

³ N.Y. Env'tl. Conserv. Law §§ 8-0101 to -0117 (McKinney 2005); N.Y. Comp. Codes R. & Regs. tit. 6, pt. 617 (2010).

between their agencies and Indian Nations.⁴ This Policy clarifies SHPO's process when reviewing projects that directly or indirectly involve interested Indian Nations; it cannot substitute for the obligations of other State and federal agencies regarding consultation with Indian Nations.

In carrying out its responsibilities SHPO will: (1) note the need for Indian Nation consultation⁵ in its correspondence with agencies; (2) facilitate, as required, the consultation process through ongoing dialogue with the involved parties; and (3) undertake consultation with Indian Nations, as appropriate. This policy addresses the scope of interested Indian Nations, and the Section 106, Section 14.09 and SEQR processes.

Interested Indian Nations

The interests of Indian Nations in lands within the boundaries of New York State are acknowledged in various ways, including through federal government recognition, New York State government recognition, and the recognition of ancestral lands or historic presence. There are nine Indian Nations resident within or having common geographic borders with New York State: the Saint Regis Mohawk Tribe of New York, Oneida Indian Nation of New York, Onondaga Nation of New York, Cayuga Nation of New York, Seneca Nation of Indians of New York, Tonawanda Seneca Nation of New York, Tuscarora Indian Nation of New York, Unkechugau Indian Nation and Shinnecock Nation of New York. The State of New York recognizes all nine nations; all but the Unkechugau are federally recognized. In addition to resident Indian Nations, a number of nations have ancestral lands that lie within the present boundaries of New York State, including, but not limited to, the Delaware Tribe of Oklahoma, the Delaware Nation of Oklahoma, the Oneida Tribe of Indians of Wisconsin, the Seneca-Cayuga Tribe of Oklahoma, and the Stockbridge-Munsee Community Band of Mohicans of Wisconsin. SHPO also recommends consultation with the Mohawk Nation Council of Chiefs, the traditional government of the Mohawk people in both the United States and Canada.

Section 106 Review

Section 106 of the National Historic Preservation Act of 1966 requires federal agencies take into account the effects of their undertaking on historic properties. The Section 106 process involves consultation with interested parties including State Historic Preservation Officers (SHPOs), Tribal Historic Preservation Officers (THPOs) or Indian Nation-designated Section 106 representatives, local governments and the public.

Indian Nation consultation occurs in two instances – when the undertaking is on tribal land⁶ or when the undertaking affects property to which a tribe attaches religious or cultural

⁴ See, Government-to-Government Consultation Policy, Bureau of Indian Affairs (Dec. 13, 2000) (on file with the Bureau of Indian Affairs), *available at* www.indianaffairs.gov/idc/groups/public/documents/text/idc-002000.pdf.

⁵ "Consultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process." 36 C.F.R. § 800.16(f).

⁶ 36 C.F.R. §800.2(c)(2)(i).

significance.⁷ When a consultation is on tribal lands,⁸ the federal agency will consult with the THPO if there is one. In the absence of a THPO, the federal agency will consult with a representative designated by the tribe and with SHPO. SHPO will also be consulted if an undertaking on tribal land affects historic properties off tribal land, or if requested by a non-member affected property owner, or if agreed to by the tribe.⁹ When an undertaking may affect historic property with religious or cultural significance to any Indian Nation, the federal agency will consult with the relevant Indian Nation in addition to the required SHPO consultation.

Although the federal agency is ultimately responsible for Indian Nation consultation,¹⁰ SHPO will generally cooperate and consult with Indian Nations when an undertaking¹¹ under Section 106 identifies a Native American historic property within or immediately adjacent to an Area of Potential Effects (APE).¹²

When SHPO is a consulting party, it will do the following:

- Include in correspondence with the involved federal agency and project sponsor the following sentence that complies with the requirements of Title 36 of the Code of Federal Regulations (C.F.R.) Section 800.2(c)(2)(ii)(A):

“It is the responsibility of the Federal agency official to ensure that consultation in the Section 106 process provides potentially affected Indian Nations with a reasonable opportunity to identify their concerns about projects that involve or could involve Native American historic properties, advise on the identification and evaluation of historic properties—including those of traditional religious and cultural importance—articulate their views on the undertaking’s effects on those properties, and participate in the resolution of adverse effects”;

- Recommend that the federal agency and the project sponsor provide the interested Indian Nations with copies of all information submitted to SHPO;

⁷ 36 C.F.R. §800.2(c)(2)(ii).

⁸ For a map of tribal lands in New York State see

http://nationalmap.gov/small_scale/printable/images/pdf/fedlands/NY.pdf

⁹ 36 C.F.R. §800.2(c)(1)(ii).

¹⁰ 36 C.F.R. § 800.2(a).

¹¹ “[Federal Agency] Undertaking means 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.” 36 C.F.R. § 800.16(y).

¹² “Area of potential effects means 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.” 36 C.F.R. § 800.16(d). The federal agency is responsible for defining the APE. 36 C.F.R. § 800.4(a).

- Provide the federal agency with the following web link to its Indian Nation Consultation Map:
<http://parks.ny.gov/shpo/environmental-review/documents/IndianNationAreasofInterest.pdf>;¹³
- Copy the interested Indian Nations on its correspondence with the federal agency and project sponsor. As needed, SHPO will follow up discussions on project information and effects on historic properties through telephone calls, emails and meetings with the federal agency, the project sponsor and the interested Indian Nations. Interested Indian Nations are encouraged to send oral or written comments on the undertaking to the involved federal agency, SHPO and the project sponsor; and
- Consult with Indian Nations throughout the Section 106 process through phone calls, emails and meetings.

Section 14.09 Review

Section 14.09 of New York State Parks, Recreation and Historic Preservation Law requires consultation with SHPO if a project undertaking may or will cause any change, beneficial or adverse, in the quality of a historic property. SHPO will generally begin consultation with interested Indian Nations when an undertaking¹⁴ identifies a Native American habitation site¹⁵ or burial site within or immediately adjacent to a project impact area.¹⁶

SHPO will do the following:

- Include in correspondence with the involved state agency and project sponsor the following sentence:

“If federal permits, funding or approvals are potentially involved in this project, the federal agency is required to consult with Indian Nations

¹³ This map is not intended to exclude other federally recognized Indian Nations from the consultation process but to be used as a guide. “Section 101(d)(6)(B) of the [National Historic Preservation Act] requires the agency official to consult with any Indian Tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking.” 36 C.F.R. § 800.2(c)(2)(ii).

¹⁴ “[State Agency] Undertaking” is defined as “(1) any physical activity undertaken by a State agency, including the alteration or demolition of property, and the transfer, lease or sale of property; (2) the funding by a State agency of any physical activity, including the alteration or demolition of property, and the transfer, lease or sale of property; and (3) the approval, licensing, permitting, or any other entitlement by a State agency of any activity, including the alteration, demolition, transfer, lease or sale of property.” N.Y. COMP. CODES R. & REGS. TIT. 9, § 426.2(r) (2010).

¹⁵ “Habitation Site” means an area where Native Americans may have lived on a daily basis for months or years. These areas may be associated with burial sites. Often identified in archaeological literature as a village or large base camp, the habitation site usually has unique types or quantities of artifacts. Pottery vessel fragments or features such as fire pits, storage pits, trash disposal pits and house remains usually indicate the presence of a habitation site. This definition is attributed to Nancy Herter, PhD., Senior Scientist, Archaeology, OPRHP.

¹⁶ “Project Impact Area” is defined as “the geographic area or areas within which a proposed undertaking may cause any change, beneficial or adverse, in the character or use of an eligible or registered property.” N.Y. COMP. CODES R. & REGS. TIT. 9, § 426.2(l).

under Section 106 of the National Historic Preservation Act of 1966, as amended and its implementing regulations 36 CFR 800.”;

- Recommend that the state agency and project sponsor include Indian Nations as interested parties in the review. SHPO encourages state agencies to engage in early cooperative consultation with interested Indian Nations.¹⁷
- Provide the state agency and project sponsor with contact information for the interested Indian Nations and with the web link to its Indian Nation Consultation Map: <http://parks.ny.gov/shpo/environmental-review/documents/IndianNationAreasofInterest.pdf>
- Recommend that the state agency and project sponsor provide the interested Indian Nations with copies of all information submitted to SHPO.
- Copy the interested Indian Nations on its letters to the state agency and to the project sponsor.
- Initiate follow-up discussions on the project and its impacts through telephone calls, emails or meetings with the state agency, the project sponsor and the interested Indian Nations. Indian Nations are encouraged to send their oral or written comments on the project to the state agency, SHPO and the project sponsor.
- Consult with Indian Nations during the Section 14.09 process through phone calls, emails and meetings if an undertaking involves a habitation site or a burial site.

State Environmental Quality Review

New York State’s State Environmental Quality Review Act and regulations (SEQR) require that state and local agencies avoid and mitigate impacts to the environment, and prepare environmental impact statements for actions that may have a significant effect on the environment.¹⁸ The term “environment” under SEQR includes archeological and historic resources¹⁹ and "objects of historic significance"²⁰ commonly referred to as cultural resources. Such cultural resources are often found at Native American habitation sites and burial sites, and agencies need to identify or analyze them early on during the SEQR process.

In identifying or analyzing impacts to Native American cultural resources under SEQR, SHPO recommends that the lead agency contact SHPO and review its Indian Nation Consultation Map and GIS system maps showing areas of known archeological sensitivity. The lead agency is also

¹⁷ Some state agencies, including the New York State Department of Environmental Conservation (DEC) have adopted an Indian Nation consultation policy. DEC’s policy is entitled, *Contact, Cooperation, and Consultation with Indian Nations* (Mar. 27, 2009) (on file with DEC), and is available at www.dec.ny.gov/docs/permits_ej_operations_pdf/cp42.pdf.

¹⁸ N.Y. Evtl. Conserv. Law § 8-0109(2) (McKinney 2005).

¹⁹ N.Y. Comp. Codes R. & Regs. tit. 6, § 617.2(l).

²⁰ N.Y. Evtl. Conserv. Law § 8-0105(6) (McKinney 2005).

encouraged to consult early on with potentially interested Indian Nation representatives, local and county planning offices, municipal historians and local historic preservation review commissions.

In its role as an interested agency in the SEQR process, SHPO will do the following:

- Provide the municipality with contact information for the potentially interested Indian Nations and encourage the lead agency to include the Indian Nations as interested parties in the SEQR process;
- Encourage the lead agency to respond to comments from the Indian Nations;
- Provide additional technical assistance or comments to the lead agency to assist in identifying and analyzing impacts to the Indian Nation sites or objects;
- Facilitate discussions between the lead agency and the interested Indian Nations through telephone calls, emails or meetings; and
- Consult with Indian Nations during the SEQR process if the action involves a habitation site or a burial site.

Other Related Information

MOA Between OPRHP and SED on Sharing Files and Data dated 09/08/1998

Seneca Nation Data Sharing Agreement dated 02/08/2002

Cayuga Nation Data Sharing Agreement dated 01/17/2003

Oneida Nation Data Sharing Agreement dated 03/18/2004

History

11/01/2016 Policy created.