



## FDM 26-5-1 Establishing an Undertaking

February 18, 2020

**Getting started;** the project manager will review the steps below to determine the level of effort needed to complete Cultural Resource documentation. The flow chart in [Attachment 1.1](#) gives an overview of the process in Getting Started.

Based on the outcomes described below, the PM will be able to determine if his/her project will qualify for the provisions contained in 800.3(g) 'Expediting Consultation' or will need to complete a comprehensive section 106 review. The steps are described below.

### **ESTABLISHING AN UNDERTAKING, 36 CFR 800.3(a)1-2**

The flow chart in [Attachment 1.1](#) gives an overview of the process in Establishing an Undertaking.

#### **1.1. Federal Involvement/Funds**

**Determine if the project includes federal involvement or funds and if the project has the potential to affect historic properties.**

- Is the project located on federal or tribal lands? If yes, go to [FDM 26-5-2](#); if no, continue.
- A federal 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. If yes, continue to [FDM 26-5-1.1.1](#).
- If the project does not have federal participation and has only state participation (funds, permits, licenses, etc.), compliance with Wisconsin Statutes 44.40 is required (contact BTS for further guidance).

#### **1.1.1. Historic Properties**

**Does the project (undertaking) have the potential to affect historic properties? If yes, go to [FDM 26-5-2](#); if no, continue**

A decision that there is no potential to affect historic properties is warranted when all of the following are true:

- The project's action and proposed activities is listed on the agreement (between the FHWA, and WisDOT) for those projects determined to have low potential for affecting historic properties.
- An archival and literature search conducted resulted in no known cultural resources (archaeological, burial sites, mounds, others) in the project area.
- There will be no changes in the type or dimensions of any highway-related elements. Highway-related elements include but are not limited to the roadway, median, curb and gutter, sidewalks, shoulders, beam guard, as well as activities that might change a building's setting such as ditching, flattening a curve, or grading.
- Project acquires land, in easement or fee simple, less than 0.5 acre (0.20 hectare), or in strips equal to or less than five feet (1.52 meters) wide.
- Project disturbs land within existing or proposed right-of-way of less than 0.5 acre (0.20 hectare), or in strips equal to or less than five feet (1.52 meters) wide.
- Project is not adjacent to or proposing to rehabilitate historic buildings or structures and is not within historic districts or adjacent to archaeological sites.
- There will be no change in the traffic-carrying capacity of the highway (e.g., no parking removed to create additional lane or lanes).
- No trees, bushes, or other substantial landscape features, such as retaining walls, will be removed or altered.
- Results of solicitation of public input indicate that there are no concerns about historic properties.
- Results of solicitation of input from Indian Tribes indicate there are no concerns about historic properties.
- Review of the National Register of Historic Places (NRHP) and state inventories for archaeological, architectural and historical resources indicates no listed or eligible historic properties in or adjacent to the project.

## 1.2. Screening List

### Determining if project is on or qualifies for the Screening (streamlined project review) List

1. Having reviewed the criteria in [FDM 26-5-1.1](#), the Project Manager ensures that:
  - a. The project is on the Screening List (streamlined project review) for BOTH History and Archeology. The Project Manager prints out page from Screening List (streamlined project review) and include it as defined in the guidance (blue language) for the appropriate environmental document template being used for the project; which can be found here: <https://wisconsin.gov/Pages/doing-bus/eng-consultants/cnst-rsrcs/environment/formsandtools.aspx>. The correct language for the comment is "Pursuant to 36 CFR 800.3 WisDOT and SHPO concur that this project has no potential to affect historic properties."
  - b. The project is not on the Screening List (streamlined project review) for EITHER History OR Archeology.
    - The Project Manager, having reviewed the criteria in [FDM 26-5-1.1](#), believes the project qualifies for the Screening List.
    - The Project Manager provides BTS with appropriate materials to document that the project qualifies for the Screening List.
    - BTS reviews the materials, arranges for archival and literature search if appropriate and notifies Project Manager of the decision (qualifies or does not qualify) within 15 working days.
2. Projects not on the Screening List (streamlined project review) will require further work. Go to [FDM 26-5-1.3](#).

## 1.3. Section 106 Review Form

### Reporting Notification Efforts and Commitments or Identification Steps on the Section 106 Review Form

In some cases, a project may not qualify for the Screening List, but little or no extra research is required by Cultural Resource specialist(s). That is, sufficient information exists to allow for documentation of how the project will proceed under Section 106 and that documentation can be reported on the Section 106 Review form. Here archeology and historic buildings and structures are slightly different.

- Archeology. If a known archeological site is adjacent to a project, it may be possible for the Project Manager to notify and consult with consulting parties and commit to avoidance techniques. This resolution can be recorded on the Section 106 Review form. \*\*
- Historic Buildings and Structures. For projects where all the adjacent historic buildings and structures are known, and the Project Manager can apply the criteria of effect and adverse effect, it may be appropriate to do so. In such cases, the results can be reported on the Section 106 Review form. \*\*

Go to [FDM 26-5-2](#) Identify Participants below.

*\*\* The SHPO will have 30 days to comment on the findings. Their signature on the form constitutes their comments. With that signature, the Project Manager may conclude that s/he has "taken into account" possible project impacts on historic properties and may proceed with project development.*

## 1.4. Determine Whether Any Other Applicable Laws Apply

In some cases, other federal, state, local, or Tribal laws, procedures, and agreements may require consideration by WisDOT for actions. The WisDOT project manager or designee is responsible for making this determination.

## 1.5. Complete Environmental Document

If the project is on the BTS Screening List, the Project Manager should include one of the following statements in the project file and environmental document:

"The WisDOT and THPO (if assumed the functions of the SHPO) concur that this project has no potential to affect historic properties."

or

"The WisDOT and SHPO concur that this project has no potential to affect historic properties."

SECTION 106 FULFILLED

### **LIST OF ATTACHMENTS**

|                                |   |
|--------------------------------|---|
| <a href="#">Attachment 1.1</a> | Establishing an Undertaking                                       |
| <a href="#">Attachment 1.2</a> | Identify and Notify Appropriate Consulting Parties                |
| <a href="#">Attachment 1.3</a> | Consultation for Determination of Area of Potential Effects (APE) |

|                                |                               |
|--------------------------------|-------------------------------|
| <a href="#">Attachment 1.4</a> | Identification                |
| <a href="#">Attachment 1.5</a> | Evaluation and Results        |
| <a href="#">Attachment 1.6</a> | Adverse Effects               |
| <a href="#">Attachment 1.7</a> | Resolution of Adverse Effects |
| <a href="#">Attachment 1.8</a> | Implementation                |

**FDM 26-5-2 Identify Participants, 36 CFR 800.3(c)1**

February 16, 2021

The flow chart in [Attachment 1.2](#) gives an overview of the process in [FDM 26-5-2](#).

**Identify Appropriate Federal Agency (usually FHWA), SHPO, THPO (or Designated Tribal Representative), and Other Interested Parties for the Determination of the Area of Potential Effects (APE), 36 CFR 800.3(c)1.**

**2.1 Projects Located on Federal Lands**

The appropriate Federal Agency, appropriate Federal Preservation Officer (FPO), interested Tribes, and other interested parties must be consulted.

**2.2 Projects Located on Tribal Lands**

The appropriate Federal Agency, THPO (or Designated Tribal Representative), interested Tribes, and other interested parties must be consulted. For projects on tribal lands, the WisDOT will authorize project development once tribal agreement (e.g. Tribal Chair, Tribal Council and THPO) is reached. For purposes of consultation, tribal lands include DOT right-of-way held in fee within the exterior boundaries of any Indian reservation and all dependent Indian communities.

**2.3 Projects Located on State, Public, or Private Lands**

The appropriate Federal Agency, SHPO, interested tribes, and other interested parties must be consulted.

**2.4 Notification Requesting Comment and inviting to Consult**

After determining land ownership, the project manager will provide notification and project details to the appropriate review official (federal agency/SHPO/THPO/Designated Tribal Representative). Notifications requesting comments and inviting parties to consult on the undertaking must contain the following information:

- Project description
- Project location (project map)
- Archival results, if available
- Recommendations to consider methods and level of identification efforts that will be carried out to determine if historic properties are located within the undertaking

The Project Manager will use the lists of Tribal Contacts and Areas of Tribal Interest for Project Notification (see links above; also see FDM [5-15-10](#)) to identify tribes based on the geographical areas of interest. Regardless of land ownership, these tribes shall be notified on all undertakings within the geographical areas for which they have expressed interest.

A list of Tribal contacts and geographical Areas of Tribal Interest for Project Notification is maintained and available from the WisDOT Tribal Liaison and found at <https://wisconsindot.gov/Pages/doing-bus/eng-consultants/cnslt-rsrcs/environment/cultural-resources.aspx>.

*ACTION: The WisDOT Project Manager notifies interested parties of proposed undertaking. This notification letter is required to come from WisDOT staff. If the Project Manager is a consultant, the notification letter is to be sent from the WisDOT Project Supervisor. (Pursuant to 36 CFR 800.3, WisDOT is requesting comments and consultation regarding the proposed undertaking. During this commenting period if no response(s) is received, if necessary, the project manager shall make follow up attempts (telephone, email, in-person meeting, and etc.) to consult with the THPO or designated Tribal representative. These attempts shall be commensurate to level of undertaking, and the attempts shall be documented in the project record. If no response is received within 30 days, the project may proceed to the next step in the process.)*

**FDM 26-5-3 Consultation for Determination of Area of Potential Effects**

November 17, 2010

**Consultation for Determination of Area of Potential Effects, 36 CFR 800.3(d)-(g)**

See [Attachment 1.3](#) for an overview of [FDM 26-5-3](#).

The project APE as defined by 36 CFR 800.16(d) as

“...the geographic area or areas within which an undertaking may directly or indirectly cause alternations in the character or use of historic properties, if any such properties exist. The area of potential effect is influenced by

the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking". Project actions to determine the APE, include but not limited to: utilities, haul roads, staging of equipment, storm water management, etc.

The most common types of historic properties are the following:

- Archaeological sites: The APE is generally considered to be the right-of-way, existing and proposed, and easements. It may also include areas used for the mitigation of other environmental impacts caused by the project.
- Historic buildings and structures: The APE generally consists of the existing and proposed right-of-way and beyond if the project will directly or indirectly cause changes in the setting or use of historic buildings and structures. (Refer to Architecture Survey Manual.)
- Other Historic Properties: Other types of historic properties may extend the project's APE due to the potential to impact. Besides historic buildings and structures and archaeological sites, historic properties may include the following:
  - Traditional Cultural Property (TCP)
  - Traditional Cultural Gathering Area
  - Location of cultural importance or religious significance
  - Sacred Site

Upon receipt of a request to consult with interested Tribes, the project manager shall do the following:

*ACTION: PM takes the following actions.*

1. - Arrange Consultation Meetings:
  - The project manager coordinates with tribal contacts to set a time, place, and agenda
  - Discusses the need to include tribal experts in addition to the THPO (or Designated Tribal Representative)
  - Establishes meeting formats and goals

*Note: Tribal governments are entitled to be consulted government-to-government at a federal level, which requires that meetings may be held independently from those meetings identified in FDM Chapter 5.*

2. Agenda for Initial Consultation:

- Seeking comment on Area of Potential Effects
- Considering alternative methods of identification of historic properties within the APE (for example, archival review and literature research, oral history interviews, sample field investigations, field survey)
- Discussing concerns with properties of religious or cultural significance
- Addressing confidentiality<sup>1</sup> concerns if requested under NHPA Section 304
- Planning and discussing the agenda for the next meeting(s), if applicable

The project manager may refine the project's footprint to avoid potential impacts to properties identified during consultation, thereby redefining the APE. This may require additional notification to Tribes and other interested parties if refinements exceed original APE.

*ACTION: If project APE changes occur because of design refinements/etc., the Project Manager re-notifies interested parties. If requested by a consulting party, the Project Manager arranges a consultation meeting to receive comments.*

Upon completion of the determination of the APE, go to [FDM 26-5-4](#), Identification.

## **FDM 26-5-4 Identification**

November 17, 2010

**IDENTIFICATION [36 CFR 800.4(a)-(b)]** describes how WisDOT meets the requirements to identify historic properties that could be affected by a WisDOT-managed or supervised project.

The flow chart in [Attachment 1.4](#) gives an overview of the process in [FDM 26-5-4](#), Identification.

Based on the consultation efforts conducted in [FDM 26-5-3](#), the project manager shall ensure identification strategies for historic properties are carried out. These strategies usually include retaining the expertise of appropriate qualified professionals (See [FDM 26-30](#); qualifications)

- For in-house design projects, the PM notifies BTS Cultural Resource Team by filling out a Section 106 Review ([DT1635](#)) form identifying the scope of the project. BTS in turn, will retain the appropriate

<sup>1</sup> Refer to Confidentiality, [FDM 26-1 Attachment 1.1](#) (Glossary).

professional service.

- For consultant-designed projects, the contractor is responsible for retaining the appropriate professional service.

To better consider Tribal interests in projects requiring EIS and EA documentation or all projects on Tribal lands, the project manager shall send the Tribal Historic Preservation Review Worksheet (see [FDM 26-10](#)) to all federally recognized Tribes of Wisconsin, according to their designated geographical areas of interest (see [FDM 5-15-10](#)).

*ACTION: Project manager shall send the Tribal Historic Preservation Review Worksheet to all federally recognized Tribes of Wisconsin, according to their designated areas of interest (See [FDM 26-10](#), See [FDM 26-20](#) regarding compensable services)*

Upon completion of the identification studies, the qualified professional will report the results and provide recommendations regarding whether further work is required. These results and recommendations could include the following:

1. An archival and literature search conducted resulted in no known cultural resources (archaeological, burial sites, mounds, others) in the project area, and determined by the professional a field survey was not warranted.
2. A survey was completed, and no potentially eligible historic properties or burials were identified in the APE. Go to the Section 106 Review Form description (No Potentially Eligible Historic Properties).
3. A survey was completed, and potentially eligible historic properties were identified. Further work is required. Go to [FDM 26-5-5](#), Evaluation. Note: The project manager should determine whether further work can be avoided through redesign and evaluate whether Section 4(f) will apply ([FDM 20-45-5](#)).
4. A survey was completed and a burial site (cemetery, mound or burial) was identified within the APE. Further work is required, and Wis. Stats. 157.70 may apply. Refer to [FDM 26-25](#) for details.

*Note: Depending on the type of burial site, the project may need to go to [FDM 26-5-5](#), Evaluation. This decision is determined by BTS and SHPO/THPO.*

5. A survey was conducted and potentially eligible historic properties, cemeteries or burial sites, or sacred sites were identified on federal or Tribal lands. Further work is required; go to [FDM 26-5-5](#), Evaluation. For these efforts, WisDOT partners with the Museum Archaeology Program of the Wisconsin Historical Society regarding compliance with NAGPRA.

## **FDM 26-5-5 Evaluation and Results**

February 18, 2020

### **Evaluation and Results, 36 CFR 800.4(c)**

The flow chart in [Attachment 1.5](#) gives an overview of the process for Evaluation and Results.

Evaluation [36 CFR 800.4(c)] covers the efforts to determine whether a cultural resource meets the criteria for eligibility to the National Register of Historic Places (NRHP).

When a survey indicates the presence of a cultural resource(s), either the project can be redesigned to avoid impacts to the cultural resource, or the resource must be evaluated for NRHP eligibility by a qualified professional. Completion of the steps below will aid determining whether any of the cultural resources are eligible for inclusion in the National Register.

Note: When potentially eligible properties or cemetery/burial sites are identified on federal or Tribal lands, coordination with BTS is required due to the requirements of NAGPRA, ARPA, and relevant Executive Orders, and the following process is superceded.

#### **5.1. Evaluation Completed by Qualified Professional(s)**

The project manager will retain a qualified professional(s) (see Qualifications, [FDM 26-30](#)) to complete an evaluation of cultural resources identified within the APE by applying the National Register of Historic Places criteria and, if necessary, preparing an appropriate Determination of Eligibility (DOE). The qualified professional(s) will provide their evaluation results to WisDOT for review.

1. Historians will present their results using the Wisconsin Historical Society DOE form (<https://www.wisconsinhistory.org/Records/Article/CS4118>)
2. Archaeologists use the Wisconsin version of [NPS Form 10-900](#) for sites that are eligible and cannot be avoided. Archaeologists must also complete a Technical Report on Archaeological Evaluation whether a site is eligible or not. Project Managers should ask the archaeologist which combination of form and/or report is appropriate.
3. The WisDOT acknowledges Indian Tribes possess special expertise in assessing the eligibility of cultural resources to which they attach religious and cultural significance [36 CFR 800.4(c)1]. Tribal experts will also use the appropriate eligibility forms for evaluations of any potentially eligible

properties.

Also, be sure to note the following:

- The Tribal Historic Preservation Review Worksheet applies to initial identification of cultural resources and/or historic properties for EA/EIS projects and is not acceptable documentation for evaluations of potentially eligible properties. All Department of the Interior NRHP documentation standards pertain.
- Each building/structure, site, district or complex will be the subject of a separate determination. For additional guidance for architecture/history resources see the [Survey Manual](#).

## 5.2. Review of Evaluation Results

If the qualified professional recommends a property is potentially eligible, the project manager may wish to consider redesigning the project to avoid impacts to the property. This includes Traditional Cultural Properties located outside the project's footprint but still within the APE.

If refining efforts are unable to avoid impacts to historic properties or properties that may be eligible, the project manager must submit the following information, as appropriate, to BTS Cultural Resource Team for review of the evaluation results and assessment of eligibility:

- Section 106 Review Form (Form [DT1635](#)) - fill in appropriate boxes
- Results of consultation meetings with Indian Tribes and interested parties, when applicable
- Documentation and reporting
- Survey results from initial identification efforts, [FDM 26-5-4](#).
- Evaluation report and/or DOE form(s)

### FDM 26-5-6 Results of Identification and Evaluation

November 17, 2010

#### **Results of Identification and Evaluation, 36 CFR 800.4(d)**

After determining whether any eligible or potentially eligible historic properties are affected, WisDOT shall provide any and all supporting documentation to FHWA, SHPO, and THPO (or Designated Tribal Representative). If the Section 106 Review Form and accompanying materials are complete and the qualified professional's recommendations are appropriate, the WisDOT HPO will make a determination and then sign the Section 106 Review Form under Item IX and forward this determination to the SHPO and/or appropriate THPO for review and concurrence.

*ACTION: Project Manager/BTS Cultural Resource Team submits findings to consulting parties and requests consultation. (Project Manager has responsibility for submitting results to all consulting parties except for SHPO or THPO when assumed duties of SHPO.) Refer to notification of survey/evaluation results letter template; also see [FDM 5-15-10](#).*

- No Eligible Historic Properties in APE, or No Effects on Historic Properties in APE
    - The project manager will notify all consulting parties of the determination that no historic properties will be affected.

The SHPO/THPO reviews WisDOT's decision and, if concurs with findings, signs and returns the Section 106 Review Form.
  - If the SHPO/THPO, Indian Tribes and WisDOT or FHWA disagree, SHPO/THPO and/or Indian Tribes must notify the WisDOT in writing. WisDOT must involve the WisDOT Tribal Liaison in the subsequent mediation. The project manager shall include any letter of opposition received from the Indian Tribes and SHPO/THPO in the supporting documents of determination.
- If no objections are received, go to Complete Environmental Document below.
- (Pursuant to 36 CFR 800.4, WisDOT is requesting comment/consultation regarding the findings. During this commenting period if no response(s) is received, if necessary, the project manager shall make follow up attempts (telephone, email, in-person meeting, and etc.) to consult with the THPO or designated Tribal representative. These attempts shall be commensurate to level of undertaking, and the attempts shall be documented in the project record. If no response is received within 30 days, the project may proceed to the next step in the process.)*
- If objections are received, go to Assessment of Adverse Effects, 36 CFR 800.5 ([FDM 26-5-7](#)) below.
  - Eligible Historic Properties Affected:
    - If WisDOT determines that there are historic properties that may be affected by the undertaking, WisDOT (project manager) shall notify all consulting parties, including FHWA, SHPO/THPO (or Designated Tribal Representative), Indian Tribes, and other interested parties, to consult and consider concerns regarding potential adverse effects on these historic properties. A template notification letter to Tribes regarding potential effects to historic properties is provided at [add

link; copy of letter is appended to this file] (also see [FDM 5-15-10](#)).

Go to [FDM 26-5-7](#), Assess Effects.

*(Pursuant to 36 CFR 800.5, WisDOT is requesting comment/consultation regarding the finding of Effect. During this commenting period if no response(s) is received, if necessary, the project manager shall make follow up attempts (telephone, email, in-person meeting, and etc.) to consult with the THPO or designated Tribal representative. These attempts shall be commensurate to level of undertaking, and the attempts shall be documented in the project record. If no response is received within 30 days, the project may proceed to the next step in the process.)*

### Complete Environmental Document

If there are no eligible properties in the APE or no effects on historic properties in the APE, and no objection to findings has been received from stakeholders, the Section 106 Process is fulfilled. Proceed with the environmental document and/or place the signed Section 106 Review Form in the project file. The environmental document should include one of the following statements:

"The WisDOT and SHPO concur that this project has no effect on historic properties."

"The WisDOT and THPO (if assumed the functions of the SHPO) concur that this project has no effect on historic properties."

or

"The WisDOT, SHPO and THPO concur that this project has no effect on historic properties."

SECTION 106 FULFILLED

## FDM 26-5-7 Assessment of Adverse Effects

February 18, 2020

### ASSESSMENT OF ADVERSE EFFECTS (36 CFR 800.5):

This section provides instructions on how to assess adverse effects upon the eligible or potentially eligible properties. In consultation with the federal agency (usually FHWA), State Historic Preservation Officer (SHPO), Tribal Historic Preservation Officer (THPO) or Designated Tribal Representative, Indian Tribes who attach religious and cultural significance to properties, and interested parties, the WisDOT project manager shall determine whether or not the project will affect eligible or potentially eligible properties within the Area of Potential Effects (APE).

The flow chart in [Attachment 1.6](#) gives an overview of the process in [FDM 26-5-7](#).

#### 7.1. Apply Criteria of Adverse Effect

The project manager, in cooperation with the Bureau of Technical Services (BTS), shall determine if the undertaking will have an adverse effect on historic properties within the APE. According to 36 CFR 800.5 (a) (1), 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. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance, or be cumulative.

The project manager, in cooperation with BTS, shall consult with FHWA, SHPO, THPO or Designated Tribal Representatives in determining whether the project will have an adverse effect upon eligible or potentially eligible properties.

**ACTION:** Project Manager/BTS Cultural Resource Team in cooperation with FHWA submits findings to consulting parties and requests consultation.

If there is a finding of no adverse effect, proceed to [FDM 26-5-7.2](#).

If it is determined that there will be an adverse effect, and the properties cannot be avoided by refining the project, go to [FDM 26-5-8](#), RESOLVE ADVERSE EFFECTS. Note: The Project Manager should also review [FDM 20-45](#) to determine whether Section 4(f) applies.

#### 7.2. A Finding of No Adverse Effect (FNAE)

A Finding of No Adverse Effect (FNAE) is appropriate when an eligible or potentially eligible property is in the APE and there is nothing about the project that might adversely affect or diminish the characteristics that qualify the property for the National Register. FNAE may include conditions to ensure there is no adverse effect to the historic property (referred to as CNAE – Conditional No Adverse Effect). If the project does not adversely affect historic properties, the Project Manager submits a FNAE to BTS. See [FDM 26-5-7.3](#).

#### 7.3. Prepare and Submit Finding of No Adverse Effect to BTS

The project manager submits the documentation for the determination of No Adverse Effect to BTS for approval

by the WisDOT Historic Preservation Officer (HPO). The FNAE must contain information about all historic property types, including archaeological sites and historic buildings and structures. Reporting requirements for the FNAE are included in [FDM 26-10](#).

*ACTION: Project Manager submits FNAE to BTS Cultural Resource Team.*

#### 7.4. FNAE Notification, Consultation, and Approval

The WisDOT HPO reviews the submitted documentation and determines whether the findings support the FNAE. If the submittal is determined to be sufficient, the WisDOT HPO will approve the FNAE and forward it to the appropriate<sup>2</sup> SHPO/THPO or Designated Tribal Representative and consulting parties for review and comment.

If there is no objection from any parties or no response, Section 106 is fulfilled. Go to [FDM 26-5-7.6](#).

Should any consulting party object to the FNAE, see [FDM 26-5-7.5](#).

#### 7.5. SHPO/THPO/Consulting party(ies) Objects

The SHPO/THPO (or Designated Tribal Representative) and other consulting parties have thirty (30) days from receipt to object to the FNAE (under 36 CFR 800.5(c)). As stipulated in 36 CFR 800.5(c)(2)(i), the objecting consulting party(ies) must notify the FHWA or WisDOT in writing that it disagrees with the finding and specify the reasons for the disagreement.

The FHWA, SHPO/THPO (or Designated Tribal Representative), BTS, and project manager will consult to resolve the objection. If the objection cannot be resolved, go to [FDM 26-5-8](#), RESOLUTION OF ADVERSE EFFECTS.

#### 7.6. Complete Section 106 Portion of Environmental Document

Documentation of the FNAE must be included in the environmental document or project file by the project manager.

If the FNAE includes conditions that must be implemented for the project to have no adverse effect on eligible or potentially eligible properties, the Project Manager must complete the Environmental Commitments page in the EIS or appropriate environmental document template found here:

<https://wisconsindot.gov/Pages/doing-bus/eng-consultants/cnslt-rsrcs/environment/formsandtools.aspx>

SECTION 106 FULFILLED

### FDM 26-5-8 Resolution of Adverse Effects

February 18, 2020

**RESOLUTION OF ADVERSE EFFECTS (36 CFR 800.6)** brings parties together to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties. This step will outline the recommended approach to conduct consultation regarding measures to avoid, minimize, or mitigate adverse effect and drafting conditions within a Memorandum of Agreement (MOA).

The flow chart in [Attachment 1.7](#) gives an overview of the process in [FDM 26-5-8](#).

#### 8.1. BTS Notifies Consulting Parties

On behalf of the WisDOT Historic Preservation Officer (HPO), the Bureau of Technical Services (BTS) notifies consulting parties that the project is expected to have an adverse effect on eligible or potentially eligible properties. Consulting parties may include the federal agency (usually FHWA), Advisory Council on Historic Preservation (ACHP), State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) or Designated Tribal Representative, local governments, and any interested parties, Indian Tribes, and property owners. Documentation must be consistent with 36 CFR Part 800.11(e).

FWHA/WisDOT goal is to schedule a consultation meeting to address effects within 30 days of notifying consulting parties of a determination of adverse effect. Consulting parties who are unable to attend the meeting may submit comments by telephone, letter, fax, e-mail, or other venues. To ensure these comments are taken into consideration during this phase of project planning, responses from consulting parties are requested prior to the day of the meeting.

*ACTION: FHWA/WisDOT-BTS notifies and invites consulting parties to consult on adverse effect(s) to eligible/potentially eligible historic properties.*

Refer to the link below for geographical Areas of Tribal Interest for Project Notification regarding notification on projects:

<https://wisconsindot.gov/Pages/doing-bus/eng-consultants/cnslt-rsrcs/environment/cultural-resources.aspx>

<sup>2</sup> Refer to Confidentiality, [FDM 26-1 Attachment 1.1](#) (Glossary).



## 8.2. Consultation to Develop and Evaluate Measures to Avoid, Minimize, or Mitigate Adverse Effects to Historic Properties

Consultation will be coordinated by the WisDOT Regional Environmental Coordinator (REC), project manager, and/or BTS. The goal of the consultation will be to:

- discuss actions that can be taken to avoid, minimize, or mitigate effects on eligible properties
- decide who will complete necessary documentation, including the Finding of Adverse Effect (FAE) and Documentation for Consultation (D for C)
- determine responsible parties for agreed-upon actions/stipulations

If, as a result of consultation, adverse effects can be avoided, return to Finding of No Adverse Effect in [FDM 26-5-7](#), ASSESS EFFECTS, as appropriate. If adverse effects cannot be completely avoided, see [FDM 26-5-8.3](#).

## 8.3. Prepare Finding of Adverse Effect (FAE) [also known as Documentation for Consultation (D FOR C)] and Memorandum of Agreement

Responsibility for completing the Finding of Adverse Effect (FAE) report and Memorandum of Agreement (MOA) will be assigned at the consultation meeting. The FAE presents alternatives that were considered to avoid or minimize the adverse effect on eligible properties. The MOA contains mitigation measures agreed upon by the consulting parties. A FAE and a MOA will be developed for projects having an effect on historic property(ies). Upon completion, the FAE and MOA are submitted to BTS. See [FDM 26-5-8.4](#).

## 8.4. Documentation Accepted

If the MOA stipulates mitigation measures that are acceptable to all parties, FHWA will send the agreed-upon MOA out for signature to all interested consulted parties. After a 30-day signature response period, all received signatures will be included in the MOA. See [FDM 26-5-8.5](#).

If agreement cannot be reached among the consulting parties to resolve adverse effects the FHWA and WisDOT may determine that further consultation will not be productive and terminate consultation. The FHWA/WisDOT shall notify the other consulting parties and provide them the reasons for terminating in writing. FHWA shall request that ACHP comment and shall notify all consulting parties of the request. Within 45 days of receipt of request, the ACHP shall provide its comments to the FHWA with copies provided to WisDOT and all consulting parties as appropriate. The FHWA shall take into account the Council's comments in reaching a final decision on the undertaking. Section 110(l) of the act directs that the head of the agency shall document this decision and may not delegate her/his responsibilities pursuant to Section 106.

## 8.5. Complete Environmental Document

The project manager may proceed with the environmental documentation for the project after the ACHP has accepted the MOA. The ACHP's accompanying letter, which indicates concurrence in the MOA, should be included in the environmental document. The Project Manager must complete the Environmental Commitments page in the EIS, or appropriate environmental document template found here:

<https://wisconsindot.gov/Pages/doing-bus/eng-consultants/cnslt-rsrces/environment/formsandtools.aspx>

## FDM 26-5-9 Implementation

November 17, 2010

### IMPLEMENTATION:

The project manager is responsible for retaining qualified professionals for the implementation of any mitigation commitments agreed upon during [FDM 26-5-8](#): Resolve Adverse Effects. These professionals may include archaeologists, historians, Tribal experts, museum curators, or other specialists who may be required to execute certain types of mitigation commitments.

The flow chart in [Attachment 1.8](#) gives an overview of the process in [FDM 26-5-9](#).

### 9.1. Review Environmental Commitment Sheet

The project manager shall review the Environmental Commitments Sheet (Basic Sheet 8) to identify any commitments that must be fulfilled before, during, or after construction. These commitments are to be incorporated into the special provisions of the construction contract. The commitments are tailored to a specific project and range from simple activities that can be completed within a short time period to complex assignments that may take several years.

### 9.2. Implement Commitments

Commitments must be executed to fulfill WisDOT's legal obligations as agreed upon during the NEPA/NHPA process.

### 9.3. Post-Review Discoveries

During project implementation, if significant inadvertent discoveries are encountered that have the potential to be eligible for the NRHP, Section 106 requirements regarding post-review discoveries (36 CFR 800.13) are in

effect.

**9.4. Submit Evidence of Completion to BTS**

Once the commitments have been fulfilled, the project manager must submit documentation of the completed commitments to BTS.

**9.5. BTS Notifies FHWA/SHPO/THPO**

After receiving documentation of completed commitments, BTS will notify the FHWA and the SHPO/THPO that all Section 106 commitments have been fulfilled. Any documentation will be forwarded to the SHPO/THPO.

SECTION 106 FULFILLED