

Appendix E. National Historic Preservation Act Section 106 Compliance

Glossary

Adverse Effect/Impact: Anything that will alter, damage, or destroy the integrity of a historic property's characteristics, either directly or indirectly; thus, impact the historic property's qualification for listing in the National Register. Adverse effects may include: demolition; physical destruction of or damage to all or part of the property; alteration, restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation, provision of handicapped access; removal of a property from its historic location; change of character; neglect which causes deterioration; introduction of visual, atmospheric, or audible elements that diminish the integrity of the property's significant historic features; transfer, lease, or sale of a property out of federal ownership without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.

Applicant: Refers to any person, as defined in ESA section 3(13), who requires formal approval or authorization from a Federal agency as a prerequisite to conducting an action. For the purposes of this GCP, an eligible Applicant is one that has the legal authority to execute their proposed project on the lands that are proposed for coverage under the GCP and sufficient legal control to implement the conservation plan, such as ownership of property in fee simple, a lease agreement that grants authority for the proposed project, or similar type of legal authority to conduct the proposed activities (50 CFR²⁸⁸ 402.02, 50 CFR 17.22(b)(2)(F), 50 CFR 17.32(b)(2)(F), HCP and ITP Processing Handbook).

Area of Potential Effect (APE): 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.

Concurrence: An agreement in judgment of consulting parties.

Consulting Parties: Individuals and organizations with a demonstrated interest in the undertaking or the affected historic properties. Consulting Parties can include "State Historic Preservation Officers; Tribal Historic Preservation Officers; Indian Tribes; Native Hawaiian organizations; representatives of local government; Applicants for Federal assistance, permits, licenses, and other approvals; the Advisory Council on Historic Preservation; and others with an interest in the property.

Cultural Resources Professional: A Cultural Resources Management (CRM) Qualified Professional is defined as an individual who meets the established professional standards as found in the Secretary of Interior's Standards and Guidelines for Archeology and Historic Preservation.²⁸⁹

²⁸⁸ CFR stands for Code of Federal Regulations.

²⁸⁹ NPS 1983

Cultural Site: Includes archaeological sites, traditional cultural property, and especially any identified or suspected religious/sacred site such as a platted or unplatted cemetery (including prehistoric earthen burial mounds).

Eligible for Listing on the National Register of Historic Places (NRHP): An action through which the property is determined to meet the National Register criteria even if the property does not actually become listed.

Ground Disturbing Activities: Any activity that involves disturbing the soil in any way.

Historic Property: Any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the NRHP maintained by the Secretary of the Interior. This term includes artifacts, records, and material remains related to and located within such properties. This term includes properties of traditional religious and cultural importance Indian tribe or Native Hawaiian organization and that meet the National Historic criteria” (sometimes referred to as traditional cultural properties or TCPs).

Ineligible for Listing on the National Register of Historic Places (NRHP): An action through which the property is found to NOT meet the National Register criteria for inclusion on the list of Historic Places.

Material Remains: The physical evidence of human habitation, occupation, use, or activity, including the site, location, or context in which such evidence is situated, or items of material culture from those locations. Only material remains that are of archaeological interest are considered to be archaeological resources.

Minimally Invasive Techniques: Any activity that does not disturb the environment, ground, or any historical properties within an APE.

National Historic Preservation Act of 1966 (NHPA): This law is the federal preservation authority for the preservation of cultural, historical, and archaeological resources on Federal land. Of particular interest is section 106, which requires Federal agencies to consider the effects, whether direct or indirect, of their undertakings on historic properties. Implementation is regulated by the Advisory Council on Historic Preservation (ACHP).

National Register of Historic Places (NRHP): The official list of our country's historic buildings, districts, sites, structures, and objects worthy of preservation.

Nonground Disturbing Activities: Activities that do not disturb the soil in any way.

Previously Disturbed Lands: Lands that the soil has previously been disturbed on, such as agricultural fields, construction sites, etc. If the project will surpass the soil depths that were previously disturbed than section 106 will still be required.

Regional Historic Preservation Officer (RHPO): The head U.S. Fish and Wildlife Service archaeologist for the region that the project is located in.

Secretary of Interior’s Professional Qualifications Standards: The Secretary of the Interior establishes professional standards for the preservation and protection of all cultural resources listed in or eligible to be listed in the National Register of Historic Places. These standards promote responsible preservation practices to protect our cultural resources and are used by Federal agencies for their “historic preservation responsibilities.”

Section 106: NHPA section 106 requires Federal agencies to consider the effects, whether direct or indirect, of their undertakings on historic properties by consulting with interested parties. This review process requires time and must be completed before any kind of approval or funding is granted.

State Historic Preservation Officer (SHPO): The head archaeologist for the state that the project is located in.

Traditional Cultural Properties (TCP): A property that is associated with the cultural practices, traditions, beliefs, lifeways, arts, crafts, or social institutions of a living community.

Tribal Historic Preservation Officer (THPO): The Tribal preservation officer who reviews section 106 correspondences and ensures that the interests of their Tribe are being considered.

Tribe: A federally recognized Tribal Nation.

Undertaking: 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.

Section 106 Compliance Protocol

1.0 Introduction

This protocol applies to Applicants adopting the Multi-Bat Species General Conservation Plan (GCP) for Routine Development Projects in New York (NY), Pennsylvania (PA), and West Virginia (WV), in their applications to the U.S. Fish and Wildlife Service (Service) for Incidental Take Permits (ITPs) under ESA section 10. It should only be used for those activities and lands specified in the GCP.²⁹⁰ Following this protocol is necessary for compliance with the NHPA section 106 in the context of Service’s decision to grant a Permit under the GCP.

²⁹⁰ It is the intention of the Service to make the GCP available to Applicants for a 10-year period. However, subsequent procedures may be developed that supersede the approach described herein. If a new procedure is adopted, the Service will engage appropriate Applicants to discuss any superseding protocol. However, the Service recommends that all permittees regularly contact the local field office (see GCP appendix A) or the Service’s Regional Habitat Conservation Plan (HCP) Coordinator to ensure that they are adhering to the most current protocol.

Activities authorized under a Permit, including those issued through the GCP, are considered an “undertaking” under the NHPA. An “undertaking” is defined in the NHPA regulations as follows:

“[A] project, activity, or program funding 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.”²⁹¹

As such, compliance with section 106 is required when an ITP is issued pursuant to the GCP. For the purposes of this protocol, activities considered an undertaking in connection with the GCP, fall within two categories:

- 1) they do not have the potential to affect Historic Property; or
- 2) there is potential to affect Historic Property and an Applicant is required to consult with the SHPO, THPO, or Service RHPO.

The regulations promulgated pursuant to the NHPA define “Historic Property” as follows:

“[A]ny prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and material remains related to and located within such properties. This term includes properties of traditional religious and cultural importance Indian tribe or Native Hawaiian organization and that meet the National Historic criteria” (sometimes referred to as traditional cultural properties or TCPs).²⁹²

For the purposes of this protocol, Historic Property includes sites considered as TCPs. Notably, most activities authorized by the GCP, do not have the potential to affect Historic Property. Nevertheless, an Applicant must take the following steps to ensure compliance with section 106. This protocol assumes that the Service will be the lead agency for the purposes of compliance.²⁹³

2.0 Determining Section 106 Applicability (see Flow Chart at the end of this appendix to help with applicability determination)

Step 1. Are the activities considered to have no potential to impact Historic Property?

Activities authorized by the GCP that have no potential to affect Historic Property do not require further section 106 review.

²⁹¹ 36 CFR 800.16(y).

²⁹² 36 CFR 800.16(1)(1)

²⁹³ 36 CFR 800.2(a)

The Service considers the activities listed below as having no potential to disturb any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in the NRHP (aka “Historic Property”); therefore, do not require further section 106 review.²⁹⁴

Accordingly, if the proposed activity fits within one or more of the categories listed below, the Service’s section 106 compliance for this activity will be considered concluded. An Applicant shall maintain documentation of those conclusions for their records and make them available to the Service upon request.

Activities considered to have no potential to impact Historic Property:²⁹⁵

A. Nonground disturbing exemptions

- 1) **Surveys and Inspections** – Field observations, site inspections, data collection, investigations, driving along previously established paths or roads, and report writing that do not involve disturbance of the ground or buildings/structures.
- 2) **Public Education and Outreach** – Classroom and outdoor education activities that do not involve ground or building/structure disturbance.
- 3) **Hand Removal or Introduction of Plants and Animals** – The removal from or introduction of plants or animals to the natural environment without ground or building/structure disturbance.
- 4) **Proposals, Plans or Protocols** – The writing or implementation of research or management activities that take place entirely within extant offices and laboratories.
- 5) **Other Nonconstruction Activities** – Activities which do not involve or lead directly to construction, such as planning and research activities; grants for training; engineering to define the elements of a proposed action or alternatives so that social, economic, and environmental effects can be assessed.

B. General Habitat and Vegetation Management

- 1) **Seeding and Planting** – Active planting of an area to promote preferred vegetation. Seeding and planting may use minimally invasive techniques such as broadcast seeding or no-till drill without disturbance of soil below the lowest level of previous disturbance.
- 2) **Herbicide Application** – Use of equipment and vehicles to apply herbicides via foliar applications and other techniques to control invasive plants, noxious weeds, and incompatible vegetation.
- 3) **Controlled Grazing** – Use of controlled grazing (i.e., using cows, goats) to sustain early successional habitats.

²⁹⁴ 36 CFR 800.3(a)(1)

²⁹⁵ 36 CFR 800.3(a)(1)

- 4) **Brush Removal** – Removal of dense brush using forestry mowing, chainsaws, or other mechanical methods to promote more open grassland habitat types.
- 5) **Mowing or Haying** – Mechanical mowing or clipping of vegetative material to sustain early successional habitats.
- 6) **Noxious/Invasive Weed/Woody Species Control** – The control of surface vegetation (weeds and woody species) by prescribed burning, hand and mechanical mowing, cutting, and clipping, or chemical control practices without disturbance of soil below the lowest level of previous disturbance.

C. Maintenance and Modernization Construction

- 1) **General Improvement and Maintenance** – Improvement and maintenance of existing infrastructure where lands have been previously disturbed and where activity will not disturb the soil beyond the area of previous disturbance.
- 2) **Building/Infrastructure Maintenance** – For utility infrastructure projects this includes, but is not limited to, guyed wire replacement, culvert replacement, pole wrapping or painting, above and below ground structural replacements, and woodpecker assessments and patching. On transportation lands this includes, but is not limited to, pavement repair, mill and overlays, shoulder repairs, painting and striping, guardrail installation or replacement, lighting installation or replacement, manhole/inlet cleaning, installation and maintenance of curb and gutter, culvert installation and maintenance, bridges and piers, scour aprons, cattle grates, and similar structures. These activities will not disturb the soil beyond the area of previous disturbance.
- 3) **Building/Structure Removal** - The removal of buildings and structures younger than 50 years from the date of the proposed activity or that have been determined to be ineligible for listing in the NRHP with SHPO concurrence.
- 4) **Temporary Staging and Storage** - Temporary staging and material storage areas for construction using construction matting or other access pads in wetlands, waterway crossings or other environmentally sensitive areas. Temporary staging and storage areas are removed, and vegetation is typically restored following construction.
- 5) **Construction within Previously Disturbed Lands** – Activities that do not cause disturbance beyond the extent or depth of previously disturbed land (i.e., largely within the impacted footprint of the existing infrastructure and previous ground disturbance). On utility infrastructure lands this includes, but is not limited to, construction of structures and pipe segments, reconductoring, burying lines (conductors, fiber optic, or other), adding or modifying overhead lines or pole attachments, demolition and removal of existing structures and pipe segments, construction of substations, and installation of new structures or pipe within existing rights-of-way. On transportation lands this includes, but is not limited to, pavement replacement, roadway construction or repair, bridge and culvert widening, extensions or replacement, lane and shoulder widening or

extension. Construction of pathways (bike lanes, sidewalks, trails, or other paths), rail replacement, construction of noise walls or retaining walls, burying lines (conductors, fiber optic, or other), adding or modifying overhead pole attachments, bank stabilization activities that are hard armoring through rip rap, concrete, sheet piling, or similar methods that are unlikely to allow vegetation establishment, and, construction within the existing rights-of-way including rest areas, roundabouts, interchanges, truck escape ramps, weigh stations, spoils disposal or waste management areas, and similar facilities.

- a. For both utility infrastructure and transportation lands, this includes facility construction and building maintenance, including small buildings, lighting, storage areas, and stormwater facilities maintenance; grading and excavation; installation and maintenance of erosion control best management practices, site clean-up and restoration, including grading and reseeding on existing rights-of ways.

D. Areas Previously Reviewed

- 1) **APE Previously Surveyed with Negative Results** – The APE of the proposed activity has been previously subjected to a rigorous scientifically-conducted archaeological and/or architectural identification survey by professionals meeting the Secretary of the Interior’s qualifications and no sites/buildings/structures were found (with documented evidence that the survey[s] was conducted and concurrence was achieved from all consulting parties, especially SHPO).²⁹⁶

If the activity does not fit within any of the above categories, further review is warranted, proceed to Step 2.

Step 2. Are Known Historic Properties in the Permit Area²⁹⁷?

Due to their sensitivity to interested parties, any activity located within any previously known Historic Property and cultural site, including an archaeological site, traditional cultural property, and especially any identified or suspected religious/sacred site such as a platted or unplatted cemetery (includes prehistoric earthen burial mounds), requires further review.²⁹⁸

Applicants shall determine whether the activity would occur in a known Historic Property.

A known Historic Property can be identified through prior consultations, or through verbal or written communications with Federal, Tribal, or State historic preservation offices. Through contacting the SHPO, Applicants may also cross-reference the project site to State and Federal cultural resource databases to determine if the site is a known Historic Property.

²⁹⁶ 36 CFR 61

²⁹⁷ The GCP defines the Permit Area as “the geographic area where a Permit applies (HCP and ITP Processing Handbook). The Permit Area for ITPs issued in association with this GCP will be defined for each individual project and must be completely within the Plan Area consisting of the states of NY, PA, and WV, excluding Federal lands.”

²⁹⁸ 36 CFR 800.5(a)

If the activity has the potential to adversely impact Historic Properties but does not occur within an APE with known Historic Properties, the Applicant must conduct an inventory of the APE (in accordance with state guidelines) to confirm that there are no Historic Properties within the APE.

The Applicant shall maintain documentation of these conclusions for their records and make them available to the Service upon request.²⁹⁹ No further consultation is required if the inventory finds no Historic Properties, and the activity can proceed.

If the activity occurs within a known Historic Property, and scope of activity cannot be modified to avoid the boundaries of the Historic Property, further review is required and the Applicant should proceed to Step 3.

Step 3. An Activity that has the Potential to Affect Historic Property: Formal Section 106 Consultation

Where an activity has the potential to affect Historic Property, an Applicant is required to assist the Service in the section 106 compliance obligations by completing consultation. For each project area, the Applicant shall initiate procedures outlined in regulations working directly with the other consulting parties (e.g., SHPO, THPO).³⁰⁰

At this stage, it is **strongly recommended** that an Applicant work with a cultural resources professional that meets the Secretary of Interior's CRM Professional Qualifications Standards to review the activity, guide the Applicant through the consultation process and identify ways to avoid impacts to known Historic Property through a change in the scope of activities.³⁰¹ The full protocol for consulting on an activity that has the potential to affect Historic Property includes the following:

- 1.) Define the project site and parameters (APE and timing of activities).
- 2.) Cross-reference the project site to State and Federal historic and cultural resource databases within the SHPO and/or the THPO, if applicable, to see if any potential impacts to known Historic Property can be identified (if not done already).
- 3.) Project information resulting from the review and consultation above will be submitted to the relevant SHPO and any other consulting parties identified as having an interest in the APE (e.g., THPOs/tribes). The Applicant should clearly state to the consulting parties that this is a Service undertaking for purposes of section 106. A specific SHPO's review form can be used, or correspondence containing equivalent information, with the supporting documentation including maps and database searches to be sent to the appropriate SHPO/THPO for review.

²⁹⁹ 36 CFR 800.4(d)

³⁰⁰ 36 CFR 800 *et seq.*

³⁰¹ 36 CFR 61

- 4.) The SHPO and the other consulting parties should review the project within 30 calendar days (a THPO or Tribe may need a longer timeframe) and may request a field visit or “survey”.³⁰² If no response is given or no survey is requested, activities can begin as planned and the Applicant shall document this for their records, to provide to the Service on request. If this occurs, the Service will consider its section 106 compliance satisfied in connection with this activity.

- 5.) If a field survey is mutually agreed to by the consulting parties, a cultural resource professional, meeting the above referenced standards in the appropriate academic discipline, must conduct it, and one of the following outcomes is possible as a result of the survey:
 - a. If a Historic Property is not found, the Applicant must notify the consulting parties, receive concurrence, document this for their records, and be prepared to provide this information to the Service upon request. Completion of these steps by the Applicant will be considered to have satisfied the Service’s section 106 compliance for this activity.

 - b. If a Historic Property is is found, the Applicant, in consultation with the consulting parties, will develop a plan, if necessary (most times it is not necessary if the site(s) can be avoided), to evaluate whether or not the site is eligible for inclusion on the NRHP and what effect the project, if any, will have on the site. Except for the stipulation below, while working with the consulting parties, the Applicant will independently follow the section 106 process to the end and shall maintain documentation for their records, which must be made available to the Service upon request.³⁰³

*Completion of these steps by the Applicants will be considered to satisfy the Service’s section 106 compliance for this activity.*³⁰⁴

³⁰² 36 CFR 800.4(d)(i)

³⁰³ The Service RHPO may become directly involved in the section 106 review (through the Applicant staff) if the process reaches “resolution of adverse effects” before the conclusion of the section 106 process (36 CFR 800.6). At that time, the Service will enter the process as a signatory to a Memorandum of Agreement to resolve the adverse effects to the Historic Property. The Service will only enter into the section 106 process earlier if any consulting party disagrees with the Applicant’s description of the undertaking or the Applicant’s determination, at which time, notification from the Applicant will be sent in writing to the Service if the disagreement cannot be resolved in a timely manner by the Applicant.

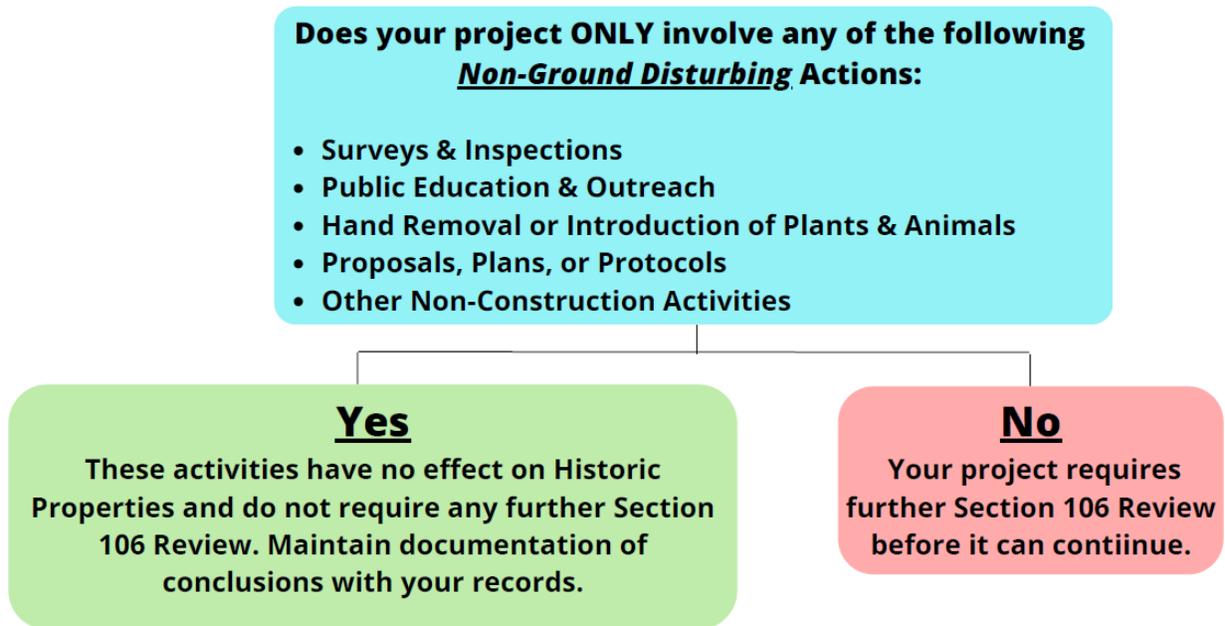
³⁰⁴ 36 CFR 800.4(d)(2)

Reference:

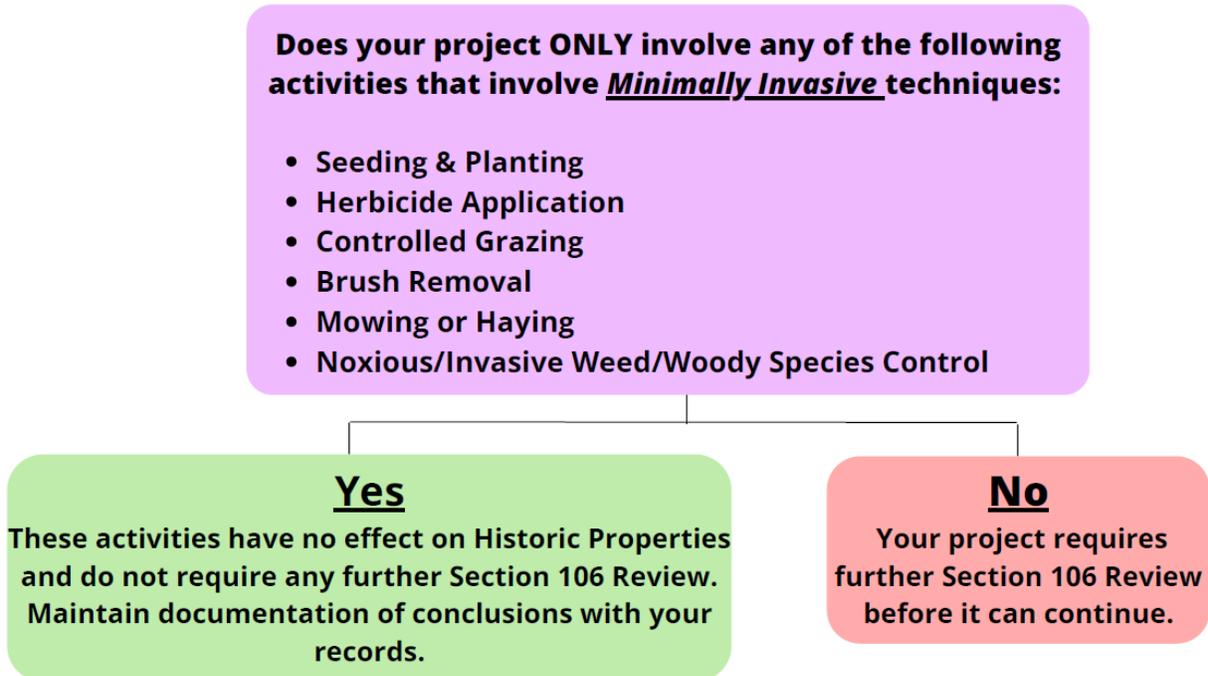
National Park Service (NPS). 1983. Archeology and Historic Preservation, Secretary of the Interior's Standards and Guidelines. Part IV. Federal Register Vol. 48, No. 190, pp. 44716–44740. September 29, 1983.

The following flowcharts further help show how to proceed with completing the NHPA section 106 process.

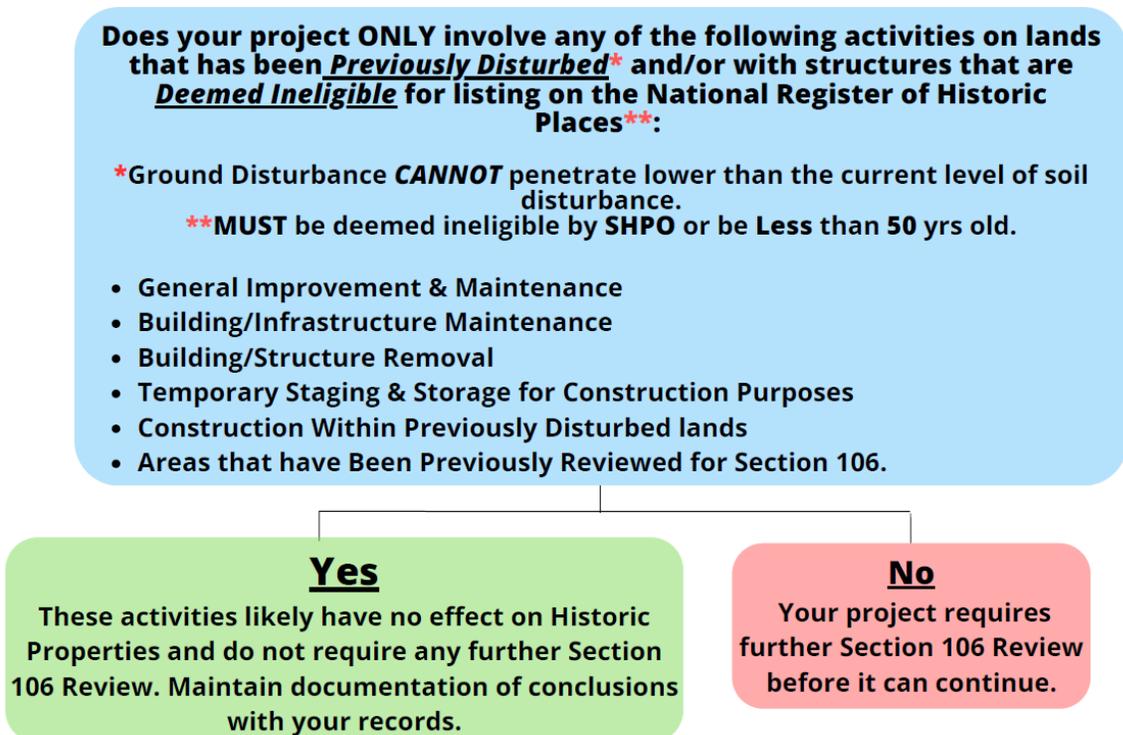
Nonground Disturbing Exemptions:



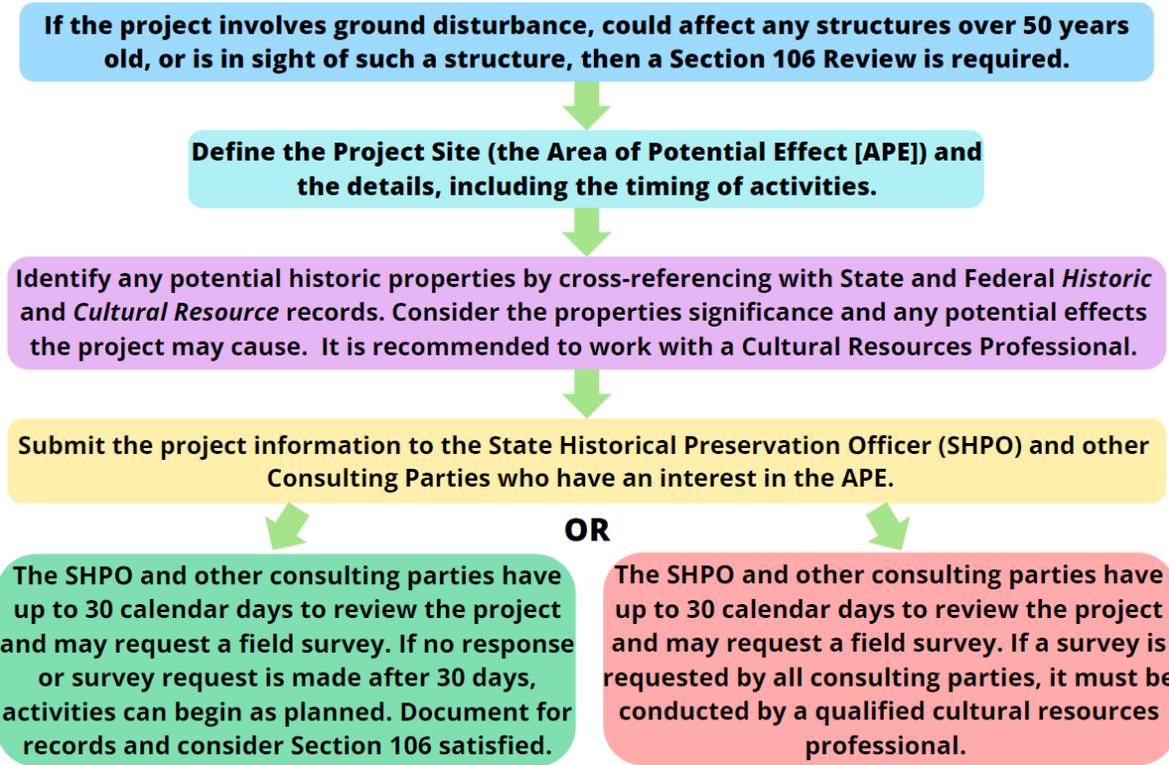
General Habitat and Vegetation Management Exemptions:



Maintenance and Modernization Construction Exemptions:



NON-Exempted Project Activities:



Field Survey Requested by Consulting Parties:

