

**Sound Transit/WSDOT Re-Alignment
Issue Paper No. 18**

TOPIC:	Section 106 Compliance: Cultural, Historic, and Archaeological Resources (including coordination with the SHPO and Tribes)
ACTION TEAM SPONSOR:	Environmental Action Team Concurrence
PRIMARY AUTHOR(S):	Steve Kennedy, Sound Transit
APPLICABLE PROJECTS:	All Sound Transit co-lead federal agency (FTA and FHWA) projects with federal nexus. For FHWA-only lead projects, it is assumed the same process will apply. For FTA-only lead projects, applicability will be determined on a case-by-case basis. It is likely a similar process would be followed but FTA would take the lead on steps where FHWA and WSDOT are lead, as described in the process steps below.
DATE OF FIRST DRAFT:	December 1, 2000
ISSUE:	For Sound Transit projects with co-lead federal agencies (FTA and FHWA), what is the series of process steps that will need to be followed in complying with Section 106 regulations?
CURRENT STATUS:	Final Draft
DATE APPROVED:	January 4, 2001

BACKGROUND

Under revised Section 106 regulations (Historic Resources: 36 CFR Part 800), coordination between Sound Transit and the federal lead agencies under NEPA (normally FTA and FHWA) with the SHPO (State Historic Preservation Officer) and with Indian Tribes has taken on added significance. If steps are missed, this could result in delays for projects, and inability of federal agencies to issue environmental documents such as EAs and EISs, as well as approve environmental determinations such as Documented CEs, FONSI, and RODs. Section 106 originated from the National Historic Preservation Act of 1966.

FTA and FHWA have their own processes for implementing Section 106, as do WSDOT and Sound Transit. Thus, there is a need to define a process that meets all of the agencies' needs and requirements, and one that is streamlined and efficient. That is the purpose of this issue paper.



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DECISION

A. SECTION 106 COMPLIANCE STEPS

The narrative below establishes the normal process that will be followed for Sound Transit co-lead agency projects with a federal nexus in regard to compliance with Section 106 regulations, including coordination with the SHPO and Tribes. For projects where FTA and FHWA are co-lead, it will be assumed that FHWA will serve as the federal lead. Certain process steps discussed below requiring agency action will be accomplished through FHWA via WSDOT.

1. Determine if the Project is Exempt from Section 106 consultation according to the Programmatic Agreement (PA): WSDOT and FHWA have a signed PA with the SHPO and the Advisory Council on Historic Preservation which stipulates that certain projects do not need to go through Section 106 consultation (such as projects within the median of divided highways which will occur on lands previously disturbed). As of this writing, FTA is finalizing a PA with the SHPO. If it is determined by Sound Transit that a project qualifies as an exemption, this should be communicated to and confirmed with WSDOT, FHWA, and FTA. Steps 2-9 below would not apply to these projects.

2. Early (Programmatic) Coordination with SHPO and the Tribes: Prior to, or concurrent with, initial screening of alternatives preceding the preparation of NEPA documents, Sound Transit will coordinate with SHPO and the Tribes on a “programmatic basis” to inform them of upcoming projects. Although the precise format of this has not been finalized, it is likely that a summary of planned, future Sound Transit projects would be compiled and submitted to SHPO and Tribes. This summary information and coordination would function as an early “heads-up” to SHPO and Tribes even before the projects may be fully defined and a preferred alternative or proposed action is identified. It would serve to notify the SHPO and Tribes of anticipated future actions, convey project needs and any information available about the projects at that time, and invite comment from the SHPO and Tribes. This project summary would be sent out by Sound Transit with copies to FTA, FHWA, and WSDOT. It is anticipated to be compiled and sent out on an annual basis. There would be no formal or defined comment period, but any comments received from the SHPO and Tribes on specific projects would be addressed as a part of the project alternatives screening process.

3. Formally Initiate Section 106 Process: Need to establish an "undertaking". A Sound Transit project will constitute an undertaking if there is a federal "nexus": the project either involves, or may involve, federal funding and/or requires a federal permit. This step will typically occur after a proposed action or preferred alternative has been identified.

Sound Transit (Environmental Compliance Division) will provide WSDOT with the following information: list of Tribes with jurisdiction in the project area; a project description; and a vicinity map. WSDOT will then provide this information to FHWA and request initiation of the Section 106 consultation. On behalf of both FHWA and FTA, as the co-lead federal agencies, FHWA will send letters to the SHPO, potentially affected Tribes, and any non-Tribal consulting parties notifying them of the project, and briefly describing the project. Once FHWA has initiated Tribal consultation, the Tribes are requested to respond within 30 days as to whether they wish to participate in the proposed project or not. The FHWA letter should make it clear that the project is a Sound Transit project.

4. Define Area of Potential Effect (APE): Typically, this will be determined by the environmental consultant performing the historical/cultural/archaeological evaluation/assessment in coordination with the

Environmental Compliance Division (ECD) at Sound Transit. See below for additional comments on Tribal jurisdiction. The federal lead agencies and the SHPO need to agree with the APE. The specific coordination with the SHPO on this prior to actual project environmental documentation and analysis will vary according to the nature and level of potential impacts of each project. Tribes should also be appraised of the APE and given the opportunity to be involved in the determination of the APE, if feasible (for many projects, the APE should not be a major issue and specific Tribal coordination on this may not be warranted). This can probably be done most efficiently as the consultant contacts Tribes in the preparation of the cultural resources technical report (if one is prepared), or other Tribal coordination.

5. Identify Properties of Historic, Cultural, or Archaeological Significance in the APE: Sound Transit, and its consultants, determines if there are any potentially affected resources (both Tribal and non-Tribal) in the APE. In order to accomplish this, relevant lists, registers, and inventories compiled by local, state (including SHPO), Tribal, and federal agencies need to be reviewed. Potentially affected Tribes may also be consulted by either phone or letter for their input at this stage of the process. Sound Transit consultants doing the historical/cultural/archaeological evaluation will typically perform these tasks. The SHPO is concerned with historic, cultural, and archaeological resources "on or eligible" for listing in the National Register of Historic Places.

6. Determination of Eligibility: ST or WSDOT will provide documentation on potentially affected resources to SHPO. SHPO will then make a determination of eligibility for listing on the National Register of Historic Places.

7. Determination of Effect: Based upon the research performed in # 5, and eligibility information obtained in #6 (if appropriate and necessary) Sound Transit determines if any historic properties (or cultural/archaeological resources) are likely to be affected. This determination is then forwarded by Sound Transit (Environmental Compliance Division in coordination with the Sound Transit project manager) to FTA and WSDOT/FHWA for their agreement. This assessment, whether or not there is an adverse or any other effect, needs to be conveyed to SHPO for their review and concurrence (see # 8 below for further discussion), along with any appropriate supporting documentation.

If a technical report has been prepared, this report with a cover letter summarizing the potentially affected resources and the effect determination, will be forwarded from Sound Transit (Environmental Compliance Division in coordination with the Sound Transit project manager) to WSDOT. WSDOT will send the information to the SHPO. The federal lead agencies, and WSDOT, should have previously reviewed the technical report as well as agreed with the conclusions and determination of effect before this letter goes out.

Copies of the technical reports will be sent out to Tribes with jurisdiction at the same time they are sent to SHPO, whether or not a Tribe has responded to the request to participate under #3 above. The Technical Reports will be sent out to the Tribes by WSDOT.

8. SHPO Concurrence: After the letter in # 7 is sent to SHPO, SHPO has 30 days to respond with their concurrence, or the lack thereof. It is assumed that for both "no effect" and "effect" determinations, a letter from the SHPO with their conclusion on the effect determination, will be required. This letter should be obtained prior to approval of the FONSI or the ROD. When there is SHPO concurrence on the "no effect" determination, the process is concluded under Section 106.

9. Resolve Adverse Effects (if applicable): If the project is determined to potentially cause adverse effect on qualified Section 106 historic resources, the consultation continues. Resolution is usually brought about through a MOA (Memorandum of Agreement) with the affected parties. The MOA outlines the agreed upon measures which the federal lead agencies and Sound Transit will take to avoid, minimize, or mitigate the adverse effect. In some cases, the consulting parties may agree that no such measures are possible, but that the adverse effects must be accepted in the public interest.

Section 4(f) Applicability: It is also important to note that if there is an adverse effect on a Section 106 resource, there will be a Section 4(f) use since historical resources of local, state, or national significance (publicly or privately-owned) are protected under Section 4(f). If a Section 4(f) Evaluation is prepared, this needs to go to the Department of the Interior (DOI) for review and approval [see separate Section 4(f) Compliance Issue Paper No. 41 for further discussion].

Projects with an adverse effect, require coordination with the Advisory Council on Historic Preservation (ACHP, or Council). Council participation has been reduced in the process of resolving adverse effects. All MOAs no longer have to be reviewed and signed by the Council. The MOA can be negotiated and finalized without Council involvement, although the lead federal agency must file the document with the Council as final evidence of completing Section 106. Before this can happen, the Council must first be provided documentation on the project by the agency, so that it can choose to participate if it believes the situation merits it. The Council may participate in consultation when there are substantial impacts to important historic properties, when a case presents important questions of policy or interpretation, when there is a potential for procedural problems, or when there are issues of concern to Indian Tribes or Native American organizations. The Council may also be requested to participate by the lead federal agency, Sound Transit, or another party. In these cases, development and signature of an MOA would proceed with the Council as a signatory.

Further details on this process the process of Council involvement in MOAs and resolution of adverse effects are described in 36 CFR Part 800, or on the Council web site (<http://www.achp.gov>).

B. DRILLING AND GEOTECHNICAL WORK

For co-lead and FTA sole lead projects, no construction or soil disturbance activities, including Phase II site investigations and geotechnical work, will occur prior to FONSI or ROD approval (or formal concurrence from the Services if it occurs after the FONSI) without FTA's prior review and approval. FTA or FHWA, as appropriate, will evaluate the potential for geotechnical work to affect any Section 106 resources based on the historical/cultural/archaeological evaluation performed by Sound Transit and its consultants, and any other available information. The specific process for obtaining these approvals is outlined in a separate issue paper concerning geotechnical and drilling issues.

C. SPECIFIC TRIBAL COORDINATION ISSUES

If there are potentially affected Tribes (federally or non-federally recognized) within the project area, Sound Transit needs to coordinate with them, as noted above. One major difference for the Tribal coordination is that if Tribal historic, cultural, or archaeological resources are potentially located, or actually found, within the APE but are off Tribal lands, Tribes do not need to formally concur with our effect determination, as does SHPO. In actual fact, however, if Tribal artifacts are found on a project site, the relevant Tribe should be contacted immediately and coordinated with as closely as possible. It is also

important to note that Tribes can have jurisdiction in large areas outside of formal reservation boundaries as a result of treaty fishing rights (Tribal "U and A Areas": Usual and Accustomed Fishing Areas). For example, the Muckleshoot Tribe's U and A area encompasses Elliot Bay, other portions of Puget Sound, Lake Washington, as well as drainage basins of the Cedar, Duwamish/Green, and other river systems in a

several county area. The ECD has maps of Tribal U and A Areas for reference, if necessary. These maps

are located on the Sound Transit Environmental Compliance Division Intranet web site. The SHPO has noted several key items in regard to "what Tribes want":

- 1) Consult as early as possible
- 2) R-E-S-P-E-C-T
- 3) Consultation is an exchange of ideas. Meaningful dialogue is expected.
- 4) Natural resources are considered cultural resources
- 5) Need to deal with Tribes on a "government-government" basis. The new Section 106 regulations, as well as State of Washington policy, recognize Tribal sovereignty. For this reason, Tribes often prefer to deal directly with the federal lead agencies (FTA or FHWA) under NEPA, as opposed to the local or regional implementing agency such as Sound Transit.

For projects which may affect Tribal resources covered under Section 106, it may be prudent to involve the affected Tribes in the hiring of the historic/cultural/archaeological consultants. Some Tribes have their own "approved" list of consultants with whom they have worked and developed a level of trust and confidence.

Attachments: Programmatic Agreement Between FHWA, WSDOT, ACHP, and the Washington State SHPO

Website for Advisory Council on Historic Preservation (ACHP): <http://www.achp.gov>

**ENVIRONMENTAL ACTION TEAM DECISION ON ISSUE PAPER NO. 18:
Section 106 Compliance: Cultural, Historic, and Archaeological Resources (including
coordination with the SHPO and Tribes)**

AGREED TO ON JANUARY 4, 2001 BY:

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