

HDR

Enhancing Rail Project Planning through Effective NEPA/NHPA Review

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01

Regulatory Background

Federal Compliance Laws

- National Environmental Policy Act (NEPA) of 1969
- National Historic Preservation Act of 1966 (NHPA)
- Section 4(f) of the DOT Act of 1966
- Archaeological Resources Protection Act of 1979 (ARPA)
- Native American Graves Protection and Repatriation Act (NAGPRA)

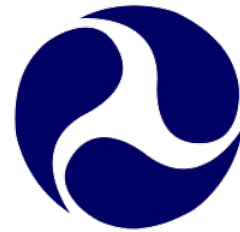


*Looking west down Atlantic Avenue from the Sackman Street Bridge, LIRR emerging from a tunnel, Brooklyn, 1923
(<https://flic.kr/p/aA2xqm>).*

Federal Agencies



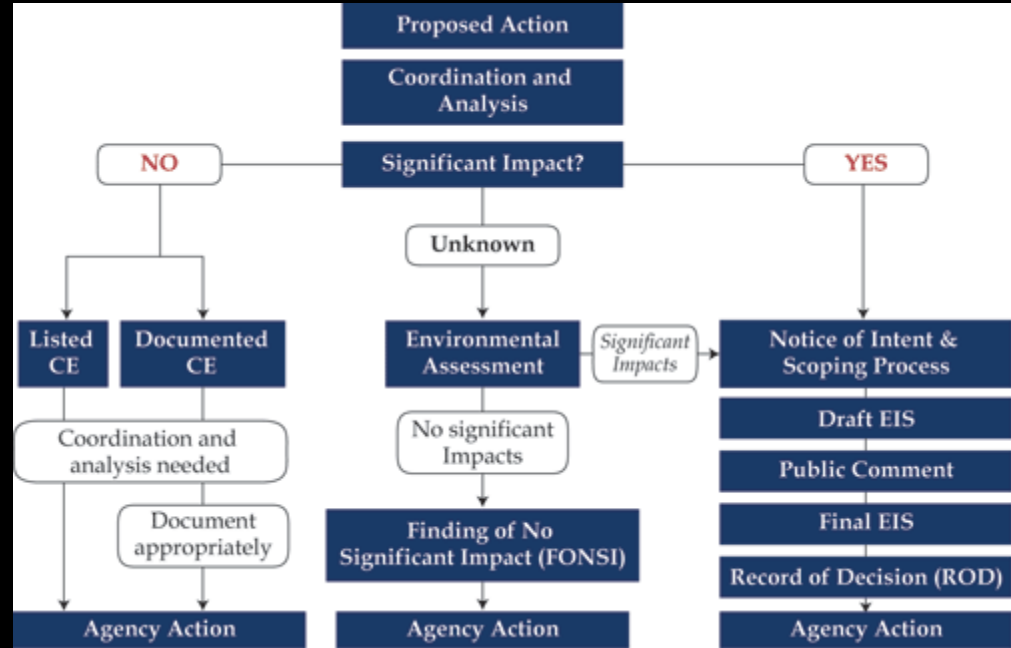
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**Federal Highway
Administration**

NEPA

- Formally established environmental protection as a Federal policy
- Requires federal agencies to assess the environmental impacts of their projects, including impacts to historic and cultural resources
- Results in the preparation of a Categorical Exclusion (CE), Environmental Assessment (EA), or Environmental Impact Statement (EIS)
 - A complete list of projects likely to qualify as CEs can be found under 23 CFR § 771.117 Categorical Exclusions*



NEPA Decision-Making Process

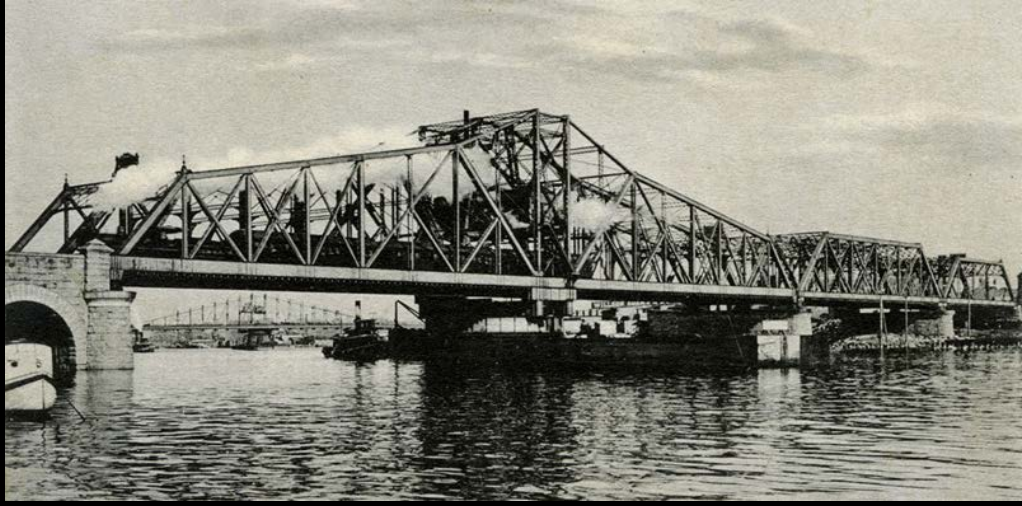
NHPA

- Enacted in 1966
- An Act to Establish a Program for the Preservation of Additional Historic Properties throughout the Nation
- Section 106, implementing regulations at 36 CFR 800



Section 106

- Requires federal agencies to take into account the effects of their undertakings on historic properties, and afford the ACHP a reasonable opportunity to comment
- Procedures for implementing Section 106 are located at 36 CFR Part 800



Section 106 Terms

- Undertaking = any project, activity, or program funded in whole or in part under the jurisdiction of a federal agency; those carried out with federal funds; and those requiring a federal permit, license, or approval (36 CFR 800.16(1))
- Historic property = any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in the National Register of Historic Places (NRHP)

Traditional Cultural Properties (TCPs)

- Essentially the same as “properties of traditional religious and cultural importance” in the NHPA
- For National Register eligibility determinations, tribes are recognized in the NHPA as experts
- National Register Bulletin #38 defines and explains evaluations of TCPs
- TCPs are associated with cultural practices or beliefs or a living community that:
 - are rooted in the community’s history; and,
 - are important in maintaining the continuing cultural identity of the community



Indian tribes hold more than 50 million acres of land, approximately two percent of the United States, including lands in Arizona (top) and Washington (left).

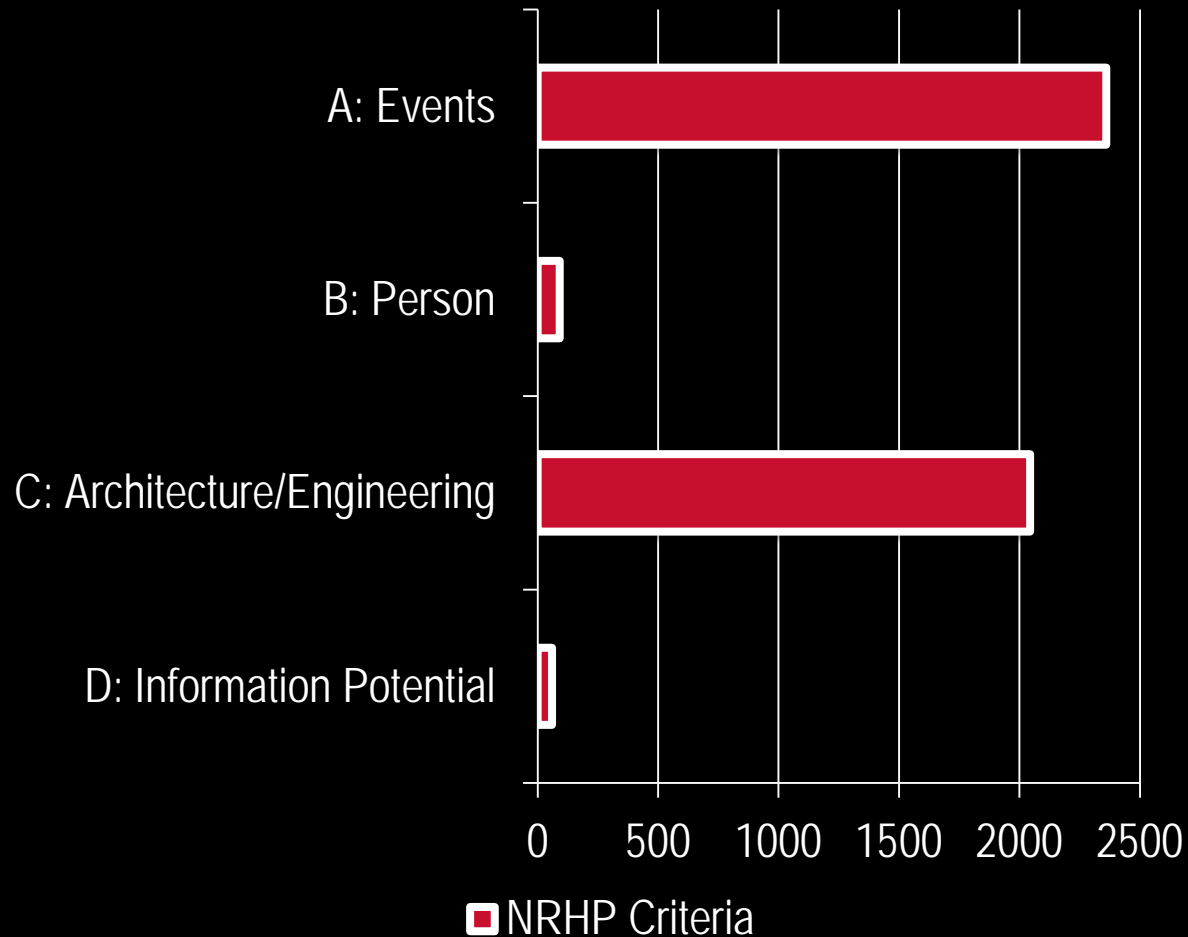
NRHP Criteria (36 CFR Part 63)

- The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and:
 - A. That are associated with events that have made a significant contribution to the broad patterns of our history; or
 - B. That are associated with the lives of significant persons in or past; or
 - C. That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
 - D. That have yielded or may be likely to yield, information important in history or prehistory.

NRHP Criteria for Rail-Related Properties

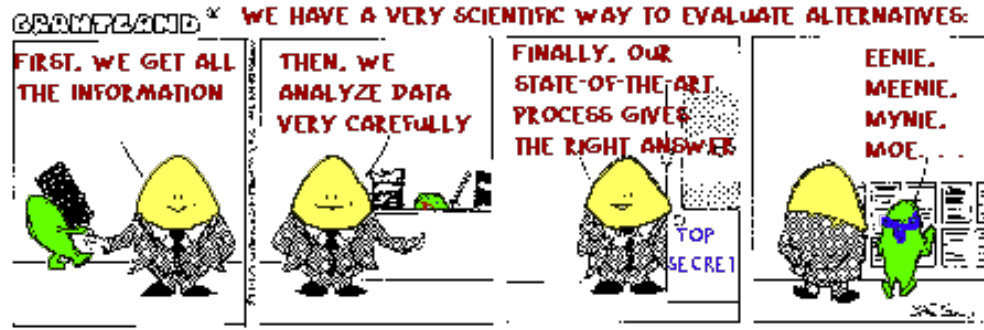
Rail-Related Historic Properties

- 2013 FRA study reviewed NRHP records and found 2,915 “rail related” properties, including 23 rail corridors listed in NRHP
- Most rail related projects were significant under Criterion A (2,361)
 - Property can be significant under multiple criteria
- Vast majority were buildings, followed by districts, structures, sites, objects
- New York had most rail-related historic properties with 204



Section 4(f)

- DOT Act of 1966
- Protects publicly-owned parks, recreation areas, wildlife/waterfowl refuges, and historic sites of local, state or national significance, from conversion to transportation uses
- *De minimis* provision added in 2005



ARPA

- ARPA was enacted “to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals” [Sec. 2(4)(b)]
- Primarily focused on regulation of legitimate archaeological investigations and enforcement of penalties against looters and vandals



NAGPRA

- Describes the rights of Native American lineal descendants, Indian tribes, and Native Hawaiian organizations with respect to the treatment, repatriation, and disposition of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony
- Requires that Federal agencies and museums receiving Federal funds inventory holdings of Native American human remains and funerary objects and provide written summaries of other cultural items
- Provides greater protection for Native American burial sites and more careful control over the removal of Native American human remains, funerary objects, sacred objects, and items of cultural patrimony on Federal and tribal lands



M. Kauffmann/Time Life Pictures/Getty Images

02

Regional and State-level Considerations

Regional Compliance Laws

- New York State Historic Preservation Act of 1980
- New York State Environmental Quality Review Act (SEQRA)
- California Environmental Quality Act
- Wis. Stats. 157.70, and others regarding burial sites
- Development plans near cemetery grounds in Indiana (IC 14-21-1-26.5)
- New Jersey Register of Historic Places Act of 1970

California
Environmental
Quality
Act

2014

CEQA

STATUTE AND GUIDELINES

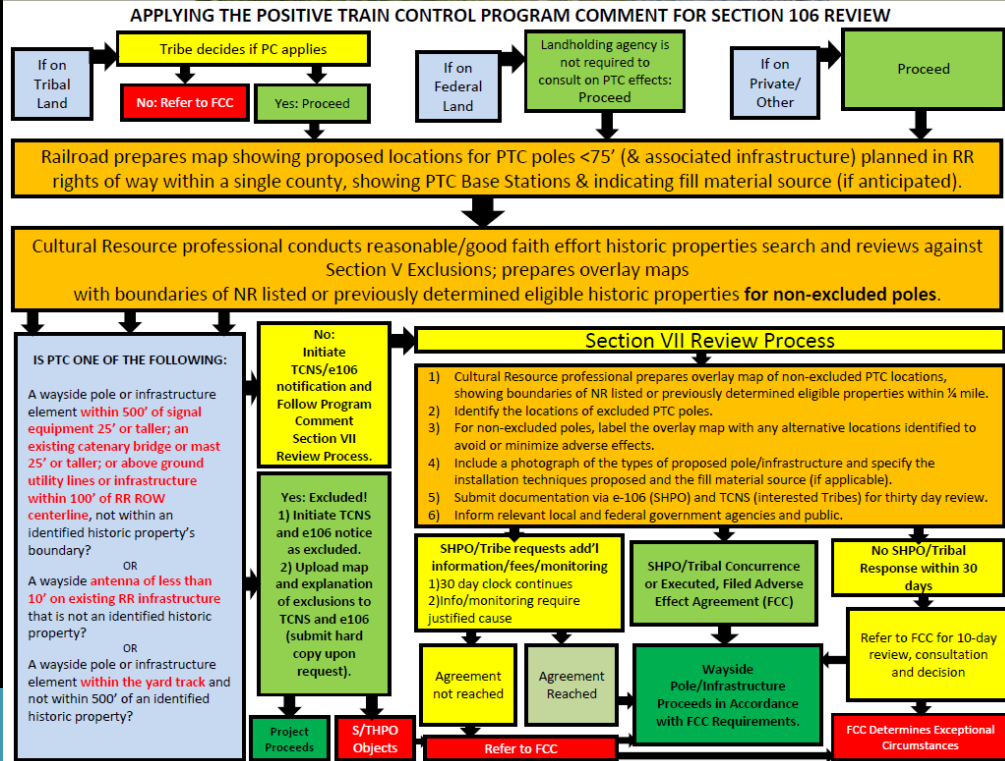


03

Project Examples

PTC (Everyone's Favorite)

- A tough beginning
- Improved process
- Cooperative applicants/consultants = cooperative tribes/SHPOs
- Inadvertent finds



Linear Resources and Planning

- Long project hold times (start/stop) cause delays in permitting process, which in turn end up creating delays in the project!
- Railroad admits in meetings that a certain segment of rail is only remaining single-track on the subdivision, and it was critical to the founding of an old town nearby.
- Rail sets construction schedule to start ~45 days after estimated permit submission date, allowing no time for resolution of effects to resources.



Archaeological Site Evaluations

- Eligible archaeological site identified during pre-permitting fieldwork, so typically client must await agency consensus determination of eligibility and effect
 - Then formalize MOA
 - Then carry out terms of MOA
 - Depending on MOA terms, construction proceeds sometime after terms are met
- However, desire for rapid construction means identification of alternative timeline
 - Consultant drafts MOA at same time as the field report, assuming agencies will agree with Adverse Effect finding
 - Concurrently prepare data recovery plan, other MOA-required plans, request expedited reviews, and above all rely on consultant for best judgment and decisions



Human Burial Sites and Thorough Pre-Planning

- A case in strategy!
- Some states, like Wisconsin, require consultation when projects cross burial sites, even if no federal undertaking
- Appropriate advance coordination and information sharing allows consultant to do thorough “homework”
- Can result in good PR, goodwill, and timely construction

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04 Strategy

Ways to Streamline Compliance

- Best practices
- Coordinate Section 106 with other reviews
- Pre-planning
 - Historic Contexts
 - Inventory of Historic Properties
 - Survey and Evaluation
- Programmatic Agreements
- Secretary of the Interior's *Standards for the Treatment of Historic Properties*
 - <http://www.nps.gov/tps/standards.htm>





ACHP's Best Practices for Compliance

- Section 106 works most effectively and efficiently when an applicant:
 - assumes an active and informed role in the process at the earliest stages of project planning.
 - approaches the consideration of alternatives to avoid or minimize adverse effects with flexibility, creativity, and respect for the interests of other participants in the process.
 - is familiar with the federal agency's policies and guidance and maintains open channels of communication with the agency throughout the process.
 - ensures that project schedules provide sufficient time for Section 106 review and are properly coordinated to avoid last minute or rushed consultation.
 - avoids taking actions that harm historic properties or making commitments before completing the process.
 - selects qualified professional contractors and consultants that have demonstrated capability to carry out the Section 106 process.
 - provides adequate documentation to support findings and determinations, which are integral to a thorough and accurate administrative record.
 - carries out agreed-upon measures to avoid, minimize, or mitigate adverse effects to historic properties.

Best Practices for Railroad Clients

- Railroads should *be more familiar with the Section 106 process* (and the variety of regional and state regulations) so that they might better understand how it works and thereby better represent their own interests
 - IDIQ-type relationship with a trusted client
 - Hire a full-time cultural resources expert with years of S106 regulatory experience
- Railroads need to be sure to get the right contractor for the job
 - Some are not familiar enough with S106 process to provide the *best* advice
 - Quick/cheap fieldwork doesn't necessarily equate with regulatory prowess
- When the right contractor for the job is obtained, Railroads need to *listen carefully*
- The SHPOs are not consistent in the historic value they impose on railroads.
 - Some consider all rail lines eligible
 - Others only ascribe historic value to specific types of associated historic structures and features
- Railroads need to plan ahead effectively when NEPA and Section 106 reviews are required or anticipated—*Timing is everything*

Coordinate Section 106 with Other Reviews

- State and local reviews (permits, zoning, variances, commission reviews/approvals, SEQRA/CEQR)
- Integrate NEPA and Section 106
- Substitute NEPA for Section 106
 - Must meet standards of 36 CFR 800.8(c)(1)

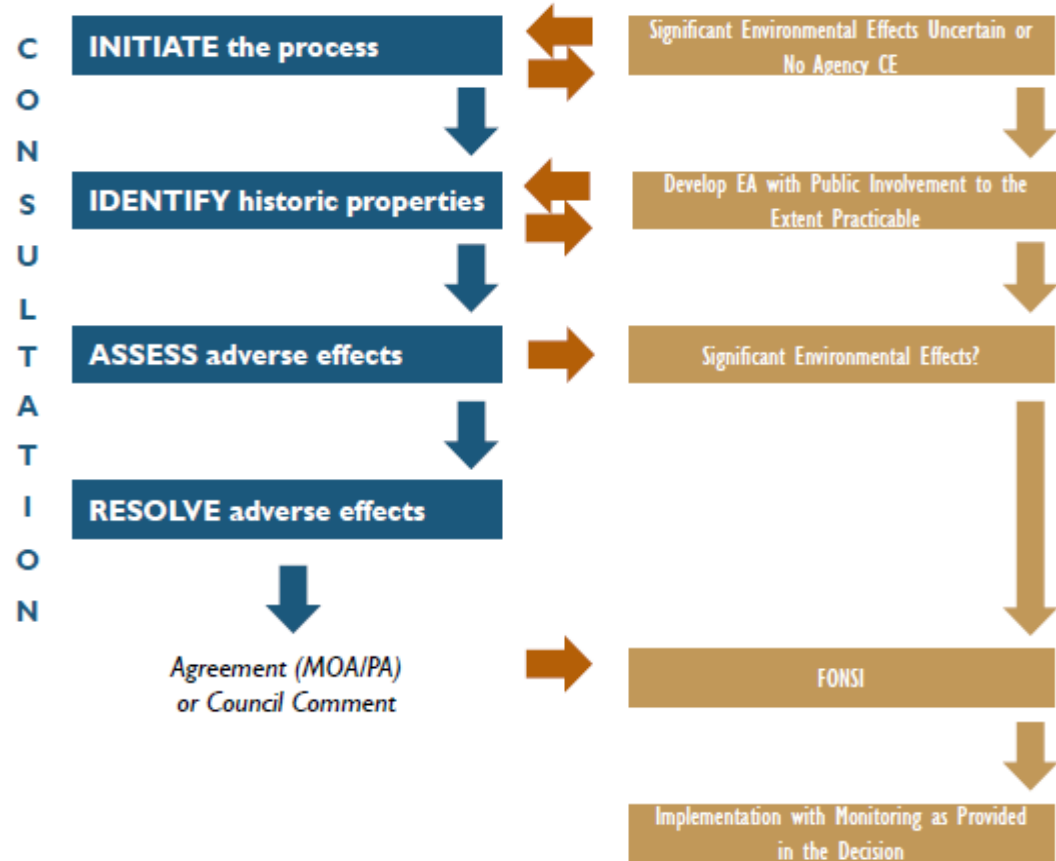


*Connecticut River Bridge,
Hardesty & Hanover
(<http://bit.ly/1LJ82Ek>).*

Integrating Section 106 and NEPA

- Consider Section 106 as early as possible in NEPA process
- Public participation, analysis, and review can sometimes be structured to meet the purposes of both statutes
- Remember, a CE does not eliminate Section 106 and 4(f) responsibilities
- Refer to *NEPA and NHPA: A Handbook for Integrating NEPA and Section 106*, published by the Council on Environmental Quality (CEQ) and Advisory Council on Historic Preservation, March 2013.

TIMING AND COMMUNICATION Section 106 and EA



Four Treatment Approaches for Historic Properties

- Preservation
 - Places a high premium on the retention of all historic fabric through conservation, maintenance and repair
 - Reflects a building's continuum over time, through successive occupancies, and the respectful changes and alterations that are made
- Rehabilitation
 - Emphasizes the retention and repair of historic materials, but more latitude is provided for replacement because it is assumed the property is more deteriorated prior to work
- Restoration
 - Focuses on the retention of materials from the most significant time in a property's history, while permitting the removal of materials from other periods
- Reconstruction
 - establishes limited opportunities to re-create a non-surviving site, landscape, building, structure, or object in all new materials

Who do I contact for assistance?

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