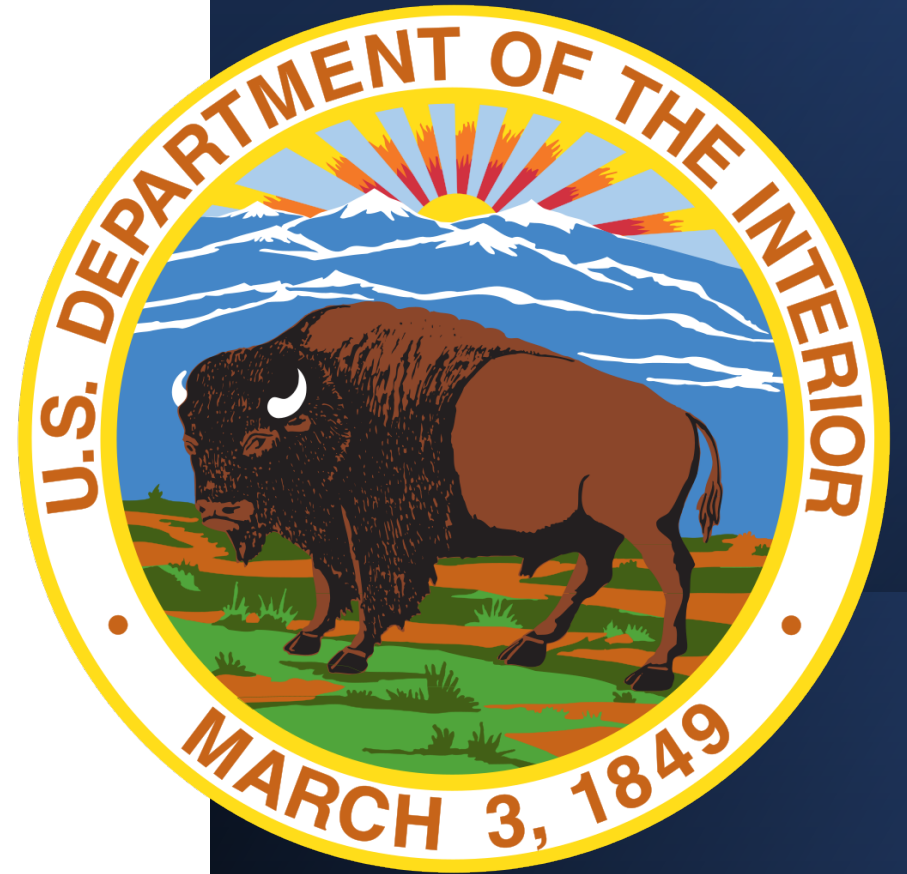


Bipartisan Infrastructure Law:

ESA and NHPA Compliance for State Formula Grant Awards

*Orphaned Wells Program Office (OWPO)
U.S. Department of the Interior*

January 11, 2024



ESA and NHPA Requirements

- State formula grants are subject to Section 7 of the Endangered Species Act (ESA) and Section 106 of the National Historic Preservation Act (NHPA).
- OWPO is taking this opportunity to preview for states the anticipated relevant terms and conditions and an approach for compliance with these federal requirements.
- Under ESA Section 7(a)(2), OWPO is required to ensure that activities funded by formula grants are not likely to jeopardize species listed on the Federal List of Endangered and Threatened Wildlife and Plants or result in the destruction or adverse modification of critical habitat designated for Federal Endangered and Threatened Wildlife and Plants.
- Under NHPA Section 106, OWPO is required to identify and assess the effects of formula-grant-funded *undertakings* on historic properties listed in or eligible for listing in the National Register of Historic Places.
- This webinar will give an overview of how ESA and NHPA compliance will be conducted with respect to State Formula Grants.

ESA Compliance Approach

- As a condition of an award, the state and its designees agree to serve as OWPO's non-federal representatives (NFRs) for purposes of assisting OWPO with ensuring that respective activities funded, in whole or in part, by the formula grant are not likely to jeopardize listed species or result in adversely modifying critical habitat.
- As an NFR, the state and its designees (if applicable) agree to provide requisite information and make recommendations to OWPO as to whether their activities funded, in whole or in part, may affect listed species or critical habitat.
- As an NFR, the state and its designees (if applicable) agree to provide its recommendations and information supporting its recommendations as to whether their activities funded under the grant will have "no-effect" on listed species and critical habitat or whether the activities "may affect, not-likely-to adversely affect" listed species or critical habitat.
- Under limited circumstances, we anticipate that formal consultation may be appropriate for any activities funded by the grant that "may affect, likely-to-adversely-affect" listed species or critical habitat. If this is the case, the NFR agrees to assist OWPO with submitting a request for initiating formal consultation with the U.S. Fish and Wildlife Service or National Marine Fisheries Service, as appropriate.

Endangered Species Act Compliance Reviews:

This grant is being awarded pursuant to Section 40601 of the Infrastructure Investment and Jobs Act (P.L 117-58), commonly known as the "Bipartisan Infrastructure Law (BIL)." Under the BIL, the Secretary of the Interior is directed to award grants to eligible States to carry out activities that address orphaned wells. Under Section 7(a)(2) of the ESA, the Department of the Interior is required to ensure that activities funded by this award are not likely to jeopardize species listed on the Federal List of Endangered and Threatened Wildlife and Plants or result in the destruction or adverse modification of critical habitat designated for Federal Endangered and Threatened Wildlife and Plants.

The ESA Section 7 implementing regulations at 50 C.F.R. § 402.08 allow federal agencies to designate a non-federal representative (NFR) to conduct informal consultation. Accordingly, as a condition of this award, the recipient (and, if any, the recipient's designee(s) assisting with environmental compliance with respect to the award) agrees to serve as an NFR pursuant to 50 C.F.R. § 402.08. The Orphaned Wells Program Office (OWPO) reserves the right to rescind this designation.

As an NFR, the recipient of this award (and, if any, the recipient's designee(s) assisting with environmental compliance with respect to the award) agrees to carry out the responsibilities described in Paragraphs (1)–(3) below. The recipient also agrees to coordinate with the OWPO or its designated agent assisting with ESA Section 7 compliance.

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1) No-Effect Determination: The NFR will evaluate its project (identified at an appropriate scale) to determine whether it will have any effects to ESA-listed species or their critical habitats. If the NFR finds that a no-effect determination is appropriate, the NFR must provide documentation supporting that finding to the Department of the Interior's OWPO. The NFR may request technical assistance from the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) (FWS and NMFS are both referred to in the Sections below as the "Service"). Documentation indicating the project will not result in any "effects of the action" may include an Official Species List from the Services indicating that neither the range of an ESA-listed species nor the critical habitat of an ESA-listed species is found within the respective project area (i.e., the "action area," as defined in the ESA Section 7 implementing regulations at 50 C.F.R. § 402.02). For ESA-listed species under FWS's jurisdiction, an Official Species List can be obtained online through FWS's "Information for Planning and Consultation" web application, otherwise known as "IPaC" and located at: <https://ipac.ecosphere.fws.gov/>. If OWPO has not notified the NFR of any concerns with the NFR's no-effect determination within 10 business days of receipt of the documentation in support of the determination, then the NFR, sub-recipient, or their contractors may proceed with this project. However, if OWPO notifies the NFR, in writing, that it does not accept the "no effect" determination, as submitted, then the NFR may not begin any ground-moving activities related to this project until OWPO provides written approval to begin such activities.

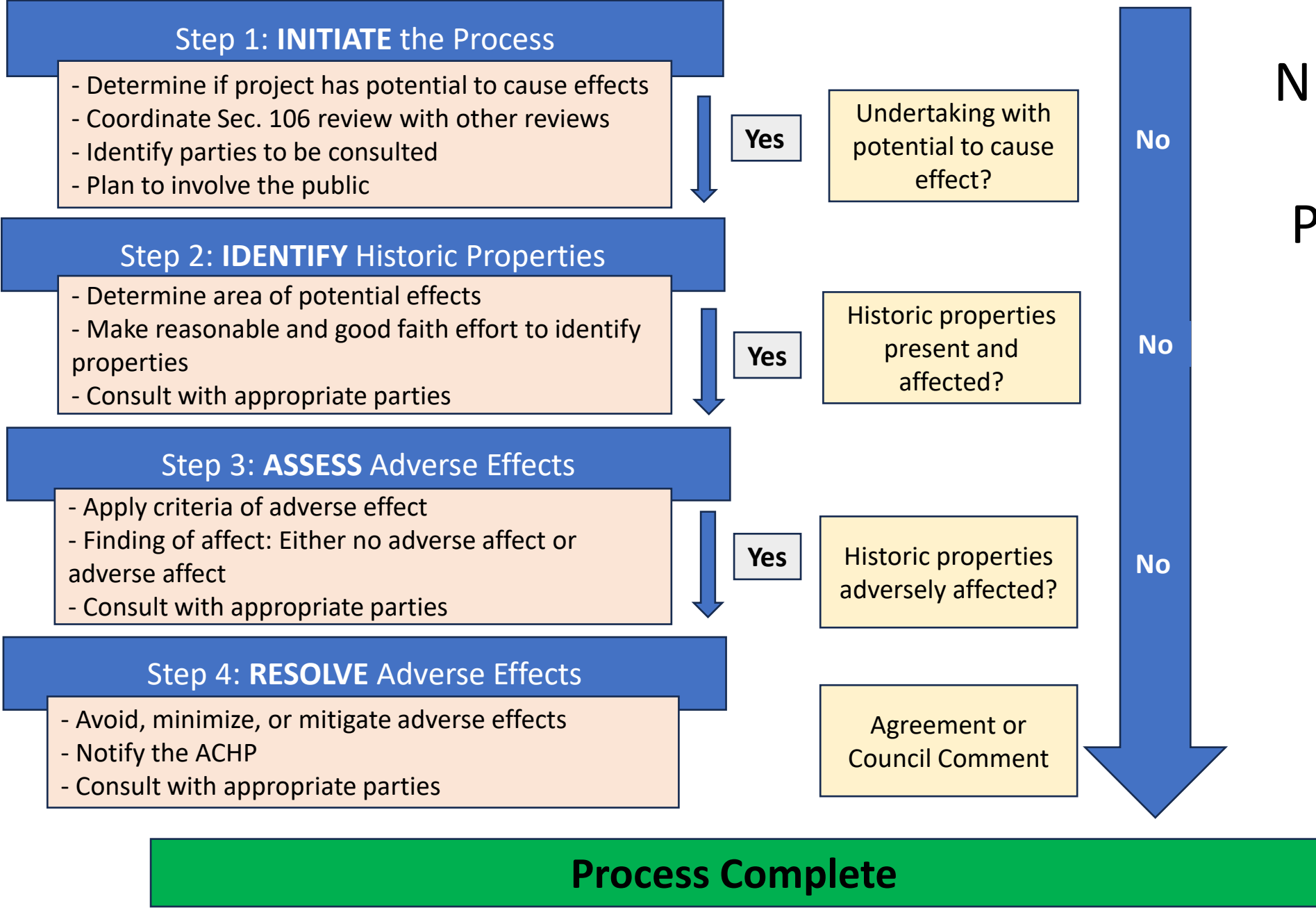
2) May Affect, Not-Likely-To-Adversely Affect Determination: If an NFR makes a preliminary determination that a project may affect, but is not likely to adversely affect, ESA-listed species or critical habitat, the NFR must notify OWPO. OWPO or its agent may seek additional information from the NFR to submit a request for the appropriate Service's written concurrence that the project is not likely to adversely affect ESA-listed species or critical habitat. As an NFR, you agree to provide additional information and further assistance to OWPO in preparing this request for concurrence. If the appropriate Service concurs that the project is not likely to adversely affect ESA-listed species or critical habitat, formal consultation is not required, and ESA compliance is complete.

3) Formal Consultation: In some limited circumstances, formal consultation of the State's project may be required. The ESA Section 7 implementing regulations do not provide for assignment of formal consultation responsibilities to an NFR. However, NFRs may assist in the development of a request for formal consultation with the appropriate Service. If formal consultation is required, the recipient of this award, as an NFR, agrees to assist OWPO or its agent in developing an initiation package (containing the requisite information described at 50 C.F.R. § 402.14(c)) that the OWPO will submit to the appropriate Service in its request for formal consultation.

NHPA Compliance Approach

- OWPO will authorize each state grant recipient to initiate the NHPA Section 106 consultation process.
- As a condition for receipt of the grant, the receiving state must conduct the initial steps of the NHPA Section 106 process, including:
 - Identifying and evaluating historic properties within the area of potential effects associated with specific activities.
 - Evaluating the effects of the activities within that area.
 - Contacting the State Historic Preservation Officer (SHPO), and other parties (*e.g.*, a Tribe) to coordinate the NHPA Section 106 review.
 - Providing OWPO, or its agent, with the State’s preliminary finding and supporting documentation.
- OWPO, or its agent, will provide the preliminary finding and supporting documentation to the SHPO, as well as the Tribal Historic Preservation Officer, if applicable.
- A State, or its subrecipients and contractors, may not begin “undertakings” until the OWPO notifies the State the consultation process is complete.

NHPA Section 106 Review Process Flow Chart



NHPA Award Term: Slide 1 of 2

Historic Preservation:

With the exception of those activities listed below, the activities funded under Section 40601 of the BIL are “undertakings” with the potential to affect historic properties and, as such, are subject to review under Section 106 of the National Historic Preservation Act (NHPA), 54 U.S.C. § 306108, and the implementing regulations, 36 CFR Part 800.

Section 106 applies to historic properties listed in or eligible for listing in the National Register of Historic Places. By and through this Term and Condition of award, the OWPO authorizes the Recipient to initiate NHPA, Section 106 consultation, and to assume responsibility for steps in the process consistent with 36 CFR 800.2(c)(4). As a condition for receipt of the grant, the Recipient must conduct the initial steps of the Section 106 process, which includes identifying and evaluating historic properties within the area of potential effects associated with specific projects and assessing effects (36 CFR 800.4 through 800.5). To fulfill the requirements of these steps, the Recipient must initiate consultation with the State Historic Preservation Officer (SHPO) and other consulting parties. The Recipient should notify the OWPO if there are Indian tribes potentially affected by an undertaking; OWPO remains responsible for government-to-government relationships with Indian tribes unless the affected tribe(s) agrees in advance to the Recipient conducting such consultation. SHPO contact information is available at the following link: <http://www.ncshpo.org/directory>.

NHPA Award Term: Slide 2 of 2

Before taking any action that may affect historic properties, the Recipient must provide the OWPO with a preliminary finding or determination consistent with the documentation standards in 36 CFR 800.11(d), (e). OWPO will provide this documentation, as prepared by the Recipient, to the SHPO and/or the Tribal Historic Preservation Officer (as applicable) consistent with the requirements in 36 CFR 800.4(d)(1)-(2), 800.5. OWPO, in coordination with the Recipient, will seek to resolve any adverse effects to historic properties consistent with 36 CFR 800.6. The Recipient, or its subrecipients and contractors, may not commence activities until the Section 106 process is complete.

The following activities funded under this grant have no potential to cause effect to historic properties and, thus, require no further review: 1) documentary research and analysis; 2) GPS/GIS mapping; 3) survey and inventory with no ground disturbance (i.e. pedestrian survey, shovel testing and test unit excavation, and the use of remote sensing techniques), provided that site access is limited to existing roads and paths of ingress/egress; and 4) site assessment with no ground disturbance, provided that site access is limited to existing roads and paths of ingress/egress.

The Recipient may elect to engage the OWPO regarding the potential development of a programmatic agreement to set forth a streamlined Section 106 process covering the activities funded by these grants.

Next Steps:

- ESA and NHPA terms and conditions will be included in all phase 1 formula grant awards.
- The OWPO recognizes most, if not all, states are familiar with ESA and NHPA requirements.
- The OWPO will prioritize working with states to ensure compliance with the ESA and NHPA so that states can continue the fantastic work underway across the country to plug and reclaim orphaned wells.
- If requested, the OWPO could coordinate with the IOGCC to schedule a webinar to provide more details on the ESA and NHPA requirements and compliance and answer questions.

Comments or Questions?

- If you think of questions following today's meeting, please reach out to the Department by contacting your state's AO and FAOR.
- Susan Lee, Division Chief, State Orphaned Wells Program: susan_lee@ios.doi.gov
- OWPO email box: orphanedwells@ios.doi.gov
- OWPO webpage: <https://www.doi.gov/orphanedwells>