
HISTORICAL PRESERVATION AND SOLAR DEVELOPMENT IN SHUTESBURY, MASSACHUSETTS



SHUTESBURY HISTORICAL COMMISSION
MARCH 2021

Table of Contents

INTRODUCTION	3
TRIBAL ENGAGEMENT: FIRST STEPS.....	4
ZONING BYLAWS COMMENTS.....	4
ATTORNEY GENERAL'S OFFICE FEEDBACK ON SOLAR BYLAW.....	15
ARE THE HISTORIC PRESERVATION ZONING CLAUSES REASONABLE REGULATION?	16
THE NATIONAL HISTORIC PRESERVATION ACT	19
SUMMARY AND CONCLUSIONS	24
RECOMMENDATIONS.....	26
APPENDIX A ABBREVIATIONS	29
APPENDIX B APPLICABLE STATUTES AND INDIGENOUS RESOLUTIONS	30
APPENDIX C DEFINITIONS	34
APPENDIX D TRIBAL HISTORIC PRESERVATION OFFICE CORRESPONDENCE (2016).....	38
APPENDIX E NATIONAL REGISTER OF HISTORIC PLACES QUICK GUIDE.....	47
APPENDIX F NHPA, SECTION 106 QUICK GUIDE	49
APPENDIX G ACHP NATIVE AMERICAN TRADITIONAL CULTURAL LANDSCAPES ACTION PLAN.....	52
APPENDIX H USACE GENERAL PERMIT HISTORIC PROPERTIES NOTIFICATION FORM	55
APPENDIX I EPA SECTION 106 DOCUMENTATION.....	57
END NOTES	67

Introduction

The following report contains the Shutesbury Historical Commission's comments on the Town Zoning Bylaws and the Solar Zoning Bylaw. It will describe how to implement this Bylaw and why it is valuable to our community. The Shutesbury Historical Commission produced this report in response to the state Attorney General's Office's feedback about our town's Solar Zoning Bylaw. The focus here is only on the historical preservation features of the Bylaw.

In a separate Historical Commission Report, the *Introduction to Indigenous Cultural Sites in Shutesbury*, we describe the history of Indigenous land use in this region, Ceremonial Stone Landscapes (CSLs), and how local government can engage with Indigenous communities today in an equitable and just manner. That report describes in more depth key concepts such as the National Historic Preservation Act, Tribal Historic Preservation Offices (THPOs), Traditional Cultural Properties, Ceremonial Stone Landscapes, and Tribal consultation. This report will not duplicate that information. The reader is advised to use the *Introduction to Indigenous Cultural Sites in Shutesbury* as a companion and reference for these findings. Appendices A through C contain useful abbreviations, definitions, and statutory references.

On November 9, 2020, the Shutesbury Historical Commission Chair notified the Shutesbury Planning Board of the Commission's interest in fulfilling our statutory role (see below) by consulting with the Planning Board on large-scale solar projects. We noted that the Shutesbury Solar Zoning Bylaw requires consideration of historic preservation as both a general standard and also specifically through the submission of documents by the Special Permit applicant ("the applicant"). This documentation must demonstrate notification to various parties of any known or suspected historic or Indigenous sites and a mitigation plan if necessary. The Bylaws do not describe how the Planning Board should evaluate the completeness and sufficiency of this documentation. It is the Planning Board's responsibility to interpret the language and intent of the Bylaw and apply it to the Special Permit Review. It is also the applicant's responsibility to do its due diligence in interpreting and fulfilling zoning requirements. The Historical Commission, however, can advise and assist all parties in preparing for the Special Permit review process under the Solar Zoning Bylaw.

The guidance included in this report is based upon an intensive review of federal and Massachusetts regulations, historical preservation standards, and general regulatory standards.

The Historical Commission has the following objectives:

1. To provide guidance on a process that the Planning Board can use to evaluate the completeness and sufficiency of the historic preservation components of a large-scale solar Special Permit application. This process is discussed in more depth in this document.
2. Discuss how the Solar Zoning Bylaw is consistent with state regulations requiring only reasonable regulation of solar projects as it pertains to historic preservation.
3. To provide background information about the history (pre-colonial and colonial) of the project area and region. In conjunction with other previously published historical reports, the *Introduction to Indigenous Cultural Sites in Shutesbury* aims to achieve this objective.

4. To provide an overview of previous cultural resource studies (if any) of the Area of Potential Effects (APE) established for any proposed projects and to outline recommendations specific to a particular project. We will aim to meet this objective within 35 days of receipt of written notification by a project applicant.

Tribal Engagement: First Steps

Shutesbury, in particular, is an area of interest to Indigenous communities and archaeologists involved in the study of Ceremonial Stone Landscapes (CSLs). As mentioned in the *Introduction to Indigenous Cultural Sites in Shutesbury*, the companion to this report, several published studies focus specifically upon Shutesbury. One of these is a comprehensive text by Dr. Curtiss Hoffman, an archaeologist and scholar, which includes data gathered in Shutesbury.

In 2016, during the permitting of the Wheelock Tract Solar Project, two Federally-recognized Tribes, the Wampanoag Tribe of Gay Head (Aquinnah) and the Narragansett Indian Tribe, explicitly expressed their historical ties to this region and their long-standing interest in Traditional Cultural Properties in the Town of Shutesbury (see Appendix D). These powerful statements from Tribal leaders clarify that Shutesbury should be seeking ways to begin a respectful conversation with Tribal communities that view our area as part of their ancestral homelands.

In 2021, the Historical Commission began a dialogue with the Wampanoag Tribe of Gay Head (Aquinnah), the Nipmuc Nation, and the Chaubunagungamaug Nipmuck to learn how they view our community as part of their collective memory and cultural identity. We look forward to developing a further dialogue with Tribal representatives. From these initial steps, however, we have already learned that Indigenous communities understand that our region contains sacred cultural sites, sites that have largely gone unrecognized by Euro-Americans for hundreds of years, and Tribal representatives may wish to be involved in their preservation.

Zoning Bylaws Comments

On June 27, 2020, an amended Ground-Mounted Solar Electric Installation Bylaw (“Solar Bylaw”) was approved at the Shutesbury Town Meeting. Below are specific comments and recommendations for applying this Bylaw to Special Permit Review. We note here that some historical preservation provisions may be unfamiliar. Our hope is that the Town government will require the same level of professionalism and due diligence required of all other regulatory oversight levels. Our objective is to provide guidance on best practices and professional standards.

Municipal Zoning Bylaw Rural Siting Principles Section 8.3-2: *Preserve stone walls and hedgerows. These traditional landscape features define outdoor areas in a natural way and create corridors useful for wildlife. Using these features as property lines is often appropriate, as long as setback requirements do not result in constructing buildings in the middle of fields.*

Historical Commission Comments:

This zoning passage applies to all development projects in Open Space Designs and projects subject to Site Plan Review or Special Permit approval. As part of the Rural Siting Principles, stone walls and stone structures are essential to the Town’s rural, natural landscape. They are unique, beautiful, and worthy of preservation. The Historical Commission has broad interests in

preserving all historic stonework, including roadside stone walls, that contributes to our community's rural character.

Municipal Special Permit Review Criteria 9.2-2.K: *Integration of the project into the existing terrain and surrounding landscape by minimizing impacts on wetlands, steep slopes, and hilltops; protecting visual amenities and scenic views; preserving unique natural or historical features; minimizing tree, vegetation, and soil removal; minimizing grade changes, and integrating development with the surrounding neighborhood in a manner that is consistent with the prevailing pattern, design, and scale of development and that protects historic structures and features.*

Historical Commission Comments:

This zoning passage in the Special Permit Review Criteria establishes that Special Permit applications should demonstrate an effort to maintain the rural landscape's aesthetic and ecological qualities and preserve historic structures. It establishes that historic preservation serves the public good and provides the rationale for the subsequent passages that address historic preservation. Other areas of town zoning also include historic preservation goals, including the Bylaws related to signs, wireless communication facilities, and wind energy systems.

Municipal Solar Zoning Bylaw:

Section 8.10-3.F. Mitigation for Disruption of Historic Resources and Properties: Historic resources and properties, such as cellar holes, farmsteads, stone corrals, marked graves, water wells, or pre-Columbian features, including those listed on the Massachusetts Register of Historic Places or as defined by the National Historic Preservation Act, shall be excluded from the areas proposed to be developed, including clearing for shade management. A written assessment of the project's effects on each identified historic resource or property and ways to avoid, minimize or mitigate any adverse effects shall be submitted as part of the Special Permit. A suitable buffer area shall be established on all sides of each historic resource. The Special Permit may be conditioned to effectuate and make enforceable this requirement.

Historical Commission Comments:

The Solar Bylaw refers to sites listed on the Massachusetts Register of Historic Places and also sites "defined" by the National Historic Preservation Act ("NHPA"). The Massachusetts Register of Historic Places is a listing of some historic properties in the Commonwealth. The word "defined" is key here as the Bylaw refers not only to properties currently listed via NHPA regulations (i.e., on the National Register of Historic Places), but also to a broader category of potential properties that may be found, via the applicant's investigations or other available data, to meet NHPA definitions.

National Register of Historic Places: For clarification, "defined" here refers to the Evaluation Criteria of the National Register of Historic Places (NRHP). Appendix E contains a brief summary of the National Register produced by the Massachusetts Historical Commission. The NRHP is established by the National Historic Preservation Act (NHPA), administered by the National Park Service, and regulated by the Advisory Council on Historic Preservation (ACHP). To be eligible

for listing in the National Register, a property must be at least 50 years of age and possess significance in American history and culture, architecture, or archaeology. A property of potential significance must meet one or more of four established criteria:

- A. Associated with events that have made a significant contribution to the broad patterns of our history;
- B. Associated with the lives of persons significant in our past;
- C. 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;
- D. Yield, or likely to yield, information important in prehistory or history.

The Bylaw covers properties that are either pre-colonial or Euro-American which meet the evaluation criteria.

Pre-colonial features can mean archaeological sites indicative of burial sites, habitation activities (e.g., dwelling sites, hearths, midden piles, tools, points, etc.), and Ceremonial Stone Landscapes. Pre-colonial refers to the period before the first European contact in the region. For practical purposes, the commonly used date for this is anything before 1492 CE. Pre-colonial Ceremonial Stone Landscapes may require different evaluation methods than non-ceremonial archaeological sites.

Post-Contact or settler period refers to any time after 1492 CE. Settler historic sites can include historic buildings, barns, stone walls, millworks, cemeteries, cellar holes and foundations. The Massachusetts Historical Commission has identified many historic properties that are eligible for NRHP listing should they be nominated. The MHC has 183 listed properties in Shutesbury, including several large districts that could be submitted as multi-site submissions or Historic Districts. Upon investigation, sites in parcels eligible for solar development may be related to already identified historic sites. For example, a historic house may be part of a larger historic farm or mill site that extends into an area zoned for Forest Conservation. Many early historic properties were associated with mills located on streams within forest tracts.

We interpret the language to mean that properties to be assessed fall into three broad categories:

- sites listed on the Massachusetts Register of Historic Places,
- sites listed on the National Register of Historic Places, and
- sites eligible for listings on either of these Registers or which are potentially eligible if properly documented. By far, the largest category of potential sites will fall in this last category.

Identification of properties falling within these three of these categories is the responsibility of the applicant.

The Bylaw requires applicants to complete a written assessment of the project's effects on any identified historic resources. The written assessment should include a mitigation plan to avoid, minimize, or mitigate any adverse effects, with a suitable buffer zone on all sides of the historic resource.

The 2008 NRHP Determination of Eligibility for the Turners Falls Sacred Ceremonial Hill site paved the way for future NRHP multi-site nominations for a Ceremonial District within a 16-mile radius of the Turners Falls site. Most of Shutesbury falls within this range. This ruling means that any Ceremonial Stone Landscapes identified in Shutesbury are eligible for inclusion in a multi-site nomination submission because the category type has already been determined to meet Criteria A and D. Because of the crucial importance and cultural significance of an Indigenous Ceremonial District, the only such district identified to date in the Northeast, any identified human-made stone structures that are not obviously Euro-American (e.g., mills and cellar holes) should be surveyed, reviewed by a Tribal Historic Preservation Officer (THPO), and included in a mitigation plan.

While a landowner or applicant may not have an interest in nominating a historic property for inclusion in the National Register of Historic Places (NRHP), and doing so does not automatically protect a site from demolition, the public has a compelling interest in knowing what historic properties exist in our community. This is especially true where large-scale solar projects are concerned as they involve the demolition of large land tracts. The Bylaw provision reflects this public interest. Identification of historic properties may also help others to understand and identify related sites on nearby parcels, as might be the case for a historic district or a Ceremonial Stone Landscape district. For this reason, the data collected should be detailed enough to enable the identification of historic properties that meet the NRHP inclusion criteria.

Qualifications for Professionals: The assessment and survey should be conducted by someone who meets or exceeds the Secretary of the Interior's Qualifications for an Archaeologist and approved for archaeological investigations by the Massachusetts State Archaeologist. This professional or team of professionals should further document, via their curricula vitae, that they have appropriate regional expertise for projects in Massachusetts. The Planning Board should require documentation that the study was properly permitted by the State Archaeologist, preferable one that prior experience consulting with regional THPOs. Tribal Historic Preservation Officers, on the other hand, are trained and qualified by the state- and federally-recognized Tribes for whom they work.

Historical Commission Recommended Written Assessment Standards:

Background Research:

- Review of historical documents, including antique town maps, maps of discontinued town roads, the MHC inventory (available online through Massachusetts Cultural Resource Information System (MACRIS), and other historical documents to identify Post-Contact features (e.g., foundations and stonework related to known homesteads, agricultural outbuildings, and millworks).
- Review of historical documentation in the 2004 Shutesbury Master Plan, 2004 Shutesbury Open Plan, and 2000 *Celebrate Shutesbury* publication.

- Review of other already-known sites in Shutesbury suspected to be pre-colonial, e.g., Mt. Mineral petroglyph, Mt. Mineral chamber, beehive chamber, standing slab chamber, “hearth stones” off of Baker Road, stone structures on DCR land off of Cooleyville Road, etc. See *Introduction to Indigenous Cultural Sites in Shutesbury*.
- Identification of all properties of particular historical significance, including features related to 18th-century and early 19th-century settlement, features related to early economic activities (millwork, manufacturing, early agriculture, etc.), properties related to historically important figures (e.g., early founding settlers, early town leaders, members of Shays Rebellion, etc.).
- Review of local pre-colonial history and archaeological data, including information readily available in the public record. The Historical Commission’s *Introduction to Indigenous Cultural Sites in Shutesbury* and the *Great Falls* documentary film are important references. At a very minimum, this review should include a discussion of the 2008 Sacred Ceremonial Sacred Hill District Determination of NRHP Eligibility, the 2020 USGS investigation of the Leverett site (which found a stone feature to be 600-800 years old), and publications by Hoffman and Cachat-Schilling. Because the 2008 Turners Falls Determination of NRHP Eligibility opens the door for nomination of Shutesbury sites as part of a multi-site NRHP district, applicants should consider this eligibility when evaluating a site. **Failure to do so should be considered evidence of an incomplete assessment.**
- The report should incorporate any specific feedback received from the Historical Commission, the MHC, Tribal representatives, Third Party Reviewers, and any other sources contacted as a part of the investigation.

Phase I Pedestrian Survey: The written assessment should include a non-invasive, pedestrian surface survey of the APE, including adjacent wetlands. Transect surveying is not sufficient as it does not allow for a comprehensive assessment of stone structures, some of which may be clustered together and not visible from a distance. The survey should extend into adjacent wetlands because both pre-colonial and early settler structures were often near water sources and provide important context (e.g., a mill structure on a stream may be related to an outbuilding foundation outside the buffer zone.)

- Identification of all stone piles, mounds, and other stone features that appear to result from human activity, regardless of presumed origin. Out of respect for Tribal communities who may object to Traditional Cultural Properties being made public, early THPO consultation prior to report release is recommended.
- Supplementary photographic data (top and profile views in 4 directions) of stone features, including GPS coordinate data and ArcGIS mapping to show features in the context of topography, wetlands, current and abandoned roads, cellar and mill sites, stone walls, and property parcels.
- Supplementary maps of the project parcels and surrounding terrain from MassGIS, showing parcel boundaries, wetlands, and aerial LIDAR data, which is available as a MassGIS overlay.
- Identified features should be clearly flagged and numbered in the field for site review.

- The pedestrian survey should meet the Secretary of the Interior’s Standards for the Identification and Evaluation of Historic Properties.

Pre-Colonial Archaeology and Indigenous Traditional Cultural Properties Assessment:

As discussed in depth in the *Introduction to Indigenous Cultural Sites in Shutesbury*, only traditional communities representatives can identify a Traditional Cultural Property or Ceremonial Stone Landscape (CSL). While a Phase I Pedestrian Survey is necessary to collect data, data interpretation must include THPO review.

Data gathered about suspected sites should be shared with a THPO for interpretation. It should be up to the THPO to propose a culturally-appropriate and sensitive process for handling the data location information. This review process could occur before the Special Permit application so that the process is established before the Planning Board review.

The applicant is required to submit a notice to the Massachusetts Historical Commission to request comment. The written inquiry should include an MHC Project Notification (PN). From recent communication with the Massachusetts Historical Commission, the MHC will typically respond within 30 days.¹ If a federal undertaking triggers Section 106 consultation, the MHC will consult with the federal agency regarding the possible adverse impact on historic properties and make recommendations. For Section 106 consultation, the MHC has up to 30 days to respond to Project Notifications and Section 106 notices. The MHC, however, does respond to archaeological permit applications and site notifications. Specific questions are likely to be best addressed through a follow-up email or telephone conversation.

The MHC’s historical inventories are publicly available, but archaeological records are not public. Approved archaeologists should be able to review any relevant, non-public data. The Historical Commission is acquiring copies of all local archaeological data currently stored with the MHC. Historical Commissions are allowed to acquire this data but cannot share it. Commissions can, however, use the information to protect the resource areas. Once those records are in our possession, the Historical Commission will be available to provide general guidance to Town Boards or private parties.

The applicant is required to send a written request for comment to all Tribal Historic Preservation Offices (THPOs) of Tribes that ascribe cultural and historical significance to this area. The requirement does not distinguish between federally-recognized and state-recognized Tribes. The Commission recommends that all relevant Tribes be notified. The contact information for the appropriate THPO offices is readily available to the public. A knowledgeable cultural resource management consultant can assist the applicant with this requirement, including which offices to send notification. The Historical Commission is also happy to provide interested parties with a list of Tribes who have a currently expressed interest in Shutesbury, along with their contact information. Such a list is a starting place for a more comprehensive notification.

The documentation should include a reasonable level of effort to solicit THPO input and respond to any expressed THPO interest. The Special Permit application should include documentation of how the applicant attempted to engage in a consultation process and the outcome. If a THPO responds to written notification and invitation to comment, the application should include the

THPO's written determinations and recommendations for further evaluation. The applicant must demonstrate a reasonable and good faith effort to consult with any THPO that expresses an interest in consultation.

Note: If a THPO expresses an interest, but an applicant or landowner action prevents the THPO from personally evaluating the site and reviewing the data, the Historical Commission recommends that the written assessment be found incomplete for the Bylaw until the barriers to direct THPO site inspection have been resolved.

Additional action steps and geophysical investigation may be necessary if an archeologist or THPO raises concerns about possible burial sites. Unmarked burial sites are on occasion located and are a concern to Tribal authorities, and the Massachusetts Commission on Indian Affairs.

- Suspected burial sites are potentially under the Native American Graves Protection and Repatriation Act (Public Law 101-601; 25 U.S.C. 3001-3013) (NAGPRA), MGL Chapter 38 §6, and MGL Chapter 114, §17.
- Suspected Indigenous burial sites must be reported to the Franklin County Medical Examiner and the Massachusetts Historical Commission. If remains are determined to be Indigenous, the Massachusetts Commission on Indian Affairs must be consulted.

Historical Commission Mitigation Plan Comments:

Mitigation refers to a process of lessening or eliminating the intensity and severity of an adverse effect. An adverse effect means physical demolition, destruction, relocation, or alteration of the resource or its immediate surroundings such that the overall significance of a historical resource would be materially impaired. Standards and strategies for environmental and historical mitigation are widely available. Ideally, a mitigation plan should have the ultimate effect of reducing the adverse impact on a historic resource below a level of significance, such that the adverse impact is no longer significant.

If adverse effects are identified, a mitigation plan is required that addresses each identified, significant resource subject to an adverse effect. If no such resources are identified or no adverse effects, a mitigation plan would not be required.

If adverse effects are later identified during the Public Hearing, the Planning Board should require a mitigation plan.

Early, good faith consultation with all interested parties, even in advance of the Special Permit application submission, ensures that a mitigation plan is likely to be agreeable to all parties.

Guiding Principles of Mitigation:

When recommending mitigation measures in response to adverse effects on historic properties, the Historical Commission uses the following principles:

- Mitigation for adverse effects should be reasonably and logically connected to the adverse effect, such as connections between locations, type of historic resource, or type of impact with the proposed mitigation measure.
- Mitigation should be proportional to the adverse effect. Greater damage should result in greater mitigation efforts.
- Mitigation should have a benefit to the impacted parties (e.g. loss of an Indigenous cultural resource should be mitigated by a benefit to Indigenous communities; loss of a contributing structure in a district should be mitigated by a benefit to the district).
- Mitigation should benefit the larger public (e.g., improve understanding or education; provide new opportunities for preservation results; improve preservation systems to avoid future conflicts or losses).
- The goal is to develop measures relevant to each site to understand and celebrate its unique history, and to preserve the unique characteristics and significance for current users and future generations.

Types of Mitigation Plans:

Avoid adverse effect. Avoidance should be the first strategy to be considered. A priority should be placed on avoiding archaeological and Indigenous cultural resource areas. Avoidance could mean, for example, moving a project footprint or creating a protected buffer zone around a resource area within a project footprint. For avoidance within a project, the Historical Commission recommends a 15-foot buffer with semi-permanent fencing for the project's lifetime. A cultural resources monitor, using a THPO if Indigenous cultural resources are involved, should monitor construction-phase work.

Minimize adverse effect. In cases where adverse effects to the historic property cannot be avoided altogether, limit the impact's nature or minimize the adverse effect. An example of minimizing mitigation strategy might be reconstructing or moving a historic property to an alternative location. This strategy is not appropriate for Indigenous sites, but there are other options. For example, an applicant could offer to avoid/preserve some (but not all) sites within a project footprint and agree to work with the MHC, the Town, and Tribal groups to nominate them to the NRHP.

Alternative mitigation. If the adverse effect on the historic properties is not avoidable, an alternative action can be taken which offsets the adverse effect and has the same proportional benefit. These approaches can be creative. Examples include:

Purchase of land or preservation easements on land (outside the APE) containing historic properties to guarantee long-term preservation of those properties;

Archaeological, architectural, and landscape surveys in areas away from the APE to provide a broader base of information upon which to make decisions about significance and resource management;

Support for preservation non-profit organizations; Brochures, Displays, Interpretive Panels, & Websites;

Research into significant topics in the history, ethnohistory, archaeology, cultural landscapes, and architecture of a region, thus adding to our body of existing information and reinforces heritage education programs and heritage tourism initiatives;

Development of multimedia educational and interpretive materials related to historic properties outside the APE, or the historical periods and cultural and ecological regions associated with historic properties inside the APE;

Promotion of the use of historic properties outside the APE for heritage tourism in a manner that contributes to the long-term preservation and productive use of those properties; Support specific projects of local and regional museums or preservation organizations, including National Heritage Areas, through sustainable partnerships;

Inventory and preservation of historic properties of traditional religious and cultural significance to Tribes in conjunction with THPOs.

Support for preservation and dissemination of information from museum collections to contribute to regional / topical syntheses, update predictive models, or otherwise advance understanding of historic properties, history, and heritage;

Regional / topical syntheses of archaeological data to compile information, develop or update contexts or predictive models related to periods and resource types, and compile and disseminate gray literature;

National Register nominations.

Documentation of sites subject to demolition.

Historical Commission Third Party Review Comments:

The Historical Commission may choose to hire its own third-party consultant to review Special Permit applications. If it does, the Commission hopes the Planning Board, applicant, and landowner will work together to allow our consultant and/or Commissioners to participate in a site reviews.

The Historical Commission recommends the Planning Board utilize outside consultants under MGL Chapter 44 §53G. Ideally, the Planning Board would obtain consultation from two types of experts: a qualified archaeologist and a Tribal Historic Preservation Office Cultural Resource Monitor who can comment on the sufficiency of the assessment of possible Indigenous cultural resources. Note that in 2016, the Shutesbury Planning Board used 53G to hire an archaeologist to consult on a solar project. There is thus a precedent for this type of consultation.

The Department of the Interior's Archaeology and Historic Preservation Professional Qualifications Standards define the qualifications for an archaeological consultant. The State Archaeologist's office also approves individual archaeologists for projects within the Commonwealth. A consultant should satisfy both criteria.

Tribal Historic Preservation Officers (THPOs) are not subject to the Department of the Interior's qualifications for archaeologists. Each individual Tribe establishes the training and qualifications for a Tribal Historic Preservation Officer. The Department of the Interior recognizes THPOs as being uniquely and solely qualified to comment on Traditional Cultural Properties. A THPO for a federally-recognized Tribe who has a historical/cultural tie to this region is, therefore, by definition, fully qualified for the role of Cultural Resource Monitor. By analogy, THPOs are certified by their Tribes in the same way that licensed professionals of all kinds are licensed by the state governments, determining the necessary licensure requirements. Almost all THPO offices consult on development projects and serve as project consultants in a variety of capacities.

Neither of these two types of experts can be a substitute for the other as they represent entirely different disciplines, methods, and perspectives. At the same time, they can and do complement one another. A THPO consultant for the Planning Board is essential if, for some reason, the applicant is unable to complete satisfactory THPO consultation. The Historical Commission is in the process of building collaborative relationships with regionally-based Tribal authorities. It can serve as a liaison to facilitate the discussion of an appropriate THPO consultant.

Section 8.10-4.A.3. Locations of all known, mapped or suspected Native American archaeological sites or sites of Native American ceremonial activity. Identification of such sites shall be based on responses, if any, to written inquiries with a requirement to respond within 35 days, to the following parties: all federally or state recognized Tribal Historic Preservation Officers with any cultural or land affiliation to the Shutesbury area; the Massachusetts State Historical Preservation Officer; tribes or associations of tribes not recognized by the federal or state government with any cultural or land affiliation to the Shutesbury area; and the Shutesbury Historical Commission. Such inquiries shall serve as a notice to the aforesaid parties and shall contain a plan of the project, specific identification of the location of the project, and a statement that permitting for the project is forthcoming. Accompanying the site plan shall be a report documenting such inquiries, the responses from the parties, a description of the location and characteristics, including photographs, of any Native American sites and the outcomes of any additional inquiries made based on information obtained from or recommendations made by the aforesaid parties. A failure of parties to respond within 35 days shall allow the applicant to submit the site plans.

Location of all known, mapped, or suspected Native American archaeological sites or sites of Native American ceremonial activity.

The Bylaw passage explains that this condition is partially met through written notification to several entities: the Shutesbury Historical Commission, the MHC, and Tribal Historic Preservation Offices (THPOs) whose Tribe assigns cultural and historical significance to this area.

As the Historical Commission's *Introduction to Indigenous Cultural Sites in Shutesbury* explains, there is compelling evidence that local Forest Conservation tracts contain Indigenous stone structures. The language of this Bylaw (i.e., “suspected sites of Native American ceremonial activity,”) uses the term “suspected” because it is presumptuous and inappropriate for a developer or a Town board to determine unilaterally that something **is** a ceremonial site, e.g., Ceremonial

Stone Landscape or Traditional Cultural Property. Only Tribal representatives (i.e., THPOs) can make that determination.

Showing respect for Tribal sovereignty and cultural authority is discussed at length in the Historical Commission's *Introduction to Indigenous Cultural Sites in Shutesbury*. Field researchers skilled in surveying Indigenous stone structures should have the knowledge and expertise necessary for identifying possible sites requiring further evaluation. Archaeologists with a solid understanding of ethical practice should understand how to apply these principles.

The U.S. Advisory Council on Historic Preservation (AChP) and US Department of the Interior (see Appendix F, Appendix G, and Bulletin #38 in *Introduction to Indigenous Cultural Sites in Shutesbury*) make it clear that Tribal consultation is essential to the protection of Indigenous Traditional Cultural Properties and Landscapes. Ethnocentrism is a problem in historic preservation, especially where the dominant Euro-American culture attempts to define the cultural reality of ethnic minority groups. Applicants and Town boards should refrain from making inappropriate assumptions (e.g., that a stone feature is insignificant or due to settler activity) without THPO guidance.

The Shutesbury Historical Commission, upon receiving notification, will endeavor to provide site-specific findings and recommendations to the applicant and the Planning Board within the allotted 35-day response window.

To meet the requirements of this provision, the applicant must send written notifications and requests for comments to THPO offices for Tribes that express or have expressed in the past an interest in this region. The applicant's archaeological consultation team will understand how to identify these Tribes and facilitate the appropriate communication. The applicant will need to document that it has done its due diligence in noticing Tribes. THPOs will likely require access to the features in the field. While Tribal notifications need to be sent broadly, nothing bars the applicant from engaging in early consultation with one or more Tribal Offices to ensure that meaningful consultation occurs. In fact, early engagement and collaboration resolve many challenges.

The Historical Commission maintains a list of Tribes that have expressed interest in this area. This is a starting place; that is, the list of Tribes contacted must include these Tribes, and others as determined at the time. This includes state-recognized Tribes and the federally-recognized Tribes who were parties to the Turners Falls Sacred Ceremonial Hill investigation and determination. The Historical Commission is also working to develop collaborative relationships with regional THPOs. We can be a resource for assisting applicants in identifying interested consulting THPOs. Because of the traditional practice of inter-tribal marriage and coalition-building, and the colonial history of land displacement and tribal relocation, not all present-day traditional communities with historical and cultural ties to this region are based in Massachusetts.

If for some reason, the applicant is unable to obtain consultation from a THPO before the submission of the Special Permit application, the Phase I survey can still be submitted and reviewed by the Planning Board's 53G Third Party Reviewers. The Planning Board's use of 53G authority to retain the services of a THPO can ensure that Traditional Cultural Properties are properly evaluated.

If archaeological sites are identified through the Phase I Pedestrian Survey, the applicant would decide whether to develop a Phase II intensive investigation or to avoid the sites. If there are questions about other archaeological sites in Shutesbury, the Historical Commission can act as a resource once it has acquired the MHC town data.

In the case of suspected-but-not-confirmed features identified through the Pedestrian Phase I survey, the applicant can propose a mitigation plan with the understanding that a mitigation plan may change through the review process. The Commission strongly recommends that the Planning Board use its statutory authority to hire a THPO as a third-party reviewer early on in the process to avoid unnecessary delays.

Attorney General's Office Feedback on Solar Bylaw

On November 4, 2020, the Massachusetts Attorney General's Office (AGO) provided written feedback on the Solar Bylaw. Offering this feedback is a standard part of the review of any zoning changes. **The AGO approved the Bylaw, finding it constitutional.**

As is true of all solar bylaws passed by towns across the Commonwealth, the AGO offered cautions about how solar bylaws may be affected by pre-existing state law, MGL Chapter 40A, §3. This statute forbids towns from passing Bylaws that “prohibit or unreasonably regulate” solar projects, except where necessary to protect the public health, safety, or welfare. This provision has been interpreted to mean that towns may regulate solar projects as long as the regulations are not unreasonable. Solar zoning bylaws do not necessarily conflict with this state statute. The waiver provision in the Solar Zoning Bylaw empowers the Planning Board with built-in flexibility to modify regulatory requirements when appropriate.

Many towns now have solar bylaws and municipal solar bylaws have been supported by the Massachusetts Department of Energy Resources. There is little case law to determine how this statute affects municipal zoning bylaws. Nevertheless, the AGO wrote in its feedback, “In addition, as a general principle, we recognize that the Town may utilize its zoning power to impose reasonable regulation on solar uses based upon the community’s unique local needs.” The AGO cautions that provisions that amount to unreasonable regulation may expose the Town to a legal challenge or Special Permit Appeal. However, note that a challenge or Appeal does not mean that the Town’s zoning will not ultimately prevail. Below are the Historical Commission’s specific responses to the AGO’s feedback on the historical preservation clauses.

Section 8.10-3 (B), (C), (D), (E) , and (F): These provisions require applications to show various types of mitigation plans. Paragraph (F) requires a historic resources mitigation plan. The AGO cautions that the Solar Bylaw may be vulnerable to a legal challenge if the mitigation requirements are unreasonable.

Historical Commission Comments:

Mitigation strategies and best practices are discussed above in detail. Early pre-application consultation and surveying of historical/cultural resources, much as in the case of wetlands delineation, ensures the applicant is aware of resources within an APE.

While some strategies require the cooperation and consent of the landowner, many do not. If demolition is required for project viability, there are compensatory mitigation strategies that do not require site preservation. The range and variety of available strategies demonstrate that mitigation is not unreasonable regulation.

Section 8.10-4 (A) (3): This section requires a site plan showing all known, mapped, or suspected Native American archaeological sites or Native American ceremonial activity sites, based upon responses, if any, to written inquiries to the Shutesbury Historical Commission, Massachusetts Historical Commission, and all federally or state recognized Tribal Historic Preservation Officers with any cultural or land affiliation to the Shutesbury area. The AGO notes that archaeological site information is not considered public records. *See G.L. c. 9, § 26A (1) and c. 40, § 8D.*

The AGO advises:

- **Caution to protect sensitive archaeological site locations.**
- **Archaeological data may not be available to an applicant.**
- **Failure to receive a response from the listed entities does not take away requirements or right given under federal or state law, including MGL Chapter 7, § 38A, (providing for the protection and preservation of Native American skeletal remains that are accidentally uncovered during ground disturbance activities).**
- **Follow-up consultation is recommended with the Town Counsel, the State Archaeologist, and the Commission on Indian Affairs.**

Historical Commission Comments:

The developer's archaeological consultation team can review any relevant, non-public archaeological data housed with the MHC. The Historical Commission also hopes to become a repository for this data in the future.

A site plan should be submitted that shows all known, mapped, and suspected Indigenous sites based upon a comprehensive Pedestrian Phase I survey, which should map all stone features. This documentation should incorporate written responses from the Shutesbury Historical Commission, the Massachusetts Historical Commission, and any interested THPOs.

Interpretation of Indigenous Ceremonial Stone Landscapes (i.e., "Native American ceremonial activity sites") requires guidance from a THPO. Just as a wetlands scientist is necessary to delineate wetlands, a THPO is required for delineating Ceremonial Stone Landscapes or other Traditional Cultural Properties.

The statutory obligations for handling the discovery of human remains exist independent of the Solar Zoning Bylaw. Any applicant in Massachusetts has this obligation.

The Historical Commission consulted with a senior official with the MHC to confirm that MHC has a 30-day response window for Project Notifications.

Are the Historic Preservation Zoning Clauses Reasonable Regulation?

Reasonableness in regulation is a debatable concept. This discussion is based upon the accepted principle that landowners have certain rights to use their land as they choose, with some regulatory constraints upon that freedom. Many of those restraints result from the need for Special Permits, state/federal oversight, or funding with taxpayer money (including subsidies and tax benefits). Regulation always balances the rights of the individual with the interests of the public.

To some extent, reasonableness hinges on the observer's views about the project's value and the intrinsic value of the thing being regulated. If you share the view of the Historical Commission, that historic properties are priceless features of our landscape that create a sense of community and

connectedness to the past, then historical preservation regulations are reasonable as long as they meet certain standards.

To evaluate the reasonableness of the historical preservation provisions of the Solar Bylaw, we suggest the Town consider the following factors. Briefly, the reasonableness of this zoning regulation should be hinged upon the following considerations:

- 1. Is the regulation constitutional, both in terms of the State Constitution and the U.S. Constitution?**
- 2. Does the regulation make sense?**
- 3. Does the regulation yield its intended benefits and aims?**
- 4. Is the regulation reasonable in terms of costs and benefits?**
- 5. How does the regulation relate to federal regulations?**

Constitutionality: The AGO has determined that the Bylaw is broadly constitutional. Historic designations of properties, by the way, have not been found by the courts to be an infringement of landowner rights, a possible concern when discussing the reasonableness of a regulation. The US Supreme Court has ruled that formal designations, recognizing the historic character of a property as important, are not an unconstitutional “taking” of their property. Designations alone are never a “taking” of private property because the owner retains both title to and use of the landmarked property.

Making Sense: The Bylaws, as outlined above, require clearly understandable action steps that are well-understood by experts and professional consultants. As is true for many of the complex aspects of solar project design, applicants need to use consultants to meet the Bylaw requirements. They already use expert services for wetlands delineation, electrical design, environmental engineering, etc. Cultural Resource Management firms are knowledgeable enough to usher an applicant through the necessary documentation.

In 2016, the Wheelock Tract Solar Project’s developer did just that, hiring an archaeological consultant team. The Planning Board also used its 53G authority to hire its own archaeological third-party reviewer. The major change in circumstances with the Bylaw is that there is a clearer, more straightforward process for notifying the Historical Commission, Massachusetts Historical Commission, and Tribal Historic Preservation Officers.

The Bylaw now also requires that the applicant both **identify** adverse effects and **mitigate** the adverse effect, a crucial step missing from the first version of the Bylaw. Identification without mitigation makes no sense and fails to achieve the ultimate aim of historic preservation. By requiring a mitigation plan, the Bylaw now communicates to applicants that the Town Zoning is looking for a meaningful historic preservation plan. The Bylaw, importantly, does not limit the applicant by predetermining what kind of mitigation must be provided. Instead, the applicant is allowed to assess the property and make a proposal that makes the most sense for the particular property and the data. Flexibility is built into the process.

Achieving Benefits and Aims: The Bylaw requires that large-scale solar developments on Forest Conservation tracts be assessed for historic property adverse effects. Most of the parcels eligible for large-scale solar projects are currently either public property or privately-held forestry land. As the *Introduction to Indigenous Cultural Sites in Shutesbury* and the above discussion indicate,

these land tracts possess a variety of historic properties, including possibly both Indigenous and early settler features.

Forested tracts in Shutesbury that contain Indigenous stone structures are potentially eligible for listing as part of a multi-site district on the National Register of Historic Places. Settler stone works (e.g., stone walls, cellar holes, foundations, millworks), which are well known to exist, are also eligible for NRHP listing, either on their own as single sites or as part of a larger historic district. Some settler stone works on forested tracts are related historically to properties already evaluated by the MHC for NRHP nomination.

The creation of historic districts and the nomination of individual or multiple sites to the NRHP are limited by the ability to identify and document sites. Once they are demolished, they are gone forever. While the MHC has thoroughly inventoried roadside historic properties, no systematic inventory has been conducted of sites on the many large tracts of Forest Conservation land in Shutesbury.

Until recently, there were little or no development opportunities that might have an adverse effect on historic properties apart from forestry's relatively low impact. The advent of large-scale solar projects has created a new circumstance where these forest tracts are now possibly subject to industrial-scale development that could destroy many historic properties. This is a new situation as compared to the status-quo where there are no large-scale ground disturbance activities.

The Solar Bylaw creates an important and critical opportunity for historic preservation to become part of the community's zoning efforts. It also serves to ensure that the forest interiors in our community receive the same investigative efforts that have already been devoted to the Roadside Rural, Town Center, and Lake Wyola areas, where intensive inventories of historic properties already exist.

There is a long-standing precedent, well-established in case law, for local preservation bylaws. While the Solar Bylaw is not a "preservation bylaw" or a "historic district bylaw," it does serve some of the aims that these kinds of statutory tools serve. In 1978, the US Supreme Court, in its landmark decision, *Penn Central Transportation Co v. City of New York*, 438 U.S. 104 (1978), recognized that preserving historic resources is "an entirely government goal." At the state level, the MHC has strongly advocated for local statutes and bylaws, such as preservation regulations and historic districts, that match the unique needs and qualities of the communities.

Balancing Costs and Benefits: One way of thinking about the cost-benefit analysis for historic preservation provisions in the Bylaw is to think about scale and proportionality. Regulatory requirements for residential development, for example, are not on the same scale, both in terms of size and costs, as a utility-scale solar project. Large-scale solar projects involve many acres of impact and can cost tens of millions of dollars for installation. A single solar project can potentially affect more than 20 acres, between shade reduction, access roads, stormwater systems, auxiliary buildings, and arrays. Permitting for a large-scale solar project requires applicants to engage consultants and subcontractors for surveys, wetlands delineations, and other design tasks.

The Solar Bylaw requires the applicant to conduct a surface survey and some other ancillary investigations to determine if there is an adverse effect on a historic property. The cost of this investigation would amount to a tiny fraction of the overall costs of a large-scale solar project. If there is an adverse effect on a historic property, the applicant is allowed to propose a mitigation plan which does not necessarily have to change the project footprint (though it could). While it is

true that zoning for other town projects, such as residential projects, does not have this type of requirement, it is equally true that there is no other large-scale development category currently viable in Shutesbury, which is as land-intensive as large-scale solar development. Thus, the layers of review for historic property protection are both reasonable and proportional to the project type.

Historic preservation, on the other hand, potentially benefits the entire community. Identifying and preserving historic structures can help to create a historically-grounded, informative, aesthetically pleasing community landscape. Historic Districts, as stated in MGL Chapter 40C, preserve and protect the distinctive characteristics of places significant in the history of the Commonwealth and its communities; maintains and improves the settings of those places, and encourage new designs compatible with existing sites in the district. Benefits of historic districts include:

- Saving the character of the community;
- Protecting historic properties from demolitions and inappropriate development;
- Assuring that the historic built environment will be there for future generations to enjoy;
- Providing a visual sense of the past;
- Creating pride in the community;
- Creating neighborhood stabilization;
- Providing schoolchildren with educational opportunities.

Because many types of historic properties on Forest Conservation tracts are potentially eligible for the National Register for Historic Places (NRHP) should they be properly identified and documented, the Bylaw achieves critical preservation goals.

The Historical Commission is interested in possibilities for appropriate historic preservation, including options for future identification of historic properties that have not been inventoried. Historic preservation is a long-term process. Identification today may lead to future projects. We are deeply appreciative of the Town's Zoning Bylaws, which create opportunities for surveys of Forest Conservation tracts subject to development and, hopefully, for historic preservation to become part of the discussion when weighing the benefits of development to the community. While individual landowners own their own property, they do not own our collective memory, culture, and heritage. We hope reasonable preservation regulation will lead to productive dialogues and future initiatives, ultimately enriching and enhancing our community's quality of life.

The National Historic Preservation Act

As explained in fuller depth in the *Introduction to Indigenous Cultural Sites in Shutesbury*, all development projects, whether public or private, are subject to Section 106 of the NHPA if they require some form of federal action or *undertaking*. "Section 106" has become a shorthand term for the whole body of regulations and laws that carefully define how Tribal authorities and federal agencies interact around the NHPA. Section 106 is the set of provisions of the federal statute that ensures that development projects do not destroy Indigenous historic properties without Tribal input. Every year, thousands of development projects across the country are subject to the NHPA Section 106 regulations. Because of this, cultural resource management as a consulting industry has flourished.

Whether it be a permit, a funding source, or a project on federally owned land, **any federal undertaking** can trigger this process. It does not have to be a direct action that involves ground disturbance activities. This process is not dependent publicly financing or public property: the statutory requirements involve the federal agency and the Tribes, even for private projects.

As discussed in the *Introduction to Indigenous Cultural Sites in Shutesbury*, Section 106 of the NHPA is a civil rights statute that reasserts Tribal sovereignty as independent nations vis-à-vis the federal government and provides a process for Indigenous communities to advocate for the protection of Traditional Cultural Properties. The NHPA, and its amendments and regulations, were created to recognize that the federal government owes Tribes a duty for past failures and harms.

Section 106 of the NHPA requires applicants to notice the Massachusetts Historical Commission and any federally-recognized Tribes that ascribe a cultural or historical relationship to the area under development. Consultation is **required** with any federally-recognized Tribe that responds to the request for comment. Section 106 regulations also allow state-recognized Tribes to request involvement. The local government and the public are also important stakeholders in the process. Section 106 requires that the consultation include efforts to reach mutually-agreeable outcomes, including a mitigation plan and site monitoring.

The federal regulations for Section 106 consultation, established by the Advisory Council on Historic Preservation, require “reasonable and good faith” efforts by applicants and federal agencies. “Consultation” with THPOs is generally understood to include face-to-face meetings. The ACHP guidelines indicate:

“Consultation constitutes more than simply notifying an Indian tribe about a planned undertaking. The ACHP views consultation as a process of communication that may include written correspondence, meetings, telephone conferences, site visits, and e-mails.”²

Recommended best practices include: early Tribal involvement, plans to address concerns about the confidentiality of data, reasonable and good-faith efforts to identify Tribes that may attach religious and other cultural significance to a site, respectful dialogue, and efforts to ensure Tribes have a reasonable opportunity to identify Traditional Cultural Properties and participate in the resolution of adverse effects. Figure 1 shows a process recommended by the federal government for Tribal review of culturally-sensitive data for a project.

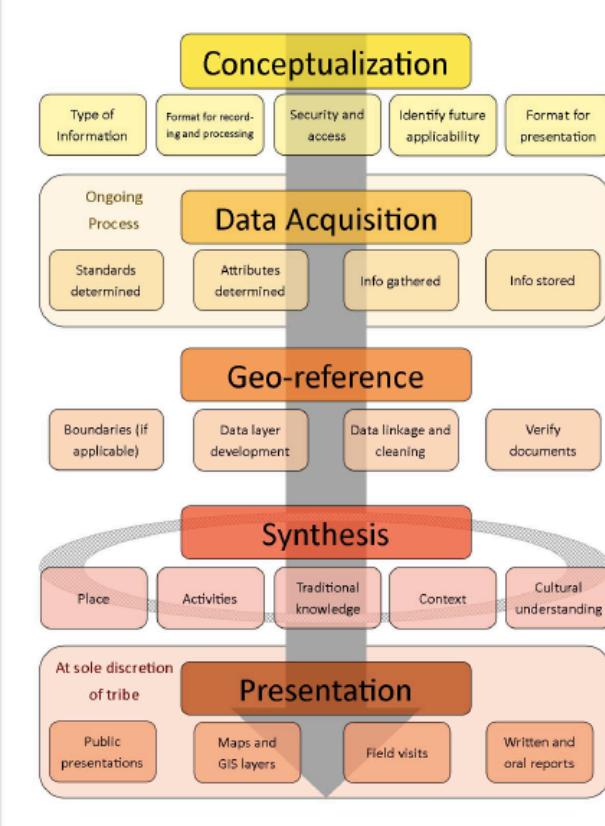


Figure 1. Template for Culturally-Sensitive Indigenous Data Collection and Retention³

The values underlying the Section 106 process are spelled out in a landmark publication by the US Department of the Interior entitled "Bulletin 38" (see *Introduction to Indigenous Cultural Sites in Shutesbury*). This policy document arose out of a recognition that preservation professionals often evaluate historic properties through the lens of their own implicit cultural biases. Bulletin 38 describes how preservation professionals can engage with traditional communities to discover historical and culturally important issues. Since its publication in the 1980s, Bulletin 38 is a "best practices" roadmap for how federal agencies and archaeologists can consult with Indigenous authorities about the preservation of their Traditional Cultural Properties, that is, properties that are of cultural, ceremonial, or historical relevance to an Indigenous community. Appendices E and F contain additional information about the Section 106 process.

The Section 106 process does **not** mean that a project will be defeated or that the Tribal consultants decide a project's outcome. Instead, this process attempts to resolve potential differences, which may involve either avoiding or mitigating harm to cultural properties. At a minimum, developers and stakeholders each make their case to arrive at an agreement. Section 106 creates a process whereby the State Historic Preservation Office, the local Historical Commission, Tribal Historic Preservation Officers, and the public can give input. Sometimes, projects may undertake additional investigations. Tribal experts may conduct site visits, monitor construction activities, and advocate if they have concerns. Sometimes, a mitigation plan resolves the adverse effect. The process may, but need not, result in an NRHP eligibility determination. The consultation results in a

Memorandum of Agreement (MOA) detailing the parties' agreement on measures to resolve adverse effects. The ACHP acts as a clearinghouse for Section 106 information, including an online library of resources.⁴

Although large-scale solar projects on private land are permitted at the local level (via Special Permit by the Shutesbury Planning Board), they may also require federal undertakings such as federal permits -- either before or after the approval of the local Special Permit. To assist the Town in decision-making, the Historical Commission has investigated federal undertakings or "hooks" that trigger an NHPA Section 106 process.

US Army Corps of Engineers: Based upon our research, depending on the project's design, the US Army Corps of Engineers (USACE) may need to issue a permit. According to the Clean Water Act (CWA), the USACE has jurisdiction over waters of the US, including wetlands, streams, and other aquatic resources. Wetlands are defined as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."⁵ The US Army Corps' jurisdiction includes an analysis of flow characteristics and functions of tributaries and wetlands adjacent to the tributary.

US Army Corps of Engineers' Massachusetts General Permits are required when proposed development occurs in a jurisdictional area. Applicants are eligible to submit a permit application via the Self-Verification Notification Form (SV) only if there are no concerns regarding adverse effects, including adverse effects on historic properties. The Self-Verification Notification Form requires the applicant to check off that the project causes no adverse effects on historic properties. In other words, this form is only appropriate if the applicant is certain that there are no adverse effects on suspected historic properties, including suspected CSLs.

If there are suspected adverse effects on historic properties, applicants must submit the longer Preconstruction Notification (PCN) application. According to the USACE, "In cases where the Corps determines that the activity may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places (NRHP), the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied."⁶

The Preconstruction Notification procedure for private applicants includes providing documentation demonstrating that the applicant has notified the MHC and federally-recognized THPOs using the Historic Property Notification Form (See Appendix H). Before submitting the Preconstruction Notification application, the USACE requires this notification and documentation that appropriate NHPA Section 106 consultation has been completed.

US Environmental Protection Agency (EPA): The National Pollutant Discharge Elimination System (NPDES) Construction General Permit is administered via the US EPA for Massachusetts projects. Elsewhere in the U.S., states assume the authority for these permits, but the EPA continues to be the permitting body for Massachusetts. During the construction phase of solar projects, construction operators must apply for and be granted an EPA Construction General Permit or CGP. These permits occur for construction projects involving an acre or more ground disturbance and are common across the Commonwealth.

According to the EPA's Stormwater Manual, the NPDES Construction General Permit accomplishes its Section 106 obligations through a pre-application process where the applicant

engages in the required notifications and consultation **before** submitting the Notice of Intent for the EPA permit. The applicant must certify that they have complied with the regulations. See Appendix I for specific guidelines and worksheets. US EPA guidance notes:

"To address any issues relating to historic properties in connection with the issuance of this permit, EPA has developed the screening process in this appendix that enables construction operators to appropriately consider the potential impacts, if any, of their installation of stormwater controls on historic properties and to determine whether actions can be taken, if applicable, to mitigate any such impacts. Although the coverages of individual construction sites under this permit do not constitute separate Federal undertakings, the screening process in this appendix provides an appropriate site-specific means of addressing historic property issues in connection with EPA's issuance of the permit."⁷

Construction operators are required to follow screening procedures to ensure compliance with Section 106 of the NHPA. For example, applicants are given the following instructions:

"Where you are installing stormwater controls that require subsurface earth disturbance, and you cannot determine in Step 3 that these activities will not have effects on historic properties, then you must contact the relevant SHPO, THPO, or other tribal representative to request their views as to the likelihood that historic properties are potentially present on your site and may be impacted by the installation of these controls." (Appendix I, p. 3).

If it identifies an adverse effect on a historical property, the screening process requires the applicant to contact the State Historic Preservation Office and the appropriate Tribal Historic Preservation Offices. If the site operator determines any of the following three criteria to be true, after following the screening process, it would indicate this on the application (Notice of Intent or "NOI") accordingly and submit it to the EPA:

1. Not installing stormwater controls that require subsurface earth disturbance.
2. Prior professional cultural resource surveys or other evaluations have determined that historic properties do not exist, or prior disturbances have precluded the existence of historic properties.
3. After an assessment, a determination is made that the installation of any stormwater controls that require subsurface earth disturbance have no effect on historic properties.

After the Notice of Intent submission to the EPA, there is an automatic 14-day (previously 7-day) waiting period during which the SHPO, THPOs, or other Tribal representative may request that EPA hold authorization based on concerns about potential adverse effects to historic properties. The EPA will evaluate any such request and notify the applicant if any additional controls to address the adverse effects are necessary.

Where the project will involve installing stormwater controls that require subsurface earth disturbance, and it **cannot be determined** that these activities will have no effect on historic properties, the site operator must contact the relevant SHPO, THPOs, or other Tribal representative to request their views as to the likelihood that historic properties are potentially present on the site and may be impacted by the installation of these controls.

The site operator is required to submit certain information to the appropriate SHPO, THPOs, or other tribal representative to initiate a request for their opinion. If no response is received 15-days after receipt of the materials, the site operator may indicate this on its NOI and submit it.

If the applicable SHPO, THPO, or other tribal representative responds to the request with an indication that no historic properties will be affected by the installation of stormwater controls at the site, then the site operator may indicate this on its NOI and no further screening steps are necessary.

As noted above, there is an automatic 14-day waiting period during which the SHPO, THPOs, or other tribal representative may still request that EPA hold authorization.

If the appropriate historic preservation authorities requested additional or further consultation within the 14-day response time, the site operator must respond with such information or consult to determine impacts to historic properties that may be caused by the installation of stormwater controls on the site and appropriate measures for treatment or mitigation of such impacts.

If, as a result of discussions with the applicable SHPO, THPOs, or Tribal representative, the site operator enters into a written agreement regarding treatment and/or mitigation of impacts at the site, then the site operator indicates this on its NOI and no further screening steps are necessary.

If, however, agreement on an appropriate treatment or mitigation plan cannot be reached within 30 days of response to a request for additional information or further consultation, the site operator may submit its NOI, but must indicate that measures to avoid or mitigate effects have not been negotiated.

Again, the SHPO, THPO, or other Tribal representative may still request that EPA hold authorization within the 14-day NOI waiting period. In coordination with the ACHP, the EPA is supposed to evaluate any such request and notify the site operator if any additional measures to address adverse effects to historic properties are necessary.⁸

The EPA has created its own streamlined process for Section 106 compliance. This process, however, does not fully align with the wording of the NHPA and ACHP regulations. In particular, the 14-day waiting period is so short that most projects fail to come to the notice of the MHC and THPOs. The NHPA regulations mandate a 30-day response window.

The EPA makes tools, worksheets, and manuals available to the public to aid developers in notifying agencies.⁹

Takeaways: The requirements and aims of the Solar Bylaw are essentially identical to those required by federal law if there exists a federal undertaking and a potentially adverse effect on a historic property. This is not unusual as there are many examples where local, state, and federal statutes overlap. If there is a federal undertaking, such as a federal permit, then the Solar Bylaw does not create any additional regulatory burden on an applicant. The Solar Bylaw and MGL 40A, §3, cannot prevent or change Section 106 as federal law takes precedence over state and local statutes. If a large-scale solar project does not require a federal permit, then the Solar Bylaw achieves the same historic preservation and civil rights equity outcomes that the federal NHPA would have aimed for. Again, given that Section 106 is applied in literally thousands of development projects every year, the Solar Bylaw's requirements are not unusual, unachievable, or unreasonable. If Section 106 is required, the Solar Bylaw allows the Planning Board to require the developer to comply with all statutory requirements before approving the Special Permit.

Summary and Conclusions

This report, combined with the companion *Introduction to Indigenous Cultural Sites in Shutesbury*, creates a strong presumption that Shutesbury's large, forested tracts contain

many human-made structures, including both pre-colonial and early settler features. These structures are valuable historic resources. Neither current state law nor the Solar Bylaw automatically protects pre-colonial and settler period sites. The Solar Bylaw gives the Town a valuable tool that serves the public good. As advocates for historical preservation for our community, the Historical Commission is interested in the identification and preservation of all historic properties in Shutesbury, including those yet to be identified. Early settler period structures, such as foundations, mill sites, and stonewalls, are commonly recognizable. Indigenous stone structures, on the other hand, are less recognizable but just as valuable.

In a recently published review of best practices in the municipal solar zoning bylaws, the Pioneer Valley Planning Commission's *Solar Best Practices Guide* (2020) includes historic preservation as a recommended component of solar zoning.¹⁰ This guide identifies historic preservation as one of the standards for solar siting review, along with design, environmental impact, public health, safety and welfare. The Pioneer Valley Planning Commission's guide also uses the Shutesbury Solar Zoning Bylaw as a model for effective zoning. The Massachusetts Department of Energy Resources (DOER) also published a 2004 guidance paper with a recommended model for municipal solar zoning bylaws. This DOER report also recommended provisions for identification and preservation of historic properties.¹¹ Historic preservation goals and requirements are thus being held up by government review bodies as important components to solar zoning requirements.

Besides the Shutesbury Solar Bylaw, many other municipal solar zoning bylaws in the Commonwealth include some consideration of historic preservation in their solar zoning regulations. Many require that applicants minimize impacts on historic resources. The Town of Athol, for example, requires the identification of stonewalls and historic features on applications. The Town of Boylston requires that the local Historical Commission approve the project. Shutesbury's Solar Bylaw provides more details than other communities' regulations, but it also allows the Planning Board to waive any requirements if the applicant can accomplish a similar outcome in a better way. The Shutesbury Solar Bylaw's requirement of consultation with the local Historical Commission is a recommended best practice.

Most importantly, each community must develop zoning practices that best match that community's unique characteristics and values. In guidance on municipal solar zoning regulations, the Massachusetts Department of Energy Resources recommends that the adoption of thoughtful design guidelines reconcile historic preservation and solar development.¹² The Shutesbury Solar Bylaw accomplishes just that. While the Solar Bylaw includes clear action steps for the initial assessment and consultation phases, it also allows applicants flexibility through the waiver process to ensure the most effective design.

The Historical Commission has begun to develop relationships with regional Tribes to develop appropriate policies and action steps toward identifying and preserving Indigenous cultural properties. Current Zoning Bylaws, including the Solar Bylaw, provide essential preservation tools that are both reasonable and practicable.

The Historical Commission notes that the Town's Zoning Bylaws require the consideration of historic preservation as a factor in Special Permits. As the permitting entity for Special Permits, the Planning Board will need to develop policies and procedures for implementing the Solar Bylaw. The Solar Bylaw clearly identifies pre-application actions required of the applicant, and the Public Hearing process allows the Planning Board, third-party reviewers, and the public to

have further input into the process. The Historical Commission hopes this position paper will help the Planning Board understand best approaches to implementing the Bylaw.

Large-scale solar projects may trigger Section 106 of the NHPA. Section 106 deals with both historic preservation and also social justice and equity. We strongly believe both of these values -- respect for history and commitment to social justice -- benefit and enhance our community. While the Section 106 process initiates at the federal level, the Solar Bylaw replicates the same efforts to arrive at mitigation plans that are agreeable to all parties: the public, the MHC, the town government, and Indigenous communities. The best outcome will be the product of early engagement and consultation with all statutorily-mandated parties. The Historical Commission hopes the Town will be good guardians of historic properties and ensure that Special Permit applicants cooperate in good faith with NHPA and Solar Bylaw regulations.

The Historical Commission finds that federal, state, and local statutes assign a unique consultative role for the Commission. While the Historical Commission does not have enforcement authority, it does have the capacity to participate in NHPA Section 106 reviews and make recommendations for the National Register of Historic Places. The Section 106 process is crucial as it is a federal process that acknowledges Indigenous communities' roles and rights. Federal agencies have liaison offices that handle these issues. By allowing the Historic Commission to be notified and offer comments on large-scale solar project Special Permit applications, the Bylaw creates a statutory role for the Historical Commission in assessing a large-scale solar energy projects' effect on historic properties. Upon written notification by an applicant, the Historical Commission will provide site-specific feedback and recommendations.

The Historical Commission congratulates our community for wisely enacting a Solar Bylaw that incorporates social justice and equity in historic preservation efforts. The requirements for notification to, and hopefully consultation with, Tribal authorities represent an embrace of the civil right and social justice aims of the National Historic Preservation Act. It also allows a discussion about Indigenous Traditional Cultural Properties with official representatives of Indigenous Tribal government.

Requiring direct engagement with THPOs is a critical step toward undoing Indigenous erasure and ethnocentrism, harmful effects. Ethnocentrism refers to evaluating other cultures according to preconceptions originating in the standards and customs of one's own culture. Ethnocentrism is a problem in historic preservation, especially where the dominant Euro-American culture attempts to define the cultural reality of ethnic minority groups. Bulletin 38 (p. 4) advises, "It would be ethnocentric in the extreme to say that 'whatever the Native American group says about this place, I can't see anything here so it is not significant,' or 'since I know these people's ancestors came from Siberia, the place where they think they emerged from the earth is of no significance.'"¹³ Many of us -- including residents, town officials, historians and archaeologists -- have firmly rooted attitudes and beliefs about the history of our community. As we all work toward a more inclusive and just society, it is incumbent upon us to challenge our assumptions and possible implicit biases. We are proud that our community has chosen to undertake this effort, as reflected in the Solar Bylaw.

Recommendations

We urge our town officials to recognize Tribes' status as autonomous, sovereign governments and to seek ways to engage with Tribal government in a collaborative, respectful partnership. The Historical Commission supports consultation with Indigenous communities, including Tribal

representatives. If appropriate, the Commission welcomes working with Tribes to nominate Traditional Cultural Properties for inclusion in the National Register of Historic Places.

The Commission offers the following recommendations, best practices, and historic property review standards for large-scale solar Special Permit applications. When reviewing these Special Permit applications, we recommend that the Shutesbury Planning Board consider the following actions:

General Recommendations:

1. As the Historical Commission has a statutory role in reviewing historical and archaeological investigations, the Planning Board is urged to involve the Commission in reviewing applications during the Public Hearing process.
2. The consultation and notification procedures outlined in the Solar Bylaw and the Section 106 guidelines can begin at any time, especially before Special Permit application submission. We strongly encourage early consultation to facilitate an efficient process. The Historical Commission invites Town boards, the Applicant, and the landowner to use the Historical Commission as a resource in this process.
3. Per Section 8.10-3 of the Town Zoning Bylaws, ensure that applicants comply with federal and state historic preservation regulations and do not grant waivers should they substantially affect historic preservation goals.
4. Use the Planning Board's statutory 53G authority to contract with both an archaeologist and a THPO to assist in deliberations and project review. The Shutesbury Historical Commission finds that the expertise of a THPO is indispensable for construction-phase cultural resources site monitoring. **An archaeologist is not a suitable substitute for the identification and monitoring of Traditional Cultural Properties.**
5. Should either the applicant or a subcontractor fail to do its due diligence regarding Project Notifications for Section 106 processes, consider finding the Special Permit application ineligible based on Section 8.10-3 of the Solar Bylaw or place enforcement mechanisms in the Order of Conditions. The early involvement of all parties in the process will reduce unnecessary construction delays.

Notification Standards:

6. To demonstrate a reasonable level of effort, applicants should at the very least provide evidence of having sent written notification to all Massachusetts state-recognized Tribes, and the federally-recognized Tribes of the New England region. Other Tribes may also be appropriate for notification. If Tribes provide responses, the applicant should provide documentation reflecting the communication efforts before the conclusion of the Public Hearing process.
7. Verify that the applicant has submitted the proper notifications to the Massachusetts Historical Commission.
8. If the applicant contends that completing the EPA or USACE screening checklists is the responsibility of a subcontractor, the Planning Board can still require that the applicant, as the primary project proponent, take responsibility for the notification and consultation process. It is important to note that the Section 106 consultation process could result in a substantive change in project design.

Consultation and Mitigation Process Standards:

9. If any Tribe expresses an interest in the project, the applicant should present documentation of how it made good faith efforts to consult with that Tribal government.
10. The mitigation plan should clearly identify the adverse effects on historic properties and explain how the proposed mitigation plan is proportional and reasonable. The plan should clearly describe the type of mitigation effort: avoidance, minimization, or alternative mitigation.
11. Before the Planning Board approves any final mitigation plan, ensure all statutorily-notified parties who have expressed in writing an interest (i.e., Historical Commission, MHC, THPOs), are allowed to review the investigation data and the APE, including conducting a site visit.
12. Before approving any final mitigation plan, verify that the applicant has devoted an appropriate level of effort in reaching a mutually-agreeable result with the consulting parties. We recommend that any application be found incomplete if it does not document due diligence in consultation with Tribal representatives.
13. If Section 106 consultation between Tribes and federal agencies is initiated, find the application to be ineligible based on Section 8.10-3 of the Solar Bylaw until that consultation has resulted in a Memorandum of Agreement, the legally-binding outcome of successful Section 106 consultation. This is important because the consultation process could significantly change the footprint and design of any project.
14. Mitigation measures should be fully enforceable through permit conditions, agreements, or other legally-binding instruments. The Planning Board should add conditions to a Special Permit that allow for construction-phase cultural resource monitoring and enforcement of a mitigation plan.

Appendix A Abbreviations

ACHP: Advisory Council on Historic Preservation

APE: Area of Possible Effect

BP: Before Present

CE: Common Era

CGP: US EPA Construction General Permit

CSL: Ceremonial Stone Landscape

DOI: Department of Interior

EPA: US Environmental Protection Agency

MACRIS: Massachusetts Cultural Resource Information System

MGL: Massachusetts General Law

MHC: Massachusetts Historical Commission

NHPA: National Historic Preservation Act

NPDES: National Pollutant Discharge Elimination System

NRHP: National Register of Historic Places

SHPO: State Historic Preservation Office/Officer

TCP: Traditional Cultural Property

THPO: Tribal Historic Preservation Office/Officer

USACE: U.S. Army Corps of Engineers

USET: United Southern and Eastern Tribes

Appendix B Applicable Statutes and Indigenous Resolutions

MGL Part 1, Title VII, Chapter 40, §8D:

Historical Commission; establishment, powers and duties. A city or Town which accepts this section may establish an historical commission, hereinafter called the Commission, for the preservation, protection and development of the historical or archeological assets of such city or Town. Such Commission shall conduct researches for places of historic or archeological value, shall cooperate with the state archeologist in conducting such researches or other surveys, and shall seek to coordinate the activities of unofficial bodies organized for similar purposes, and may advertise, prepare, print and distribute books, maps, charts, plans and pamphlets which it deems necessary for its work. For the purpose of protecting and preserving such places, it may make such recommendations as it deems necessary to the city council or the selectmen and, subject to the approval of the city council or the selectmen, to the Massachusetts historical commission, that any such place be certified as an historical or archeological landmark. It shall report to the state archeologist the existence of any archeological, paleontological or historical site or object discovered in accordance with section twentyseven C of chapter nine, and shall apply for permits necessary pursuant to said section twenty-seven C. Any information received by a local historical commission with respect to the location of sites and specimens, as defined in section twenty-six B of chapter nine, shall not be a public record. The Commission may hold hearings, may enter into contracts with individuals, organizations and institutions for services furthering the objectives of the Commission's program; may enter into contracts with local or regional associations for cooperative endeavors furthering the Commission's program; may accept gifts, contributions and bequests of funds from individuals, foundations and from federal, state or other governmental bodies for the purpose of furthering the Commission's program; may make and sign any agreements and may do and perform any and all acts which may be necessary or desirable to carry out the purposes of this section. It shall keep accurate records of its meetings and actions and shall file an annual report which shall be printed in the case of towns in the annual town report. The Commission may appoint such clerks and other employees as it may from time to time require.

MGL Chapter 30 §61. Determination of impact by agencies; damages to the environment; prevention or minimization; foreseeable climate change impacts; definition applicable to this section and §62.

All agencies, departments, boards, commissions and authorities of the commonwealth shall review, evaluate, and determine the impact on the natural environment of all works, projects or activities conducted by them and shall use all practicable means and measures to minimize damage to the environment. Unless a clear contrary intent is manifested, all statutes shall be interpreted and administered so as to minimize and prevent damage to the environment. Any determination made by an agency of the commonwealth shall include a finding describing the environmental impact, if any, of the project and a finding that all feasible measures have been taken to avoid or minimize said impact.

As used in this section and section sixty-two, "damage to the environment" shall mean any destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth and shall include but not be limited to air pollution, water pollution, improper

sewage disposal, pesticide pollution, excessive noise, improper operation of dumping grounds, reduction of groundwater levels, impairment of water quality, increases in flooding or storm water flows, impairment and eutrophication of rivers, streams, flood plains, lakes, ponds, or other surface or subsurface water resources; destruction of seashores, dunes, marine resources, underwater archaeological resources, wetlands, open spaces, natural areas, parks, or historic districts or sites. Damage to the environment shall not be construed to include any insignificant damage to or impairment of such resources.

National Historic Preservation Act of 1996, Section 106:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.

National Historic Preservation Act of 1996, Section 110(k):

Each Federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant who, with intent to avoid the requirements of section 106, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant.

ACHP Regulations: § 800.2 Participants in the Section 106 process.

800.2(2)(ii): Consultation on historic properties of significance to Indian tribes and Native Hawaiian organizations. Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party.

800.2(c)(3) Representatives of local governments. A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party. Under other provisions of Federal law, the local government may be authorized to act as the agency official for purposes of section 106.

Municipal Zoning Bylaw Rural Siting Principles Section 8.3-2:

Preserve stone walls and hedgerows. These traditional landscape features define outdoor areas in a natural way and create corridors useful for wildlife. Using these features as

property lines is often appropriate, as long as setback requirements do not result in constructing buildings in the middle of fields.

Municipal Special Permit Review Criteria 9.2-2.K: *Integration of the project into the existing terrain and surrounding landscape by minimizing impacts on wetlands, steep slopes, and hilltops; protecting visual amenities and scenic views; preserving unique natural or historical features; minimizing tree, vegetation, and soil removal; minimizing grade changes, and integrating development with the surrounding neighborhood in a manner that is consistent with the prevailing pattern, design, and scale of development and that protects historic structures and features.*

Municipal Solar Zoning Bylaw:

Section 8.10-3.F. Mitigation for Disruption of Historic Resources and Properties: Historic resources and properties, such as cellar holes, farmsteads, stone corrals, marked graves, water wells, or pre-Columbian features, including those listed on the Massachusetts Register of Historic Places or as defined by the National Historic Preservation Act, shall be excluded from the areas proposed to be developed, including clearing for shade management. A written assessment of the project's effects on each identified historic resource or property and ways to avoid, minimize or mitigate any adverse effects shall be submitted as part of the Special Permit. A suitable buffer area shall be established on all sides of each historic resource. The Special Permit may be conditioned to effectuate and make enforceable this requirement.

Section 8.10-4.A.3. Locations of all known, mapped or suspected Native American archaeological sites or sites of Native American ceremonial activity. Identification of such sites shall be based on responses, if any, to written inquiries with a requirement to respond within 35 days, to the following parties: all federally or state recognized Tribal Historic Preservation Officers with any cultural or land affiliation to the Shutesbury area; the Massachusetts State Historical Preservation Officer; tribes or associations of tribes not recognized by the federal or state government with any cultural or land affiliation to the Shutesbury area; and the Shutesbury Historical Commission. Such inquiries shall serve as a notice to the aforesaid parties and shall contain a plan of the project, specific identification of the location of the project, and a statement that permitting for the project is forthcoming. Accompanying the site plan shall be a report documenting such inquiries, the responses from the parties, a description of the location and characteristics, including photographs, of any Native American sites and the outcomes of any additional inquiries made based on information obtained from or recommendations made by the aforesaid parties. A failure of parties to respond within 35 days shall allow the applicant to submit the site plans.

USET Resolution 2003:022, Sacred Landscape Within the Commonwealth of Massachusetts: *Resolved: the USET Board of Directors support the efforts of its member Tribes to partner with the pertinent towns and call upon the towns to join the Tribes in preservation of this unique and irreplaceable Indian resource.*

USET Resolution 2009:057, Partnerships to Preserve Sacred Ceremonial Landscapes: *Resolved: the USET Board of Directors supports those member Tribes who wish to partner with individual landowners, agencies, towns, counties, and states that have stewardship of these*

properties, in order to create historic preservation initiatives that will support the permanent protection of such sacred landscapes.

USET Resolution 2007:037



UNITED SOUTH AND EASTERN TRIBES, INC.

USET Resolution No. 2007:037

SACRED CEREMONIAL STONE LANDSCAPES FOUND IN THE ANCESTRAL TERRITORIES OF UNITED SOUTH AND EASTERN TRIBES, INC. MEMBER TRIBES

WHEREAS, United South and Eastern Tribes, Incorporated (USET) is an intertribal organization comprised of twenty-four (24) federally recognized Tribes; and

WHEREAS, the actions taken by the USET Board of Directors officially represent the intentions of each member Tribe, as the Board of Directors comprise delegates from the member Tribes' leadership; and

WHEREAS, within the ancestral territories of the USET Tribes there exists sacred ceremonial stone landscapes and their stone structures which are of particular cultural value to certain USET member Tribes; and

WHEREAS, for thousands of years before the immigration of Europeans, the medicine people of the USET Tribal ancestors used these sacred landscapes to sustain the people's reliance on Mother Earth and the spirit energies of balance and harmony; and

WHEREAS, during and following the Colonial oppression of Southern and Eastern Tribes, many cultural and ceremonial practices, including ceremonial use of stones and stone landscapes, were suppressed; and

WHEREAS, the properties which comprise these sacred landscapes are threatened by the encroachments of imminent development; and

WHEREAS, whether these stone structures are massive or small structures, stacked, stone rows or effigies, these prayons in stone are often mistaken by archaeologists and State Historic Preservation Offices (SHPOs) as the efforts of farmers clearing stones for agricultural or wall building purposes; and

WHEREAS, archaeologists and SHPOs, categorically thereafter, dismiss these structures as non-Indian and insignificant, permitting them to be the subjects of sacrifice of archaeological dissection and later destruction during development projects; and

WHEREAS, Federal laws exist, including, but not limited to, Section 106 of the National Historic Preservation Act (NHPA) as amended with 36 CFR Part 800, the American Indian Religious Freedom Act, Executive Order 13007, and all other related laws, rules, regulations and executive orders that support the rights of Tribal Nations, but have yet to proactively influence protection of sacred ceremonial stone landscape sites; and

WHEREAS, many sacred ceremonial stone landscapes are on lands controlled by or are within projects which are advised, funded or permitted by government departments and agencies such as the Department of the Interior, Department of the Army, Department of Agriculture, National Park Service, U.S. Forest Service, U.S. Fish & Wildlife Service, Army Corps of Engineers, Federal Aviation Administration, Federal Communications Commission, National Oceanic & Atmospheric Administration, the Advisory Council on Historic Preservation, and the National Register of Historic Places; and

WHEREAS, claiming them as products of farm clearing, professional archaeologists and the SHPOs annually pass judgment on the significance and potential protection of these sacred ceremonial stone landscapes and their structures within USET ancestral territories; therefore, be it

USET Resolution No. 2007:037

RESOLVED the USET Board of Directors requests that all relevant government departments and agencies actively and formally facilitate consultation with the federally recognized Indian Tribes of the region regarding the sacred ceremonial stone landscapes; and, be it further

RESOLVED the USET Board of Directors recommends that the Federal departments and agencies facilitate regional workshops between Tribes, State Historic Preservation Offices, archaeologists and Federal Departments and Agencies to facilitate a better comprehension of these concerns and a correction in these dismissive and destructive local policies; and, be it further

RESOLVED the USET Board of Directors requests a draft Federal Government enforcement policy for the protection of the National Historic Preservation Act under Executive Order 13007; and, be it further

RESOLVED the Federal Government will provide the member Tribes of United South and Eastern Tribes, Inc. with assistance, when requested, for the protection of historical sites and sacred landscapes within their ancestral territories.

CERTIFICATION

This resolution was duly passed at the USET Impact Week Meeting, at which a quorum was present, in Arlington, VA, on Thursday, February 15, 2007.


Brian Patterson, President
United South and Eastern Tribes, Inc.


Cheryl Douring, Secretary
United South and Eastern Tribes, Inc.

"Because there is strength in Unity"

Appendix C Definitions

Advisory Council on Historic Preservation (AHP): *The ACHP is an independent federal agency that oversees Section 106 review and issues the regulations that implement it. The ACHP must be notified when an undertaking may adversely affect a historic property. The ACHP exercises its discretion in deciding to participate in the consultation process. The ACHP issues formal comments to the head of an agency when an agreement is not reached on how to resolve an undertaking's adverse effects. The ACHP also participates in the development of program alternatives under the regulations, and coordinates with federal agencies and consulting parties on these program alternatives.*

Area of Potential Effects (APE): *The area of potential effects or APE means 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. The APE is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking." 36 CFR 800.16(d).*

ArcGIS: *ArcGIS is a geographic information system for working with maps and geographic information maintained by the Environmental Systems Research Institute (ESRI).*

Ceremonial Stone Landscapes (CSLs): *USET, United Southern and Eastern Tribes, Inc., is a non-profit, intertribal organization of over 30 federally-recognized Tribes along the eastern coast of the United States which was formed in order for these Nations to be able to speak with one voice on issues of concern to them all. Ceremonial Stone Landscapes is the term used by USET, for Indigenous stone work sites in eastern North America. Elements often found at these sites include dry stone walls, rock piles (sometimes referred to as cairns or stone groupings), u-shaped structures, standing stones, stone chambers, unusually-shaped boulders, split boulders with stones inserted in the split, and boulders propped up off the ground with smaller rocks (balanced rocks), marked stones, petroglyphs, stone circles, effigies (e.g., turtles, serpents), mounds, platforms, enclosures, and niches¹⁴*

The variety of stone structures requires expertise to identify, and TCP of Indigenous Tribes, requires a designated representative of the Tribe to do so.

Cultural Resources: *Cultural resources can be defined as physical evidence or place of past human activity: site, object, landscape, structure; or a site, structure, landscape, object or natural feature of significance to a group of people traditionally associated with it.*

Types of cultural resources can include: archeological resources, historic structures, cultural landscapes, ethnographic resources, and artifacts that manifest human behavior and ideas. "These nonrenewable resources may yield unique information about past societies and environments, and provide answers for modern day social and conservation problems. Although many have been discovered and protected, there are numerous forgotten, undiscovered, or unprotected cultural resources in rural America."¹⁵

Cultural Resource Management: *Cultural Resource Management (CRM) involves inventorying sites, evaluating them, and sometimes mitigating the adverse effects of development projects and construction. CRM involves: archaeological surveys/inventories, recording historical buildings, consulting with Native American Tribes, evaluating resources according to Massachusetts and federal standards, and providing advice to landowners and developers.*

Federal undertaking per Section 106 of NHPA: *A Federal undertaking is a project, activity, or program either funded, permitted, licensed, or approved by a Federal Agency. Undertakings may take place either on or off federally controlled property and include new and continuing projects, activities, or programs and any of their elements not previously considered under Section 106.*

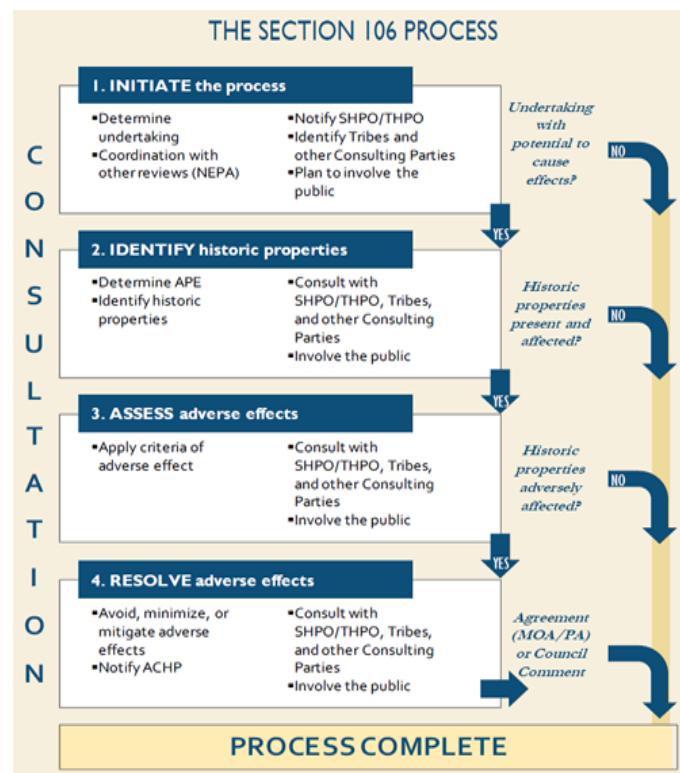
Indigenous: *Relating to or being a people who are the original, earliest known inhabitants of a region, or are their descendants. For this report, the term “Indigenous” is primarily used to describe the first peoples of the Western Hemisphere. We selected “Indigenous” because it can apply to all groups and is a term widely used internationally. “Indigenous” can be used to describe a group with a long history of settlement and connections to specific lands that has been adversely affected by colonialism, marginalization, exploitation, and displacement. We capitalize “Indigenous” as a sign of respect.¹⁶*

National Register of Historic Places: *The National Register of Historic Places is the nation's official list of properties recognized for their significance in American history, architecture, archaeology, engineering, and culture. It is administered by the National Park Service, which is part of the Department of the Interior. The Secretary of the Interior has established the criteria for evaluating the eligibility of properties for the National Register. A historic property need not be formally listed in the National Register in order to be considered under the Section 106 process. Simply coming to a consensus determination that a property is eligible for listing is adequate to move forward with Section 106 review. When historic properties may be harmed, Section 106 review usually ends with a legally binding agreement that establishes how the federal agency will avoid, minimize, or mitigate the adverse effects. Section 106 reviews ensure federal agencies fully consider historic preservation issues and the views of the public during project planning. Section 106 reviews do not mandate the approval or denial of projects.*

Phase I Pedestrian Survey: *A Phase I archaeological survey is often the first step in the archaeological process. The goal of a Phase I archaeological survey is to determine the presence or absence of archaeological resources within a project area. These investigations include background research, field investigations, artifact processing, and report preparation.*

NHPA Section 106 Process ("Section 106"): *In the National Historic Preservation Act of 1966 (NHPA), Congress established a comprehensive program to preserve the historical and cultural foundations of the nation as a living part of community life. Section 106 of the NHPA is crucial to that program because it requires consideration of historic preservation in the multitude of projects with federal involvement that take place across the nation every day. Section 106 requires federal agencies to consider the effects of projects they carry out, approve, or fund on historic properties. Also, federal agencies must provide the ACHP an opportunity to comment on such projects prior to the agency's decision on them. Section 106 requires tribal consultation in all steps of the process when a federal agency project or effort may affect historic properties that are either located on tribal lands, or when any Native American tribe or Native Hawaiian organization attaches religious or cultural significance to the historic property, regardless of the property's location. Because of Section 106, federal agencies must assume responsibility for the consequences of the projects they carry out, approve, or fund on historic properties and be publicly accountable for their decisions.*

Section 106 Consultation Process:



State Register of Historic Places. This is a published resource available for purchase through the website for the Secretary of State.

Traditional Cultural Properties: A Traditional Cultural Property (TCP) is any physical property or place that is of significance to a culture, e.g. a district, site, building, structure, or object. A TCP may be eligible for inclusion in the National Register of Historic Places (NRHP) based on its level of significance, as determined by the culture with which it is associated. Significance is often determined by (but not limited to): associations with the cultural practices, traditions, beliefs, lifeways, arts, crafts, or social institutions of a living community. TCPs are rooted in a traditional community's history and are important in maintaining the continuing cultural identity of the community

TCP Identification: TCPs are best identified by consulting directly with official representatives of members of a traditional community. Members often have a special perspective on properties that play important roles in their historically rooted beliefs, customs, and practices. While certain properties may be documented in the historic literature or through previous ethnographic or archeological studies, information on other properties may have only been passed down through generations by oral history or practice. For Indian Tribe and Native Hawaiians, knowledge of TCP locations may reside with tribal elders or traditional practitioners who may retain specific confidential information regarding the location of properties and the special qualities associated with them. Sensitivity to these issues may be necessary during any identification and documentation process. Indian Tribes and Native Hawaiians are acknowledged by the NHPA to have the final word on identification of their TCP. That is, while archaeologists may conclude something is TCP, they may not conclude something is NOT TCP.

Traditional Communities: *A traditional community is one that has beliefs, customs, and practices that have continued over time, been passed down through the generations, are shared, and help to define the traditions of the community.*

Appendix D Tribal Historic Preservation Office Correspondence (2016)



Tribal Historic Preservation Office
Wampanoag Tribe of Gay Head (Aquinnah)

April 11, 2016

Town of Shutesbury
Shutesbury Planning Board
Town Hall
Shutesbury, Massachusetts
Attn: Chairman Deacon Bonnar
Via: email: planning@shutesbury.org

Re: Shutesbury Solar Array

Dear Chairman Bonnar:

The Wampanoag Tribe of Gay Head (Aquinnah) has been made aware of the abovementioned project that is slated to be constructed in your town and we have cultural concerns that we wish the Town to consider during your decision process.

As part of the Algonquin language group, we have cultural connections with the indigenous Peoples, the Pocumtuck, of this area. Through the implementation of the National Historic Preservation Act we have done much work in Turner's Falls area on ceremonial stone features and the different components that comprise these landscapes.

It would appear from documents we have seen, that there may be impacts to certain features within the footprint of the solar array. We ask that the Town ensure that proper measures are taken to identify, avoid impacts and protect any cultural properties that could be affected by this construction and the surrounding areas where tree cutting may occur.

We have been successful in numerous other projects in protecting ceremonial stone landscapes by working with individuals and town boards in protecting cultural resources and the Tribe hopes we can collaborate with the Town of Shutesbury in the same spirit.

Please call (508)560-9014 or return email if you have any comments or questions.

Sincerely,

Bettina M. Washington

Bettina M. Washington

Tribal Historic Preservation Officer



August 15, 2016

Shutesbury Planning Board
Shutesbury, MA
Via: Email

Good evening,

I am not able to attend this evening's meeting but would like to submit this letter into the minutes.

I have followed this saga for the last 3 and half months. My first correspondence was sent via email to the Planning Board on May 2nd, I have submitted a copy of it with this letter. There are two sentences I want to bring to your attention. First, "the Wampanoag Tribe of Gay Head (Aquinnah) has not delegated its authority to any other person, government or Tribe in determining any features." Second, I offered that I could be "reached by email if the Tribe could be of any assistance to the Town of Shutesbury or its residents".

There are quite a few issues, that I feel need to go on the record. While these past few months have concerned this one project, as I said at the July 11th meeting, this was not my first visit to this area. These are places of significance and I foresee other developments/projects in the Town where we may find ourselves in similar positions. In that frame of mind, I am going to state the problems the Tribes have encountered in hopes things will go more smoothly in the future.

I still maintain, much could have been done to alleviate the problems and concerns had all parties sat down to discuss the issues. One of the reasons, if not the main reason, is that there is a lack of understanding of the rules, regulations and protocols this development has bought into play by the principal players. I find the lack of due diligence highly disturbing, especially in the archeological actions and reports. There are guidelines and rather than use those, between the proponents and the Town, you've tried to make a hybrid of concessions that has diluted and disrespected the determination process. It shows a complete lack of understanding of the consultation process. I find it incredulous that any archeological firm would neglect contacting tribal representatives in determining a TCP. Mr. Donta stated it would be best to work with the Tribes, yet this was not done.

I was contacted via phone by Mr. Lacy asking me if I could help the Town to determine whether a property held a Traditional Cultural Property (TCP). He explained that I would not be allowed to go to the actual site, my involvement would be reading a report and making a determination from the information within. I told him that would not be possible, as that is not how our Tribe makes TCP determinations. In addition, only Tribes should be making the declaration of TCP's; regardless of archeologists or anthropologists status. These are Tribal places and the Peoples have the knowledge and the responsibility to identify, preserve and protect when these places are known to them. I told him I really didn't know how else I could help him. At no time has the Tribe made any statement of expecting possible burial grounds or ceremonial stone landscapes. However, I did make the distinction at the July 11th meeting that if there were burials, that would be a whole separate issue and would bring in other parties, namely Massachusetts Historical Commission (MHC) and Massachusetts Commission on Indian Affairs. How this Planning Board wishes to handle the Commonwealth's law on suspected and known burial sites I cannot dictate, but I would certainly err on the side of caution. The Tribe's position is if it is suspected, we consider them burials. A burial or burials would be considered a TCP, however all TCP's are not burials. This has caused some confusion also. It would have been prudent to consider each of these conditions separately in my opinion. Either way, Tribal inspection is a necessity.

The archeological report has been condemned by two archeologists familiar with this area. It is beyond comprehension that the Turner's Falls Ceremonial Landscape determination of eligibility to the National Register of Historic Places (NRHP) was not mentioned in their report. Shutesbury falls well within the ceremonial stone landscape district defined by the determination. This was a ground breaking determination; the first time a ceremonial stone landscape was determined eligible east of the Mississippi. However, SWCA are not from this area and would not know the landscape. All the more reason to research. One word about the Secretary's Standards as I read in the minutes that "we do not meet the Secretary's Standards". We do not have to meet them. We hold special knowledge about our culture, we are trained by our People, our classrooms are at our Elder's feet and in the woods, swamps and shores of our Nations.

As for the MHC not having anything on their maps of cultural interest in the area of potential effect, it must be understood that because there is an absence of evidence, doesn't mean the area has been researched; it means nothing has been found or reported. It is not an absolute. In addition, MHC did not determine the Turner's Falls sight was eligible, the Keeper of the National Register made that determination. For all intents and purposes, if you want to know about ceremonial stone landscapes and TCP that may pertain to Native Americans, it is best you involve the Native Americans.

I'm not sure who or why Mr. Lacey said there was a THPO who said they could speak for the other Tribes, but I cannot imagine it was one of the Tribes we work with. Any and all tribes who hold cultural significance to an area have the right to consult. It shows a complete lack of disrespect for the sovereignty of tribes and lack of understanding of regulations, laws and rules that govern tribal interests.

By asking me to review a report and make a determination is not consultation, it is insultation. We do not allow non-tribal representatives to determine what is culturally relevant to our People, no matter how esteemed or how many letters follow their names. For too long we have had our culture taken and profited by others either monetarily or professionally, leaving the Native voice out of the picture all together. This is not a science report, though science may be applied at times, this is our culture. To treat it as anything else is an insult.

In closing, I am advising the Town of Shutesbury that whatever decision is made, TCP and/or Burial ground or not, the Wampanoag Tribe of Gay Head (Aquinna) will issue a challenge to the determination as we have not been allowed to determine the status of the property in question or determination of the extent of the area of potential effect through our cultural standards.

The last sentence of my email still stands: "I can be reached by email should the Tribe be of any assistance to the Town of Shutesbury and its residents." It appears much time and money has been spent when it would have been much easier to respectfully work together to preserve, protect and progress.

Sincerely,

Bettina M. Washington

Bettina M. Washington

THPO/Cultural Director

Wampanoag Tribe of Gay Head (Aquinna)

Solar Development Project, Parcel ZG-2

1 message

----- Forwarded message -----

From: NITHPO Harris <dhnithpo@gmail.com>
Date: Sun, Mar 20, 2016 at 9:49 PM
Subject: Solar Development Project, Parcel ZG-2
To: planning@shutesbury.org
Cc: adminsecretary@shutesbury.org, selectboard@shutesbury.org, donna.mtb@verizon.net, Bettina Washington <bettina@wampanoagtribe.net>, "T-Moheg James Quinn, THPO" <jquinn@moheganmail.com>, T-Pequot Marissa Turnbull <mturnbull@mptn-nsn.gov>, Elaine Thomas <ethomas@moheganmail.com>

Deacon Bonnar, Chair
Shutesbury Planning Board
Town Hall
Shutesbury, Massachusetts

Greetings, Chairman Bonnar:

Although the Narragansett Indian Tribal Historic Preservation Office (NITHPO) is located in Rhode Island, we have ancient cultural ties to the Pocumtuc People of your region. Pursuit to the guidelines of the National Historic Preservation Act NITHPO wishes to register its concern that earthen mounds that are suspected to be ancient and ceremonial are within proximity of the footprint of the Solar Development Project that is currently before the Planning Board. We wish to advise that appropriate caution should be taken to protect and guarantee that inadvertent impacts to these possible cultural resource sites is avoided.

Earthen features which may be cultural are depicted in the red boxes in the graphic below.



If the Planning Board wishes to use non-invasive technology to confirm the presence or absence of the cultural significance presence within these mounds - the preferred technology would be ground penetrating radar. Radar Solutions International/Doria Kutrubes (617) 308-6615 has prior experience working in Franklin County.

The area of potential effect of this project also has sensitivity for the presence of ceremonial stone landscapes. We therefore recommend that all equipment ingress and egress routes should be examined by ceremonial stone landscape identification specialists for the presence of ancient ceremonial stone groupings that could be inadvertently destroyed as equipment and materials are transported to the Project site.

I may be reached at (401) 474-5907

Doug Harris,

Deputy Tribal Historic Preservation Officer / Preservationist for Ceremonial Landscapes

NITHPO
Narragansett Indian Tribal Historic Preservation Office
4425 A South County Trail
Charlestown, RI 02813



11 April 2016

Deacon Bonnar, Chairman
Shutesbury Planning Board
Town of Shutesbury, MA
<planning@shutesbury.org>

RE: Tribal Cultural Resources/Area of Potential Effect

Greetings, Chairman Deacon Bonnar:

The Narragansett Indian Tribal Historic Preservation Office is concerned that at least 40 earthen anomalies are within the planned footprint of the solar array or in close proximity. These anomalies by shape and size could either be Tribal burials or tree throws from storm activity. It is our recommendation that (non destructive) ground penetrating radar, rather than a shovel or the blade of a bulldozer is the best approach for avoiding sacrilege in this highly questionable and potentially politically charged circumstance.

The depiction of the area of potential effect is as follows: Beginning at the relatively flat area near the old Reed Road on the northeast side of the proposed array site, previously identified as an area of possible cultural interest, and up the hill into the proposed array there are at least 40 mounds. Some are on the slope of the northeast side of the hill (outside the proposed array area), while others are on the relatively flat area at the top of the slope, well within the solar array area. The mounds are oval in shape, approximately 3 feet in width and 6 feet in length and approximately 1 foot in height above the surrounding ground surface. Some are covered with laurel, making them harder to see, while others are devoid of undergrowth.

The accompanying photo is one of approximately 40 anomalies in question. Doria Kutrubes <doria@radar-solutions.com> (617) 308-6615 is a well known ground penetrating radar (GPR) specialist. We recommend this non-invasive technology as a safeguard. Tribal monitoring is also recommended.

A handwritten signature in black ink that reads "Doug Harris".

Doug Harris, Preservationist for Ceremonial Landscapes
Deputy Tribal Historic Preservation Officer (401) 474-5907



NITHPO

Narragansett Indian Tribal Historic Preservation Office

4425 A South County Trail
Charlestown, RI 02813



Greetings, Members of the Shutesbury Planning Board:

I am concerned that the most recent Wheelock Tract Solar Array Special Permit draft does not adequately address Tribal cultural concerns. Please be advised that the serious nature of the concerns raised by three Tribes (Narragansett-Wampanoag Tribe of Gay Head / Aquinnah – Nipmuc), a noted New England archaeologist, Dr. Curtiss Hoffman, and numerous private citizens seem to have been heard at an extremely low volume or not at all. Without a Tribal Historic Preservation Assessment that utilizes Tribal Historic Preservation survey procedures at the forefront of this construction project, you and we are likely to be addressing adverse effects and unintended sacrilege issues as tree stumps are being pulled and as the backhoes and bulldozers commence their earthwork. If “adverse effects” and “unintended sacrilege” are the headlines you seek, they may be close at hand.

Tribal Historic Preservation Offices are Federally certified and quite adept at utilizing and designing procedures to avoid impacts to Tribal cultural resources. Much more than field archaeologists, by spiritual instinct and training, it is our responsibility to advise planning that avoids practices that lead to adverse effects and inadvertent sacrilege.

DOES THE WHEELOCK TRACT HAVE SUSPECTED BURIALS?

- (1) The first recommendation when burials are suspected is to commission a plan to develop an area of potential effect assessment that is informed by Tribal cultural values and local Tribal historical analysis. One component of such a plan, the Tribal historical analysis, has already been commenced in Dr. Hoffman’s letter.
- (2) A GPS mapping survey should be done of all the visible potential cultural sites of concern. This would include mapping and analyzing the more than forty mounds that have been brought to your attention.
- (3) Based on the GPS mapping and analysis and informed by Tribal directional values, presence or absence of underground concerns should then be determined by ground penetrating radar.
- (4) Lay out all findings on a plan map.
- (5) Sample the soil chemistry adjacent to any above or below ground anomalies.
- (6) Where chemistry or GPR images indicate burial signatures – AVOID.

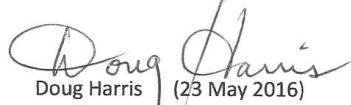
DO YOU HAVE SUSPECTED CEREMONIAL STONE LANDSCAPE MEMORIALS:

- (1) Ceremonial stone landscape groupings of stones (cairns) may represent where a death occurred, although the remains may be buried elsewhere. Prayers of balance and harmony may have been spoken into each of the grouped stones. The stones, then, would have been set in place to rebalance the spirit energy of the extremely imbalanced space of a traumatic death experience.

- (2) If this is a ceremonial stone landscape memorial, those prayers to the Earth Mother are still actively doing their work and should not be disturbed.

TRIBAL HISTORIC PRESERVATION ASSESSMENT: The foregoing assessment procedures would establish if the site is or is not a place of formal Tribal significance (burial or traumatic death related). Once the assessment has been concluded, the likelihood of finds of "adverse effects" or "inadvertent sacrilege" has been reduced to a point of close to zero potential. On behalf of the Wampanoag Tribe of Gay Head (Aquinna), Mohegan Tribe, Mashanucket-Pequot Tribe, and Narragansett Tribe, I am hereby requesting a formal Tribal Historical Preservation Assessment.

Tau botdan tamock wutche wame (We are giving thanks for all things.)



Doug Harris (23 May 2016)

Preservationist for Ceremonial Landscapes and Deputy Tribal Historic Preservation Officer
(413) 325-7691, (401) 474-5907 <dhnithpo@gmail.com>

Appendix E National Register of Historic Places Quick Guide

KnowHow #3

INFORMATION AND ASSISTANCE FROM THE MASSACHUSETTS HISTORICAL COMMISSION

What You Need to Know about Listing on the National Register

The National Register is the nation's official list of buildings, districts, sites, structures, and objects important in American history, culture, architecture, or archaeology. The National Register program is administered through the Massachusetts Historical Commission on behalf of the National Park Service.

Nominations are based on comprehensive local inventories of cultural resources. Inventories are generally compiled on a communitywide basis by local historical commissions and record basic information about the historic, architectural, and archaeological significance of individual properties and districts in a community. The completed inventory allows preservation decisions to be made within a consistent context, and identifies properties that are eligible for listing in the National Register.

1. How do I get my property listed in the National Register?

Contact your local historical commission or the MHC to determine whether an inventory form has been prepared for your property or if any additional information is required; ask your local historical commission to forward their recommendation to the MHC regarding your property's eligibility for the National Register. The MHC staff will then evaluate your property to determine whether it meets the criteria for listing in the National Register either individually or as part of a National Register District.

Criteria for Listing

The criteria for listing in the National Register are:

- a) association with events that have made a significant contribution to the broad patterns of our history;
- b) association with the lives of persons significant in our past;
- c) embodiment of distinctive characteristics of a type, period, or method of construction, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
- d) likelihood of yielding information significant in history or prehistory.

Properties must meet at least one of the above criteria to be eligible for listing in the National Register.

The MHC staff evaluation team meets regularly to evaluate properties for the National Register. The object of the evaluation is to determine whether the property meets the criteria for listing. Decisions are based on MHC's knowledge of the resource and its integrity, and an understanding of the significance of the resource within its context. The inventory serves as the basis for all evaluation decisions. When the evaluation team does not have sufficient information to render a decision, additional information may be requested. When National Register districts are being evaluated, MHC staff may make a site visit prior to completing the evaluation.

If your property is eligible, the MHC will send you a nomination form and an instruction manual. You may wish to work with the local historical commission in completing the nomination or seek the assistance of a professional preservation consultant.

MHC staff will review your nomination submission for completeness and may request additional information. When complete, the nomination will be edited and processed by MHC staff, who will present it to the State Review Board of the Massachusetts Historical Commission at one of its quarterly National Register meetings.

The State Review Board will review the nomination and vote whether or not to nominate the property to the National Register of Historic Places. After being voted eligible, the nomination will then be forwarded to the National Park Service in Washington, D.C., for listing in the National Register of Historic Places.

2. What are the benefits of being listed in the National Register?

Recognition: The National Register recognizes the significance of a property to the community, state, and/or nation.

Tax Incentives: National Register listing allows the owners of income-producing properties certain federal tax incentives for substantial rehabilitation according to standards set by the Department of Interior.

Protection: National Register properties are afforded limited protection from adverse effects of federally assisted projects; and, through automatic inclusion in the State Register of Historic Places, limited protection from state actions.

(over)

KnowHow #3

Grants: Inclusion in the State Register of Historic Places, which comes automatically with National Register listing, provides eligibility for matching state grants for restoration of properties owned by private nonprofit organizations and municipalities, when such grants are available.

3. Will National Register listing restrict the use of my property?

Listing in the National Register in no way interferes with a property owner's right to alter, manage, or sell the property when using private funds, unless some other regional and/or local ordinance or policy is in effect. If you use state or federal funds to alter your property, or need state or federal permits, the alteration will be reviewed by the MHC staff. Local funding and permitting do not trigger MHC review.

4. What is a National Register District?

Properties may be nominated to the National Register either individually or, if they are located within areas containing other significant properties, as districts. A National Register District may include any number of properties. The benefits and protections afforded by listing are the same.

5. Can my property be listed in the National Register if my community's inventory is not comprehensive?

Yes, in some cases. There are three exceptions to MHC's policy not to consider properties for the National Register in communities without comprehensive inventory.

If you can demonstrate that:

- 1) you, as the owner of income-producing property, are planning to do certified rehabilitation work and need National Register status in order to use the federal investment tax credits;
- 2) your property is in imminent danger of destruction; or
- 3) your property is of demonstrated state or national significance,

you may then submit a letter to MHC requesting a National Register evaluation for your property, stating why you want to have the property listed. However, you should note that without comprehensive inventory information, the eligibility of properties is difficult to establish. You will probably need to conduct supplemental inventory work to provide a context for evaluating the significance of your property.

6. If my house is listed in the National Register, are grant monies available for rehabilitation work?

Unfortunately, at present, the MHC does not administer federal or state rehabilitation funds for private homeowners. State grant monies, when available, are awarded only to properties owned by municipalities and non-profit organizations. Federal tax credits are available for substantial rehabilitation of income-producing and commercial properties.

7. Can I object to having my property listed in the National Register?

Yes. Once you receive notice that your property is being considered for listing in the National Register by the State Review Board, you may submit a notarized letter of objection to MHC. If your property is within a proposed National Register district, you will be invited to a public meeting in your community, prior to the State Review Board meeting, at which MHC staff will be available to answer questions about the listing. If your property is within a proposed National Register district, a majority of property owners (more than 50%) must submit notarized objections in order to prevent listing. If a majority of property owners do not object, the nomination may move forward and the properties for which there are objections will remain in the nominated district. If a majority of owners do object, the National Park Service may still formally determine the property(ies) eligible for listing, although actual listing will *not* occur.

8. Where do I go for assistance in preparing a National Register application?

Your local historical commission, local historical society, and library can provide useful resource material. Professional preservation consultants can assist you or your local historical commission with completion of the National Register nomination form. Also, when funds are available, matching Survey and Planning grants are awarded annually through MHC to fund professional National Register work. For more information, contact the MHC.

Know How #3 has been financed in part with Federal funds from the National Park Service, U. S. Department of the Interior. However, the contents and opinions do not necessarily reflect the views or policies of the Department of the Interior.

This program receives Federal funds from the National Park Service. The U. S. Department of the Interior prohibits discrimination on the basis of race, color, national origin, age, gender, or handicap in its Federally assisted programs. If you believe you have been discriminated against in any program, activity, or facility as described above, or if you desire further information, please write to:

Office for Equal Opportunity, U. S. Department of the Interior
1849 C Street NW, Room 1324, Washington, D. C. 20240

William Francis Galvin
Secretary of the Commonwealth
Chairman, Massachusetts Historical Commission
Massachusetts Archives Building, 220 Morrissey Boulevard, Boston, MA 02125
Phone: (617) 727-8470 Fax: (617) 727-5128
Website: www.sec.state.ma.us/mhc

Appendix F NHPA, Section 106 Quick Guide

U.S. Department of the Interior
National Park Service
American Indian Liaison Office



National Historic Preservation Act, Section 106 A Quick Guide for Preserving Native American Cultural Resources

What is Section 106?

Section 106 is the portion of the National Historic Preservation Act (NHPA) that is concerned with Federal undertakings.

What is a Federal undertaking?

A Federal undertaking is a project, activity, or program either funded, permitted, licensed, or approved by a Federal Agency. Undertakings may take place either on or off federally controlled property and include new and continuing projects, activities, or programs and any of their elements not previously considered under Section 106.

What does Section 106 require?

Section 106 requires Federal agencies to take into account the effects of their undertakings on historic properties and to provide the Advisory Council on Historic Preservation (AChP) with a reasonable opportunity to comment. In addition, Federal agencies are required to consult on the Section 106 process with State Historic Preservation Offices (SHPO), Tribal Historic Preservation Offices (THPO), Indian Tribes (to include Alaska Natives) [Tribes], and Native Hawaiian Organizations (NHO).

What are historic properties?

Historic properties are any prehistoric or historic districts, sites, buildings, structures, or objects that are eligible for or already listed in the National Register of Historic Places. Also included are any artifacts, records, and remains (surface or subsurface) that are related to and located within historic properties and any properties of traditional religious and cultural importance to Tribes or NHOs.

What role do THPOs, Tribes, and NHOs play in the Section 106 process?

The Section 106 regulations (*36 CFR 800*) place particular emphasis on consultation with THPOs, Tribes, and NHOs. Federal agencies must consult THPOs, Tribes, and NHOs about undertakings when they may affect historic properties to which a Tribe or NHO attaches religious or cultural significance. This requirement applies regardless of the location of the historic property.

What if an historic property is not listed in or has not been previously determined eligible for the National Register of Historic Places (NRHP)?

If an historic property is not listed in or has not previously been determined eligible for the NRHP then, as part of the Section 106 process, it should be evaluated by the Federal agency in consultation with the SHPO, THPO, Tribe, or NHO to determine if it meets NRHP eligibility. Steps for determining eligibility can be found in *National Register Bulletin 15: How to Apply the National Register Criteria for Evaluation*.

If there are questions about the eligibility of an historic property, the Federal agency overseeing the undertaking can seek a formal Determination of Eligibility (DOE) from the Keeper of the National Register (see *36 CFR 63*). The Keeper will then determine if the property is eligible for listing in the National Register of Historic Places.

What regulations govern the Section 106 process?

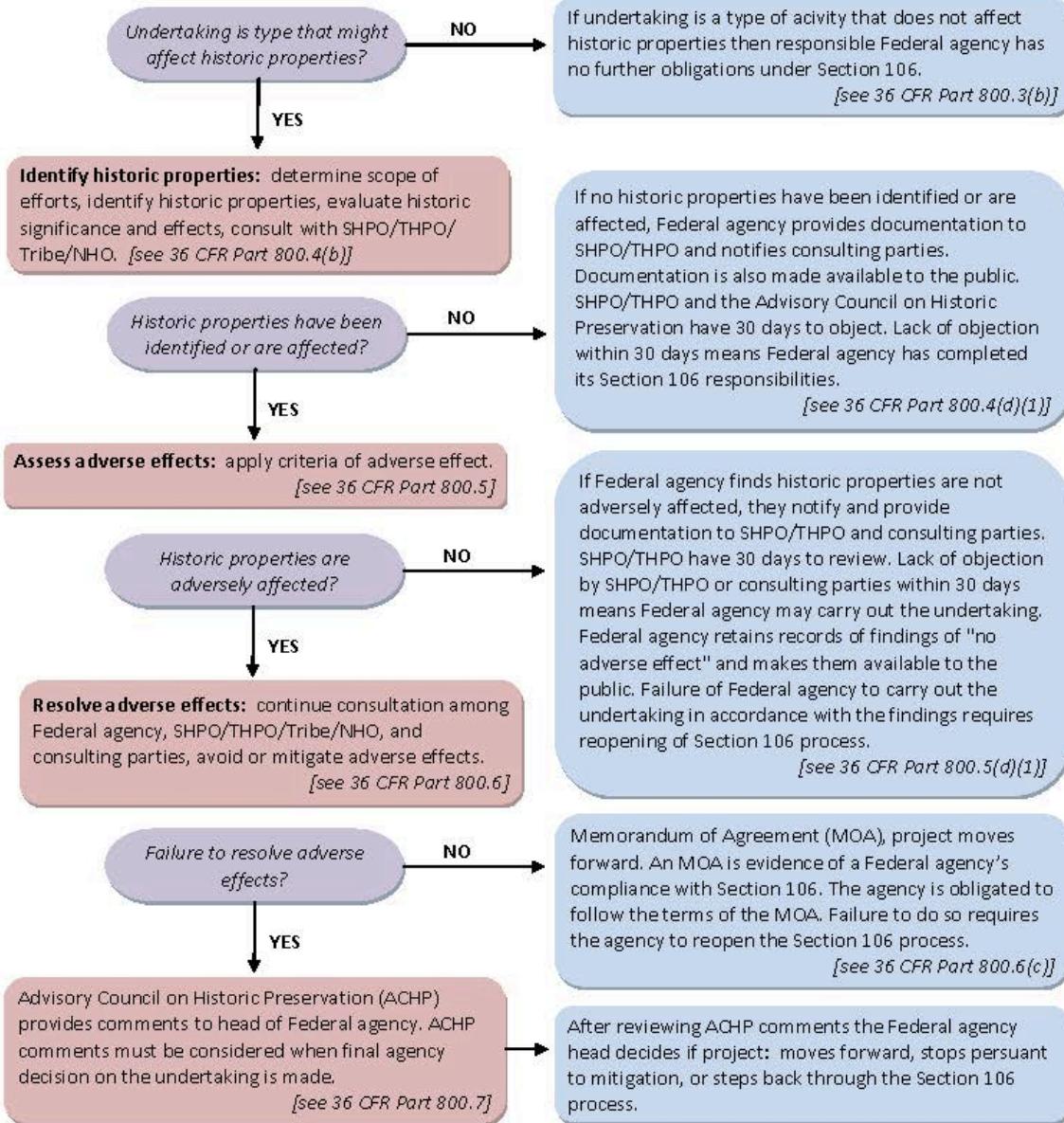
36 CFR 800 (Protection of Historic Properties) governs the Section 106 process and outlines how Federal agencies are to consult with SHPOs, THPS, Tribes, NHOs, and other interested parties, identify historic properties, determine whether and how such properties may be affected, and resolve adverse effects.

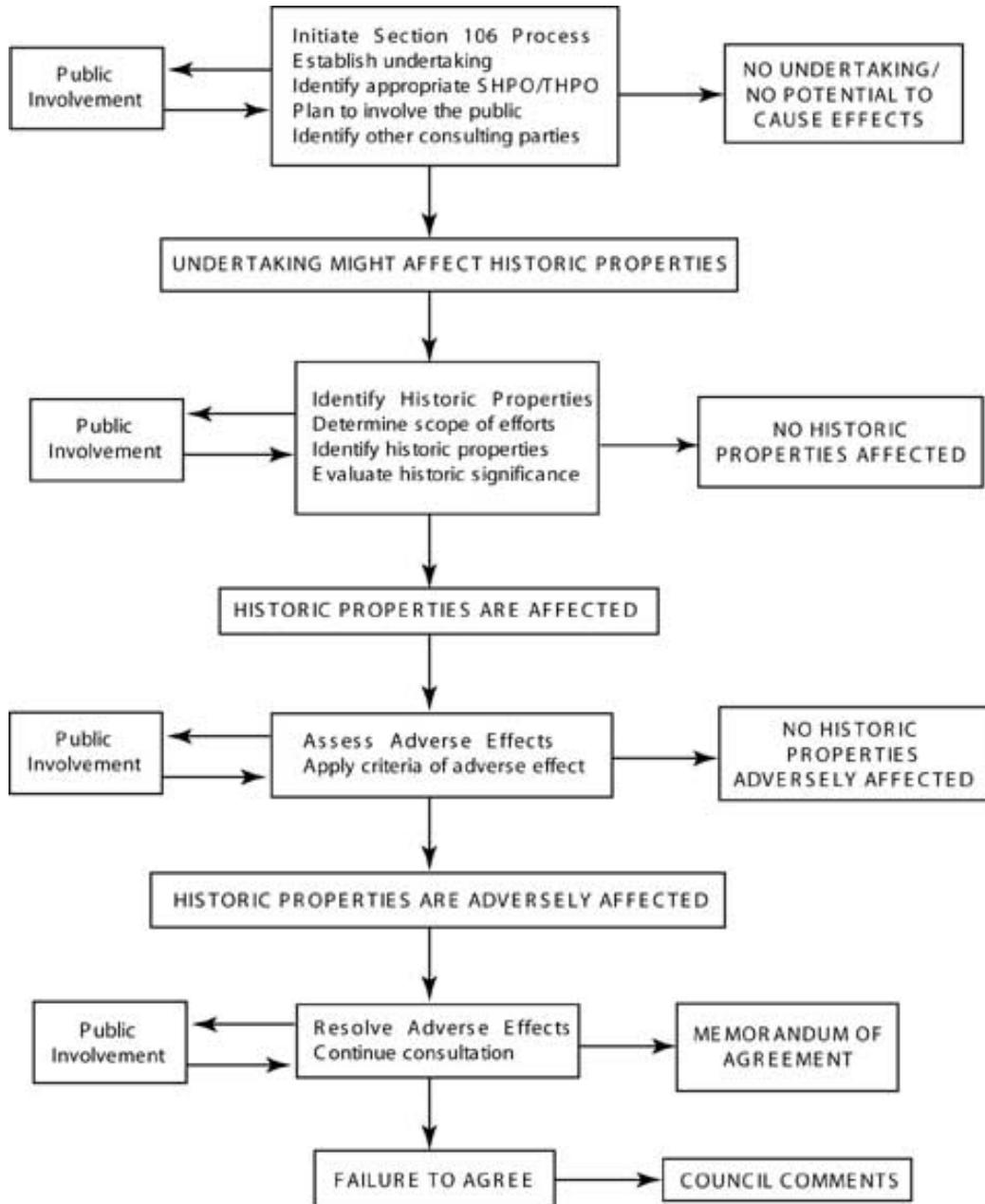
For more information about the Section 106 compliance process visit the Advisory Council on Historic Preservation website at: <http://www.achp.gov/work106.html> For the *36 CFR 800* regulations and assistance in applying them go to: <http://www.achp.gov/usersguide.html>



What is the process for Section 106 compliance?

Section 106 process initiated by Federal Agency: establish undertaking, determine responsible Federal agency, identify appropriate SHPO, THPO, Tribe, NHO and other consulting parties to include the public, also notify and plan to involve the public. [see 36 CFR Part 800.3]





Appendix G ACHP Native American Traditional Cultural Landscapes Action Plan



NATIVE AMERICAN TRADITIONAL CULTURAL LANDSCAPES ACTION PLAN

The Advisory Council on Historic Preservation (ACHP) has seen an increasing number of Section 106 reviews involving large scale historic properties of religious and cultural significance to Indian tribes or Native Hawaiian organizations (NHOs). Improvements in federal agency consultation with Indian tribes and NHOs and greater recognition of their expertise in identifying historic properties of significance to them have likely contributed to this increase. It is equally likely that there have also been increasing development pressures in places not previously developed.

These large scale properties are often comprised of multiple, linked features that form a cohesive "landscape." The recognition, understanding, and treatment of such places can be a struggle for the non-tribal or non-Native Hawaiian participants in the Section 106 process, partly due to the lack of experience in addressing such places and partly due to the lack of guidance regarding these traditional cultural landscapes.

In response to growing concerns about the impacts to these properties of religious and cultural significance to Indian tribes and Native Hawaiian organizations, in 2009, the ACHP began an informal dialogue with tribal representatives primarily via teleconferences and e-mail exchanges. During the Tribal Summit on Renewable Energy in January 2011 (go to www.achp.gov/renewable_energy.html for more information), participants recognized the importance of identifying and considering historic properties at the landscape level and avoiding inappropriately breaking these larger properties into smaller units that are managed separately and out of context. As a result of these discussions as well as the ACHP's experience in individual Section 106 reviews, it is evident that the issues are complex and warrant the attention of the larger preservation community. To that end, the ACHP held a forum in August 2011, to introduce the ACHP members to the challenges of recognizing and protecting Native American traditional cultural landscapes and to elevate the issues to policy levels within the federal preservation program (go to www.achp.gov for more information).

This proposed plan is based on the suggestions the ACHP has received and the discussions with its preservation partners since 2009. It sets forth actions designed to affirmatively address the challenges the ACHP believes are most critical for both protecting these important historic properties as well as addressing identified hurdles in the Section 106 and National Environmental Policy Act (NEPA) processes when proposed projects may impact Native American traditional cultural landscapes. The appropriate and early involvement of those parties for whom these places are so important, Indian tribes and NHOs, and the clarification of how these landscapes are to be recognized and treated in Section 106 and NEPA reviews are key elements to accomplishing these goals.

The first set of action items focuses on raising awareness both within the preservation community and among our partners about the existence of traditional cultural landscapes and their importance to Indian tribes and Native Hawaiian organizations. This purpose of this outreach is to ensure that Native American traditional cultural landscapes are considered early in land management and project planning decisions.

ADVISORY COUNCIL ON HISTORIC PRESERVATION
1100 Pennsylvania Avenue NW, Suite 803 • Washington, DC 20004
Phone: 202-606-8503 • Fax: 202-606-8647 • achp@achp.gov • www.achp.gov

Early consultation with Indian tribes and Native Hawaiian organizations to identify areas of religious and cultural significance prior to project siting decisions is not only the most effective means to avoid impacts to these places but is also the best way to minimize project delays.

The second set of action items focuses on the Section 106 process and the development of tools to assist all participants in the recognition and consideration of Native American traditional cultural landscapes. Given the increasing threats to these places from large-scale developments, the ACHP will focus its attention on this action items in FY 2012 and early FY 2013.

In order to ensure the success of these proposed measures, the ACHP and the Department of Interior (DOI) must formally commit to work together to address the broad issues surrounding Native American traditional cultural landscapes. The ACHP, as the agency with responsibility for overseeing the Section 106 review process, and DOI, through the National Park Service (NPS), as the agency with responsibility for overseeing the National Register of Historic places, should provide leadership in addressing Native American cultural landscapes in the national historic preservation program. Together, the ACHP and NPS should:

- Promote the recognition and protection of Native American traditional cultural landscapes both within the federal government and the historic preservation community as well as at the state and local levels, and,
- Address the challenges of the consideration of these historic properties in the Section 106 review process as well as in NEPA reviews.

To meet these goals, the ACHP and NPS should, in consultation with key partners including Indian tribes, Tribal Historic Preservation Officers (THPOs), Native Hawaiian organizations, State Historic Preservation Officers (SHPOs), federal agencies, preservation organizations, cultural landscape experts, and industry representatives, carry out the following actions:

1. Promote the recognition and protection of Native American traditional cultural landscapes both within the federal government and the historic preservation community as well as at the state and local levels.

- NPS and the ACHP should work with the National Association of Tribal Historic Preservation Officers (NATHPO) and other intertribal organizations to advance the recognition of Native American traditional cultural landscapes in the broader national preservation program through their interaction with preservation partners including the National Conference of State Historic Preservation Officers, the National Trust for Historic Preservation, federal agencies, and others.
- DOI, the ACHP, the Council on Environmental Quality (CEQ), and other federal agencies should work with Indian tribes, THPOs, and NHOs to reach out to applicants and trade associations to promote the early consideration of, and consultation with Indian tribes, THPOs, and NHOs about sacred sites and Native American traditional cultural landscapes in project planning and scoping.
- Federal agencies should develop long-term, meaningful relationships with Indian tribes, THPOs, and NHOs to ensure effective and early consultation that leads to better planning and, where appropriate, identifying areas of cultural sensitivity.
- The ACHP and CEQ should encourage federal agencies to integrate consultation and coordination with Indian tribes, THPOs, and NHOs as early as possible in their planning processes to identify and address potential cultural resource concerns.

- The Administration should include the protection of Native American landscapes and historic properties in its agenda for the annual Tribal Nations Meeting at the White House to engage and hear from tribal leaders on this issue.
 - The Administration should promote training for federal officials on working more effectively with tribal governments and developing greater cultural sensitivity.
2. Address the challenges of the consideration of Native American traditional cultural landscapes in the Section 106 review process as well as in NEPA reviews.
- NPS should issue additional guidance on how to apply the National Register criteria to these historic properties. The guidance should define “traditional cultural landscapes” as they relate to Indian tribes or Native Hawaiian organizations. It should also address what constitutes adequate documentation; how to protect sensitive and confidential Native American cultural knowledge and information; and, the role of traditional cultural knowledge in making determinations of eligibility.
 - NPS should update National Register Bulletin 38: *Guidelines for Evaluating and Documenting Traditional Cultural Properties* to clarify how this guidance applies to historic properties of religious and cultural significance to Indian tribes and Native Hawaiian organizations. NPS should also explore how guidance regarding Native American traditional cultural landscapes might inform the treatment of large historic properties or landscapes of significance to non-Native communities.
 - The ACHP should develop a policy statement and issue formal guidance on the need for early tribal and Native Hawaiian consultation and the consideration of Native American traditional cultural landscapes in the Section 106 review process to include the role of Indian tribes, THPOs, and Native Hawaiian organizations and how to determine effects on such historic properties.
 - The ACHP should work with NATHPO to develop a special case digest of Section 106 cases, best practices, and examples where federal agencies effectively managed such places, consulted tribes, developed innovative mitigation approaches, etc.
 - The ACHP and DOI should work with their preservation partners to address the perceived conflicts regarding confidentiality of sensitive information and the transparency of agency decision making in the Section 106 process.
 - The ACHP should promote the consideration of Native American traditional cultural landscapes through its leadership role in the Interagency Working Group on Indian Affairs as a means to reach a broader federal audience and to explore the potential intersections with other federal programs and initiatives including climate change and sacred sites protection.

With the formal adoption of this action plan by the ACHP members on November 10, 2011, the ACHP is committed to carrying out its responsibilities under this plan.

November 23, 2011

Appendix H USACE General Permit Historic Properties Notification Form



US Army Corps
of Engineers
New England District

IX: HISTORIC PROPERTY NOTIFICATION FORM

In accordance with General Condition 7, proponents must ensure and document that all potential historic properties within the permit area have been identified. To assist with this effort, proponents may send this form for self-verification activities, but must send this form for PCN activities, to the SHPO, BUAR and applicable THPO(s). You must include any Corps or state waterway agency application forms, plans and a copy of the USGS quadrangle map section that clearly marks the project location. It is recommended that you complete all fields (write "none" or "see attached application form" if applicable). The PCN sent to the Corps must include proof of having sent this form, e.g. the email or certified mail receipt that was used to send it, to the SHPO (does not accept email), BUAR and applicable THPOs. Please include any comments or requests received from these agencies with your PCN.

Project Name: _____

Address, City, State & Zip: _____

Project Proponent Name: _____

Address: _____

Phone(s) and Email: _____

Project Location (provide detailed description if necessary) Address, City, State & Zip: _____

Latitude/Longitude Coordinates (if address doesn't exist): _____

Waterway Name: _____

Agency license or funding for the project (list all licenses, permits, approvals, grants or other entitlements being sought from state and federal agencies).

<u>Agency Name</u>	<u>Type of License or Funding (specify)</u>

Project Description: _____

Does the project include demolition? If so, specify nature of demolition and describe the building(s) which are proposed for demolition: _____

Does the project include rehabilitation of any existing buildings? If so, specify nature of rehabilitation and describe the building(s) which are proposed for rehabilitation: _____

Does the project include new construction? If so, describe (attach plans and elevations if necessary): _____

To the best of your knowledge, are any historic or archaeological properties known to exist within the project's area of potential impact? If so, specify: _____

What is the total acreage of the project area?

Woodland _____ acres
Wetland _____ acres
Floodplain _____ acres
Underwater and/or bottomlands _____ acres
Open space _____ acres
Developed _____ acres

Productive Resources:
Agriculture _____ acres
Forestry _____ acres
Mining/Extraction _____ acres
Total Project Acreage _____ acres

What is the acreage of the proposed new construction? _____ acres

What is the present land use of the project area? _____

Signature of person submitting this form: _____ **Date:** _____

Name: _____

Address: _____

City/Town/Zip: _____

Telephone: _____

Appendix I EPA Section 106 Documentation¹⁷

Construction General Permit (CGP)

Appendix E – Historic Property Screening Process

Background

Section 106 of the National Historic Preservation Act (NHPA) requires Federal agencies to take into account the effects of Federal "undertakings", such as the issuance of this permit, on historic properties that are either listed on, or eligible for listing on, the National Register of Historic Places. To address any issues relating to historic properties in connection with the issuance of this permit, EPA has developed the screening process in this appendix that enables construction operators to appropriately consider the potential impacts, if any, of their installation of stormwater controls on historic properties and to determine whether actions can be taken, if applicable, to mitigate any such impacts. Although the coverages of individual construction sites under this permit do not constitute separate Federal undertakings, the screening process in this appendix provides an appropriate site-specific means of addressing historic property issues in connection with EPA's issuance of the permit.

Key Terms

Historic property- prehistoric or historic districts, sites, buildings, structures, or objects that are included in or eligible for inclusion in the National Register of Historic Places, including artifacts, records, and remains that are related to and located within such properties

SHPO – The State Historic Preservation Officer for a particular state

THPO or Tribal representative – The Tribal Historic Preservation Officer for a particular Tribe or, if there is no THPO, the representative designated by such Tribe for NHPA purposes

Instructions for All Construction Operators

You are required to follow the screening process in this appendix to determine if your installation of stormwater controls on your site has the potential to cause effects to historic properties, and whether or not you need to contact your SHPO, THPO, or other tribal representative for further information. You may not submit your NOI until you have completed this screening process. The following four steps describe how applicants can meet the historic property requirements under this permit:

Step 1 Are you installing any stormwater controls that require subsurface earth disturbance?

The first step of the screening process is to determine if you will install stormwater controls that cause subsurface earth disturbance. The installation of the following types of stormwater controls require subsurface earth disturbance:

- Dikes
- Berms
- Catch Basins
- Ponds
- Ditches
- Trenches
- Culverts
- Channels
- Perimeter Drains

- Swales

Note: This list is not intended to be exhaustive. Other stormwater controls that are not on this list may involve earth-disturbing activities and must also be examined for the potential to affect historic properties.

Note: You are only required to consider earth-disturbing activities related to the installation of stormwater controls in the NHPA screening process. You are not required to consider other earth-disturbing activities at the site. If you are installing one of the above stormwater controls or another type of control that requires subsurface earth disturbance, your project has the potential to have an effect on historic properties. If this is the case, then you must proceed to Step 2.

If you are not installing one of the above stormwater controls or another type of control that requires subsurface earth disturbance, then you may indicate this on your NOI, and no further screening is necessary. During the 14-day waiting period after submitting your NOI, the SHPO, THPO, or other tribal representative may request that EPA hold up authorization based on concerns about potential adverse impacts to historic properties. EPA will evaluate any such request and notify you if any additional measures to address adverse impacts to historic properties are necessary.

Step 2 *Have prior professional cultural resource surveys or other evaluations determined that historic properties do not exist, or have prior disturbances precluded the existence of historic properties?*

If you are installing a stormwater control that requires subsurface earth disturbance, you must next determine if it has already been determined that no historic properties exist on your site based on prior professional cultural resource surveys or other evaluations, or that the existence of historic properties has been precluded because of prior earth disturbances.

If prior to your project it has already been determined that no historic properties exist at your site based on available information, including information that may be provided by your applicable SHPO, THPO, or other tribal representative, then you may indicate this on your NOI, and no further screening steps are necessary. Similarly, if earth disturbances that have occurred prior to your project have eliminated the possibility that historic properties exist on your site, you may indicate this on your NOI, and no further screening steps are necessary. After submitting your NOI, and during the 14-day waiting period, the SHPO, THPO, or other tribal representative may request that EPA hold up authorization based on concerns about potential adverse impacts to historic properties. EPA will evaluate any such request and notify you if any additional measures to address adverse impacts to historic properties are necessary.

If neither of these circumstances exists for your project, you must proceed to Step 3.

Step 3 *If you are installing any stormwater controls that require subsurface earth disturbance, you must determine if these activities will have an effect on historic properties.*

If your answer to the questions in Steps 1 and 2 is "no", then you must assess whether your earth-disturbing activities related to the installation of stormwater controls will have an effect on historic properties. This assessment may be based on historical sources, knowledge of the area, an assessment of the types of earth-disturbing activities you are engaging in, considerations of

any controls and/or management practices you will adopt to ensure that your stormwater control-related earth-disturbing activities will not have an effect on historic properties, and any other relevant factors. If you determine based on this assessment that earth disturbances related to the installation of your stormwater controls will not cause effects to historic properties, you may indicate this on your NOI, and document the basis for your determination in your SWPPP and no further screening steps are necessary. In this case you must also attach a copy of your site map to your NOI. After submitting your NOI, and during the 14-day waiting period, the SHPO, THPO, or other tribal representative may request that EPA hold up authorization based on concerns about potential adverse impacts to historic properties. EPA will evaluate any such request and notify you if any additional measures to address adverse impacts to historic properties are necessary.

If none of the circumstances in Steps 1-3 exist for your project, you must proceed to Step 4.

Step 4: *If you are installing any stormwater controls that require subsurface earth disturbance and you have not satisfied the conditions in Steps 1-3, you must contact and consult with the appropriate historic preservation authorities.*

Where you are installing stormwater controls that require subsurface earth disturbance, and you cannot determine in Step 3 that these activities will not have effects on historic properties, then you must contact the relevant SHPO, THPO, or other tribal representative to request their views as to the likelihood that historic properties are potentially present on your site and may be impacted by the installation of these controls.

Note: Addresses for SHPOs and THPOs may be found on the Advisory Council on Historic Preservation's website (www.achp.gov/programs.html). In instances where a Tribe does not have a THPO you should contact the appropriate Tribal government office designated by the Tribe for this purpose when responding to this permit eligibility condition.

You must submit the following minimum information in order to properly initiate your request for information:

1. Project name (i.e., the name or title most commonly associated with your project);
2. A narrative description of the project;
3. Name, address, phone and fax number, and email address (if available) of the operator;
4. Most recent U.S. Geological Survey (USGS) map section (7.5 minute quadrangle) showing actual project location and boundaries clearly indicated; and
5. Sections of SWPPP site map (see Part 7.2.6) that show locations where stormwater controls that will cause subsurface earth disturbance will be installed (see Step 1).

Without submitting this minimum information, you will not have been considered to have properly initiated your request. You will need to provide the SHPO, THPO, or other tribal representative a minimum of 15 calendar days after they receive these materials to respond to your request for information about your project. You are advised to get a receipt from the post office or other carrier confirming the date on which your letter was received.

If you do not receive a response within 15 calendar days after receipt by the SHPO, THPO, or other tribal representative of your request, then you may indicate this on your NOI, and no further screening steps are necessary. Or, if the applicable SHPO, THPO, or other tribal representative responds to your request with an indication that no historic properties will be affected by the installation of stormwater controls at your site, then you may indicate this on your NOI, and no further screening steps are necessary. After submitting your NOI, and during the 14-day waiting period, the SHPO, THPO, or other tribal representative may request that EPA hold up authorization based on concerns about potential adverse impacts to historic properties. EPA will evaluate any such request and notify you if any additional measures to address adverse impacts to historic properties are necessary.

If within 15 calendar days of receipt of your request the applicable SHPO, THPO, or other tribal representative responds with a request for additional information or for further consultation regarding appropriate measures for treatment or mitigation of effects on historic properties caused by the installation of stormwater controls on your site, you must comply with this request and proceed to Step 5.

Step 5: Consultation with your applicable SHPO, THPO, or other tribal representative.

If, following your discussions with the appropriate historic preservation authorities in Step 4, the applicable SHPO, THPO, or other tribal representative requests additional information or further consultation, you must respond with such information or to consult to determine impacts to historic properties that may be caused by the installation of stormwater controls on your site and appropriate measures for treatment or mitigation of such impacts. If as a result of your discussions with the applicable SHPO, THPO, or tribal representative, you enter into, and comply with, a written agreement regarding treatment and/or mitigation of impacts on your site, then you may indicate this on your NOI, and no further screening steps are necessary.

If, however, agreement on an appropriate treatment or mitigation plan cannot be reached between you and the SHPO, THPO, or other tribal representative within 30 days of your response to the SHPO, THPO, or other tribal representative's request for additional information or further consultation, you may submit your NOI, but you must indicate that you have not negotiated measures to avoid or mitigate such effects. You must also include in your SWPPP the following documentation:

1. Copies of any written correspondence between you and the SHPO, THPO, or other tribal representative; and
2. A description of any significant remaining disagreements as to mitigation measures between you and the SHPO, THPO, or other tribal representative.

After submitting your NOI, and during the 14-day waiting period, the SHPO, THPO, ACHP or other tribal representative may request that EPA place a hold on authorization based upon concerns regarding potential adverse effects to historic properties. EPA, in coordination with the ACHP, will evaluate any such request and notify you if any additional measures to address adverse effects to historic properties are necessary.

EPA Region 1-New England Consultation Decision Worksheet

Consulting/Coordinating with Federally Recognized Indian Tribes

This document which consists of a worksheet and decision tree is an internal planning tool intended to assist regional program leads and/or project managers determine whether or not consultation is warranted or not for an EPA action, and if so, the type/level of consultation and timeline for consultation.

- I. **Mechanisms for identifying matters for consultation:** Identify the mechanism for identifying actions or activities that may warrant consultation, and provide as much of a description as possible.

EPA initiated consultation: Check appropriate box or indicate other:

- Regulatory Steering Committee (RSC)
- National Tribal Partnership/Group/Committee: _____
- Regional Tribal Partnership/Group/Committee: _____
- EPA National Program Office: _____
- Other Federal Agency: _____
- Region 1 Program Office: _____
- Other: _____

Tribal-requested or tribal organization-requested consultation: Check appropriate box or indicate other:
Maine Tribes:

- Aroostook Band of Micmacs
- Penobscot Indian Nation
- Houlton Band of Maliseet Indians
- Passamaquoddy Tribe of Indians: Indian Township Reservation
- Passamaquoddy Tribe of Indians: Pleasant Point Reservation

Massachusetts Tribes:

- Wampanoag Tribe of Gay Head (Aquinnah)
- Mashpee Wampanoag Tribe

Connecticut Tribes:

- The Mohegan Tribe
- Mashantucket Pequot Tribal Nation

Rhode Island Tribe:

- Narragansett Indian Tribe

Other Organizations:

National Tribal Organization: (United Southern and Eastern Tribes, Native Fish & Wildlife Service, etc.): _____

Other: _____

II. Initial determination if activities/actions may affect tribes:

- a. Determine if the proposed action or activity falls under the following non-exclusive list of categories appropriate for consultation: (*Note: routine administrative and staff-to-staff level interactions and communications between EPA and tribal government employees, including funding recipient-EPA staff interactions do not require consultation; see FAQ #17*)

- Regulations or rules;
 - Policies, guidance documents, directives;
 - Budget and priority planning development;
 - Legislative comments;
 - Permits;
 - Civil enforcement and Compliance monitoring actions;
 - Response actions and emergency preparedness;
 - State or tribal authorizations or delegations;
 - EPA activities in implementation of U.S. obligations under an international treaty or agreement;
 - EPA-identified activities through the Action Development Process (ADP) – see FAQ #18
 - Other- provide explanation
-
-

- b. Determine if the EPA action in question may affect a tribe or tribes in any of the following ways:

Tribal Sovereignty and Self-Determination: Action that may affect how the tribe's jurisdiction or its authority to regulate in its territories would be interpreted; action that involves a state's assertion that the state has authority to regulate the environment in a tribe's territories; action that could affect how the boundaries of a tribe's territories are interpreted;

Direct Implementation in Indian Country: Action that involves EPA implementing an environmental program in the territories of a tribe; action that involves a direct implementation tribal cooperative agreement;

Geographic Considerations: Actions on, adjacent, or nearby to Indian Country, or within a tribe's or tribes' historical preservation areas that could potentially affect a tribe's resources, rights, or traditional way of life, including properties of cultural or historical significance to a tribe;

- **Tribal Resources:** Actions that may impact treaty-reserved resources, tribal health, and cultural, traditional or subsistence resources of a tribe or a tribe's traditional way of life;
- **Tribal Ownership:** Actions related to a facility owned or managed by a tribal government, except during certain stages of the EPA enforcement process, such as during the investigation phase and when levying appropriate penalties;
- **Policy, Rulemaking, and Adjudication:** Changes to EPA regional policy that may affect tribes, especially when policy is specific to tribes. Rulemaking or adjudication by EPA Region I that may affect tribes or their rights or resources.

- c. If the activity involves other federal partners, list them below:
-
-

- III. Type/Level of Consultation/Facilitation:** If the above assessment determines that an EPA action or activity may affect a tribe, then assess what level of consultation would be appropriate, and add notes/justification as appropriate (note a tribe's desired level of interaction may differ from the results of the assessment and should be taken into consideration):

	High	Medium	Low
Complexity of the activity			
Potential implications for tribes			
Time and/or resource constraints relevant to the consultation process			
Magnitude of potential tribal impacts			
Number of potentially impacted tribes			
Involvement of tribal sovereignty or self-determination			

- IV. Determination of Consultation Mechanism:** Circle the most appropriate mechanism(s) for consultation (note a tribe's desired level of interaction may differ from the results of the assessment and should be taken into consideration):

All Low	More informal mailing of information or teleconference meeting(s) with tribal environmental director(s) or THPO(s) and associated staff involving communication and information exchange
Low/Medium	More informal teleconference meetings with tribal environmental director(s) or THPO(s) and associated staff involving communication and information exchange, as well as accompanying webinars or other enhanced educational communication tools
All Medium	Face-to-face or teleconference meetings with tribal environmental director(s) or THPO(s) and associated staff, as well as senior EPA program officials in a support role to the program lead, as appropriate
Medium/High	Face-to-face meetings, facilitated as appropriate, with tribal environmental director(s) or THPO(s) and associated staff, as well as senior EPA program officials in the lead, as appropriate
All High	Higher-level face-to-face meetings, facilitated as appropriate, with tribal leader(s) and Regional Administrator with senior EPA program official and program lead in support

- V. Tribal Consultation and Coordination Process and Timeline:** Consider consultation in the context of the project timeline for the EPA action or activity, beginning with the date that the formal notification letter is issued to the tribe. This information will be incorporated into the notification letter. **Note: The consultation policy was issued on May 4th, 2011, and is not intended to be retroactive; however, program leads should exercise judgment in determining in certain cases whether consultation in accordance with the policy is appropriate for activities initiated after May 4th, 2011.**

Date	Event	Contact information

- VI. Program Lead Recommendation for Consultation:** Based on this initial assessment the program lead recommends the following:

- Tribal Consultation is recommended
- Tribal Consultation is not recommended

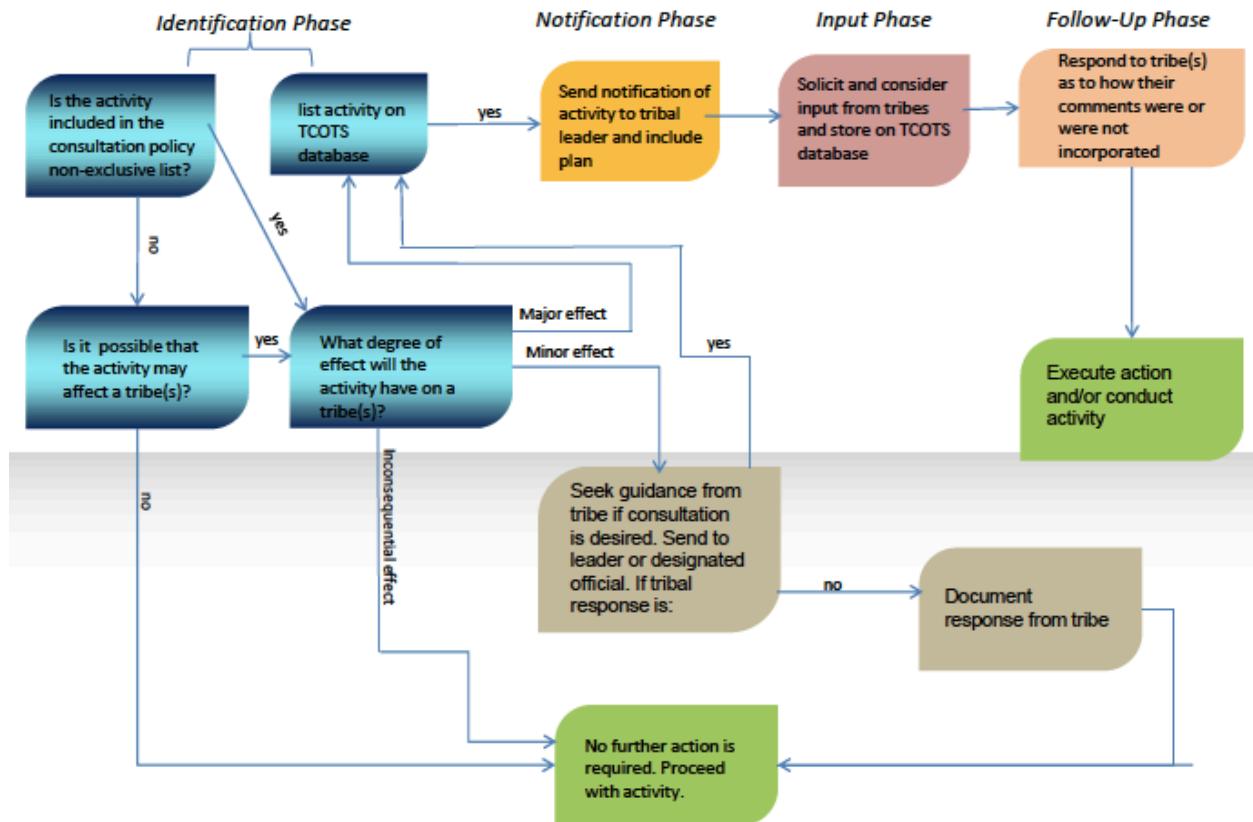
Additionally, the program lead may recommend the following actions to accompany the process decision, if consultation is either recommended or not recommended by the program lead:

- Briefing with Indian Program Manager is recommended
- Briefing with Program Manager is recommended
- Briefing with RA/DRA is recommended

VII. Reporting Requirements: A database known as TCOTS (Tribal Consultation Opportunities Tracking System) is located in the tribal portal and is accessible through Lotus Notes. This database is intended to serve as a tracking system for consultation activities from tribal notification through completion of consultation (see FAQ #9), and will require the entry of a small set of standardized information including dates associated with the consultation, the formal notification letter, any applicable supporting documentation if appropriate, and a summary of consultation completed. The following check boxes are intended to assist with the reporting process.

- Has the initial data from Section V above and the notification letter been uploaded to the database? Once this is completed, the Region 1 Tribal Consultation Advisor (TCA) will review and approve the data prior to submission to American Indian Environmental Office (AIEO).
- Have any modifications to the dates been updated in the database?
- Has any applicable documentation been linked to the database (program leads shall use discretion before linking sensitive documents, and if in doubt should consult the Region 1 TCA – see FAQs #11 and #12)?
- Has the consultation summary been uploaded to the database, and has the Region 1 TCA been notified?

CONSULTATION DECISION TREE



End Notes

¹ Edward L. Bell, Deputy State Historic Preservation Officer, Commonwealth of Massachusetts, March 8, 2021 (personal communication).

² Advisory Council on Historic Preservation. (2012). *Consultation with Indian Tribes in the section 106 review process: a handbook*, p.6.

³ Ball, D., Clayburn, R., Cordero, B., Edwards, V., Grussing, J., Ledford, R., McConnell, R., Monette, R., Steelquist, E., Thorsgard, E., and Townsend, J. (2015). *A guidance document for characterizing Tribal cultural landscapes*. U.S. Department of the Interior, Bureau of Ocean energy Management, Pacific OCR Region, OCS Study BOEM 2015-047, p. 15.

⁴ Advisory Council on Historic Preservation. List of ACHP Guidance. Retrieved from <https://www.achp.gov/training-guidance/list-of-ACHP-guidance>

⁵ U.S. Environmental Protection Agency. (n.d.) How Wetlands are Defined and Identified under CWA Section 404. Retrieved from <https://www.epa.gov/cwa-404/how-wetlands-are-defined-and-identified-under-cwa-section-404#>

⁶ U.S. Army Corps of Engineers. (April, 2018). Department of the Army General Permits for the Commonwealth of Massachusetts. Retrieved from <https://www.nae.usace.army.mil/Portals/74/docs/regulatory/StateGeneralPermits/MA/PN-GPFinal-RevApril2018.pdf?ver=2018-07-31-142949-100>

⁷ See Appendix H, p. E-1.

⁸ Gray, D.J., (March 12, 2021). Stormwater & Construction Permits Section, Water Division, U.S. Environmental Protection Agency, Region 1 (personal communication).

⁹ U.S Environmental Protection Agency. (July, 2014). Cultural resource management for USEPA personnel. Retrieved from <https://www.epa.gov/tribal/national-historic-preservation-act-nhpa-cultural-resources-manual-epa-region-1>

¹⁰ Pioneer Valley Planning Commission. (2020). Solar best practices guide: *A guide to assist municipalities with solar land use regulations*.

¹¹ Massachusetts Department of Energy Resources. (2014). *Model zoning for the regulation of solar energy systems*. Retrieved from <https://www.mass.gov/doc/model-solar-zoning-0/download>.

¹² Massachusetts Department of Energy Resources. *Regulating solar energy systems at the local level in Massachusetts: Frequently asked questions*. Retrieved from <https://www.mass.gov/files/documents/2016/08/ot/regulating-solar-faq.pdf>.

¹³ Parker, P.L., and King, T.F. (1990). *National Register Bulletin 38: Guidelines for evaluating and documenting Traditional Cultural Properties*. U.S. Department of the Interior, National Park Service, Interagency Resources Division.

¹⁴ Hoffman, C. (2018). *Stone prayers: Native American stone constructions of the eastern seaboard*. Arcadia Publishing, pp. 60-63.

¹⁵ U.S. Department of Agriculture, Natural Resources Conservation Service. *Cultural Resources*. retrieved from
<https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/technical/ecoscience/cultural/#:~:text=Cultural%20Resources%20are%20tangible%20remains,earthworks%2C%20canals%2C%20or%20landscapes>

¹⁶ <https://indigenousfoundations.arts.ubc.ca/terminology/>

¹⁷ United States Environmental Protection Agency. (October 1, 2013). *EPA Region 1 – New England: Tribal Consultation Policy Implementation Guidance Document*, Appendix C.