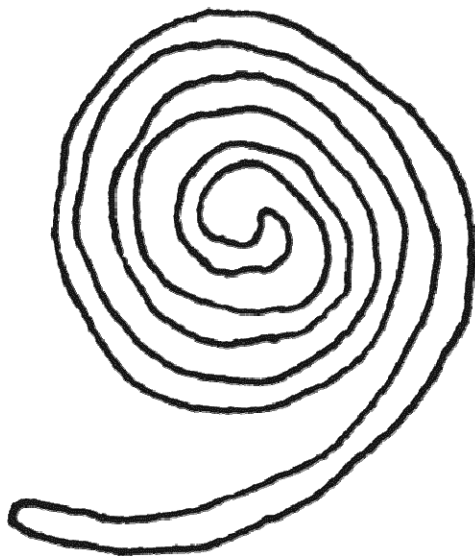


**PENNSYLVANIA
TRIBAL CONSULTATION
HANDBOOK**



**Pennsylvania
Tribal
Consultation**

FHWA/PENNDOT

FOR TRANSPORTATION AND TRIBAL CULTURAL RESOURCE STAFF

PENNSYLVANIA TRIBAL CONSULTATION HANDBOOK

Developed By:



The PENNSYLVANIA DEPARTMENT OF TRANSPORTATION,
CULTURAL RESOURCES MANAGEMENT PROGRAM



and the



PENNSYLVANIA DIVISION,
FEDERAL HIGHWAY ADMINISTRATION

2006



Acknowledgments

Much of this document was compiled from a wide variety of resources including but not limited to PennDOT Design Manuals (Part I, Publication 10; Part 1A, Publication 10A; *CEE Handbook*, Publication 294; *EA Handbook*, Publication 362; *EIS Handbook*, Publication 278), and official websites for many of the agencies discussed including PennDOT (www.dot.state.pa.us), FHWA (www.fhwa.dot.gov), among others. A full list of websites and other contacts and resources can be found in the Appendices of this document.

There are always many persons to thank in undertaking a document of this size. We would like to acknowledge the efforts of Sara Clark, Mike Stanilla, Joe Baker, and Ira Beckerman for their efforts in developing this handbook. Also thank you to Karyn Vandervoort and Deborah Suciu-Smith for their comments on early versions of the draft.

Special thanks to our contacts at each of the fourteen tribes involved in this consultation.



CONTENTS

	PAGE
Acknowledgments.....	iii
1. Introduction.....	1
1.1 Purpose.....	2
2. Federal, State, and Regional Agencies in the Transportation Development Process	3
2.1 Federal Government.....	3
2.1.1 US Department of Transportation.....	3
2.1.2 Federal Highway Administration.....	3
2.1.3 Advisory Council on Historic Preservation (ACHP) –.....	6
2.1.4 National Park Service (NPS) -	6
2.2 State Government.....	6
2.2.1 Pennsylvania Department of Transportation (PennDOT).....	6
2.2.1.1 PennDOT Bureau of Design, Environmental Quality Assurance Division, Cultural Resources Management Program	9
2.2.1.2 PennDOT Engineering Districts	9
2.2.2 Pennsylvania Historical and Museum Commission (PHMC)	11
2.2.2.1 PHMC - Bureau for Historic Preservation (BHP)	11
2.2.2.2 The State Museum of Pennsylvania, Section of Archaeology.....	13
2.3 Regional	13
2.3.1 Metropolitan Planning Organizations (MPO).....	13
2.3.2 Rural Planning Organizations (RPO) -	13
2.3.3 Independent County (IC)	14
3. Tribal Histories and Contact Information.....	16
3.1 Delaware (Lenape).....	18
3.2 Haudenosaunee (Iroquois)	21
3.3 Shawnee	23
4. Federal and State Transportation Programming and Financing	26
4.1 2005-2016 Twelve-Year Transportation Program (TYP).....	26
4.2 Statewide Transportation Improvement Program (STIP) / Transportation Improvement Program (TIP).....	26
4.3 Intermodal Surface Transportation Efficiency Act (ISTEA), Transportation Equity Act for the 21 st Century (TEA-21) and SAFTEA-LU	27
4.4 Transportation Financing: Federal-aid.....	28
4.5 PennPlan and the Mobility Plan.....	28
5. PennDOT Project Development Process	29
5.1 Planning (Transportation)	29
5.2 Prioritization and Programming.....	30
5.3 Design	30
5.3.1 Preliminary Design	30



- 5.3.2 Final Design 32
- 5.4 Construction 33
- 5.5 Maintenance and Operations..... 33

- 6. Basics of NEPA and NHPA at PennDOT..... 34
 - 6.1 National Environmental Policy Act (NEPA) 34
 - 6.1.1 NEPA Steps in the PennDOT Preliminary Design Phase..... 37
 - 6.2 National Historic Preservation Act (NHPA)..... 44
 - 6.2.1 NHPA - Environmental Impact Statements (EIS) / Environmental Assessments (EA) 45
 - 6.2.2 NHPA - Categorical Exclusion Evaluations (CEE)..... 45

- 7. The Tribal Consultation Process 48
 - 7.1 Initiate Section 106 Process 50
 - 7.2 Identify Historic Properties (Phased Identification) 51
 - 7.3 Identify Historic Properties (Phase I) 51
 - 7.4 Identify Historic Properties (Phase II/Determination of Eligibility) 52
 - 7.5 Assess Adverse Effects (Determination of Effects)..... 53
 - 7.6 Resolve Adverse Effects (Consultation and Mitigation) 54
 - 7.7 Project-specific Programmatic Agreements (PA)/ Memorandum of Agreement (MOA)..... 55

- 8. Additional Information 57
 - 8.1 Funding 57
 - 8.2 Role of Consultants at PennDOT 57
 - 8.3 Archaeological Resources..... 58
 - 8.4 Tribal Cultural Resources 58
 - 8.5 Artifacts..... 59
 - 8.6 Human Remains..... 59
 - 8.7 Inadvertent Finds 60
 - 8.8 Protocol for Transportation Staff 60

- Appendix A Terms and Resources 63
 - Glossary 63
 - Acronyms 65
 - Websites 66
 - FHWA 66
 - US Department of Transportation (USDOT)..... 66
 - PennDOT 66
 - Pennsylvania Historical and Museum Commission/Bureau of Historic Preservation (PHMC/BHP)..... 66
 - Advisory Council of Historic Preservation (ACHP) 66
 - National Park Service (NPS) 67
 - Legislation..... 67
 - US Federal Government 67
 - USDOT 67



Commonwealth of Pennsylvania	67
PennDOT	67
Appendix B Contact Information	68
Contacts.....	68
Federal Highway Administration (FHWA)	68
Pennsylvania Department of Transportation (PennDOT).....	68
Pennsylvania Historical and Museum Commission	69
Appendix C	71
PHMC Policy on the Treatment of Human Remains.....	71
Definitions.....	71
Policy I – Discovery of Human Remains	71
Appendix D.....	74
VI. Tribal Consultation	74
A. General Guidance.....	74
B. Specific Guidance	75
1. Initiating Consultation	75
2. Initiating Consultation for Pre-Existing Projects.....	77
3. Continuing Consultation	78
5. Sources.....	79
Appendix E	80
Pertinent Pennsylvania History Legislation.....	80



LIST OF CHARTS

	PAGE
Chart 2.1 FHWA Organizational Structure	4
Chart 2.2 PennDOT Organizational Structure	8
Chart 2.3 PHMC/BHP Organizational Structure	12
Chart 5.1 Five-Phase Project Development Process.....	29
Chart 6.1 PennDOT Transportation Project Development Process - EIS	39
Chart 6.2 PennDOT Transportation Project Development Process - CE	41
Chart 6.3 PennDOT Transportation Project Development Process - EA	43
Chart 6.4 Section 106 Process	45

LIST OF MAPS

	PAGE
Map 2.1 PennDOT Engineering Districts.....	10
Map 2.2 Pennsylvania’s Transportation Planning Organizations.....	15
Map 3.1 Pennsylvania Land Purchases.....	17



1. Introduction

Consultation between the United States Federal government and Federally-recognized tribal nations is a directive at the highest level. The last Executive Order to deal with the issue of tribal consultation (EO 13175 of November 6, 2000) “Consultation and Coordination with Indian Tribal Governments” directs Federal agencies to meaningful consultation between the agencies and Federally-recognized, sovereign tribal nations. All US Federal agencies must follow this directive and many have established their own directives and orders to fulfill their tribal consultation responsibilities.

The US Department of Transportation established DOT Order 5301.1 on November 16, 1999, the “Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes”, which directs each DOT mode to develop consultation procedures which reflect the special, government-to-government relationship between the US government and sovereign tribal nations. The Federal Highway Administration, as part of the US Department of Transportation, has followed this directive to establish tribal consultative relationships. After initial consultation between the Federal Highway Administration Pennsylvania Division (FHWA) and Federally recognized tribes with ties to Pennsylvania, the Pennsylvania Department of Transportation (PennDOT) has been granted authority for undertaking general tribal consultation on behalf of the Federal Highway Administration. However, FHWA retains ultimate responsibility for government-to-government consultation.

Beyond the directives to consult with Federally-recognized tribes as sovereign nations, several environmental laws require tribal consultation during projects. These laws and regulations among them are:

- National Environmental Policy Act (NEPA)
- National Historic Preservation Act (NHPA) which includes Section 106 and its guiding regulations (36CFR800)

Histories, contact information, and detailed areas of interest for the 14 Federally recognized tribes with historic ties to Pennsylvania is located in the *Pennsylvania Tribal Consultation Handbook Appendix (PUB 592) (Appendix)*. The Tribes that are still preparing their comments have their histories labeled “draft text”. At the request of the Tonawanda Seneca Nation their history has been omitted pending their review. When comments are received they will be addressed and an update of the *Appendix* will be issued.

This handbook deals only with Federal actions approved by the Federal Highway Administration, part of the US Department of Transportation, and the authority delegated for tribal consultation to the Commonwealth of Pennsylvania – the Pennsylvania Department of Transportation. These relationships and the process of tribal consultation through the Pennsylvania Department of Transportation will be explained further in the following chapters. The place of tribal consultation, particularly within the Section 106 process, will be detailed.



1.1 Purpose

The *Pennsylvania Tribal Consultation Handbook* was developed to provide guidance on consulting with Federally-recognized tribes as part of the Section 106 process for Pennsylvania Federal Highway Administration and Pennsylvania Department of Transportation staff and Federally-recognized tribes with historic ties to the Commonwealth of Pennsylvania on the process of tribal consultation.

- *The goal is to build a common foundation among these groups in order to continue on a parallel yet shared journey with mutual respect and understanding.*

This handbook is intended as a resource for Federal Highway Administration and Pennsylvania Department of Transportation staff, as well as tribal leaders and historic preservation officers. It is not intended to cover the requirements or processes of tribal consultation between Federally-recognized tribes and any other federal agency, either in Pennsylvania or beyond.

The purpose of consultation with Federally-recognized tribes is to reach an informed and supported decision on how to consider the effects of projects on historic resources. Where historic properties are of religious and/or cultural significance to tribes, the tribes bring a unique and added perspective to the consultation process.

When tribes are provided with a reasonable opportunity to provide advice on the identification and evaluation of such properties, when tribes articulate views on the project's effects on such properties, and when tribes participate in the resolution of adverse effects to such properties, the decisions and results will be better balanced.

Note

*The term "tribes" in the following publication refers only to Federally-recognized tribes included on the list maintained by the Bureau of Indian Affairs (BIA). This document will continually be updated and the updates will be placed on the PennDOT CRM website, www.penndotcrm.org. Notification of when updates are completed will be sent to all parties.



2. Federal, State, and Regional Agencies in the Transportation Development Process

Tribal consultation at any level is a process of building relationships between a variety of agencies, organizations, tribes, and personnel. Chapter 2 will introduce some of the major US Federal, Pennsylvania State and local participants in the consultation process. The use of acronyms is a hallmark of any government publication and this will not be any different. A constant reference to laws, acts and regulations with long names is made easier by using its abbreviation. Please make note of the acronyms introduced here to help identify these participants later in the document and in other publications which use acronyms commonly (a listing of acronyms and common terms can be found in **Appendix A**, as well). Brief descriptions of each non-tribal participant and their internal organization is provided to give readers a starting point for understanding the position of agency staff involved in tribal consultation. Contact information for divisions and personnel most closely involved in tribal consultation is provided in **Appendix B** at the end of this document.

2.1 Federal Government

2.1.1 US Department of Transportation (USDOT) - includes the office of the Secretary of Transportation and oversees various transportation agencies including the Federal Highway Administration (FHWA), Federal Aviation Administration (FAA), and Federal Transit Administration (FTA), among others. The US Department of Transportation was established by an act of Congress on October 15, 1966. The mission of the Department is to:

Serve the United States by ensuring a fast, safe, efficient, accessible and convenient transportation system that meets our vital national interests and enhances the quality of life of the American people, today and into the future.

The USDOT has provided internal orders to the various transportation modes under its authority to establish and conduct tribal consultation activities. For the purposes of this handbook, we are concerned with the Federal Highway Administration which oversees the activities and provides the majority of funding for the Pennsylvania Department of Transportation.

2.1.2 Federal Highway Administration (FHWA) - coordinates highway transportation programs in cooperation with states and other partners to enhance the country's safety and economic vitality, while not degrading quality of life, and the environment. The FHWA is headed by the Office of the Administrator which oversees a variety of programs and departments. This includes the Federal-aid Division Offices which are located in every state. The Federal-aid Division Office for Pennsylvania is located in Harrisburg, with staff in Philadelphia, and oversees FHWA funding to the Pennsylvania Department of Transportation, as well as other transportation agencies.

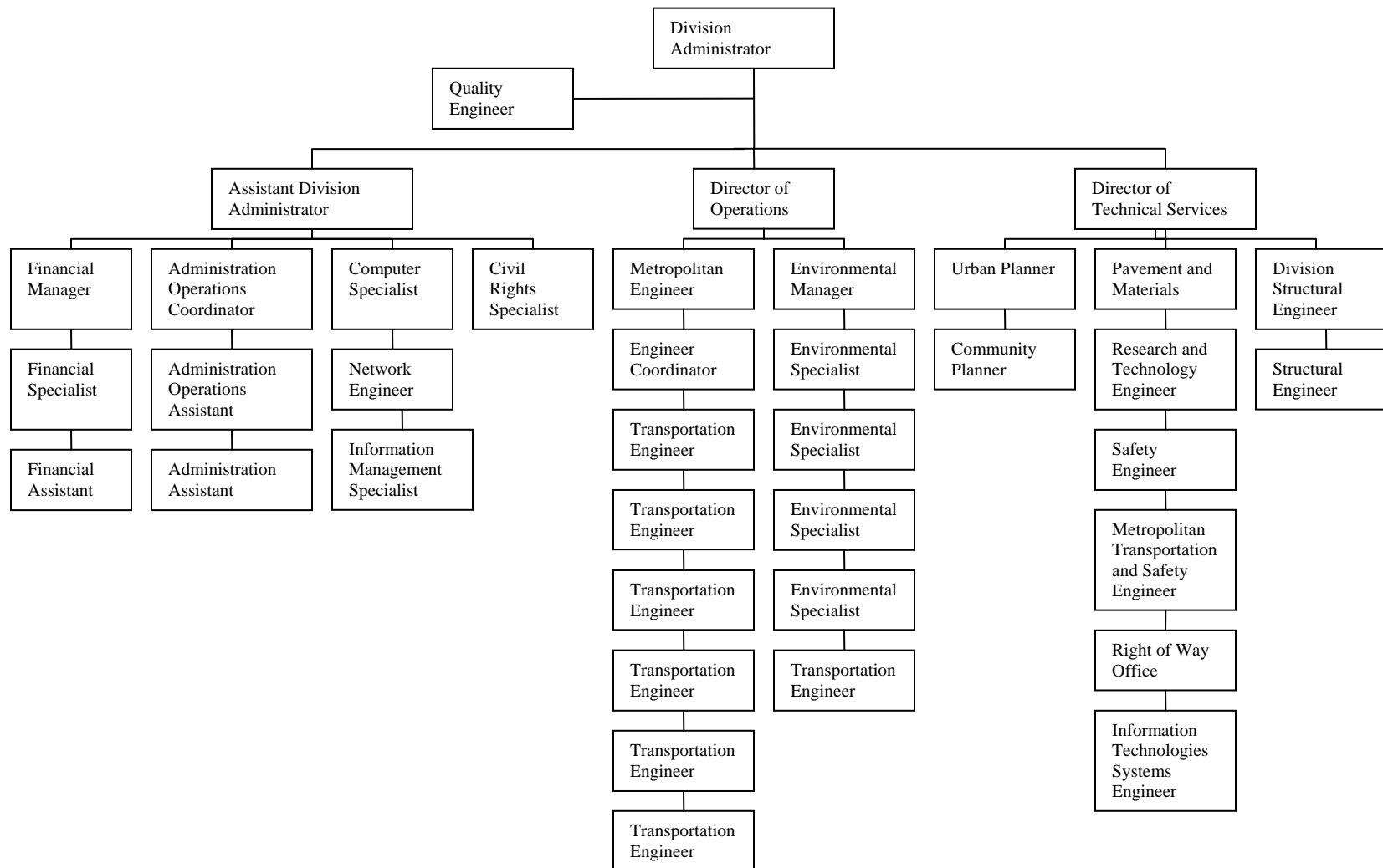


CHART 2.1 FHWA ORGANIZATIONAL STRUCTURE



The FHWA performs its mission through three principal programs. The focus of this handbook is the Federal-Aid Highway Program. The Federal-Aid Highway Program is a federally assisted state program. The State Highway Agency (SHA) is the recipient of Federal funds and is also responsible for administering the program. The role of the FHWA is to administer the Federal-Aid program in partnership with the SHA. The FHWA provides Federal financial assistance to the states to construct and improve the National Highway System (NHS), urban and rural roads, and bridges. Each of the fifty-two operating FHWA Division Offices (one in each state, the District of Columbia, and Puerto Rico) is located in the same city as the SHA. These Division Offices provide front line Federal aid program delivery assistance to partners and customers in highway transportation and safety services - including but not limited to – transportation planning and research, preliminary engineering, technology transfer, right-of-way, bridge, highway safety, traffic operations, environment, civil rights, design construction and maintenance, engineering coordination, highway beautification, and administration.

The **FHWA, Pennsylvania Division Office** is located on the 5th Floor, Room 508, of the Federal Building in Harrisburg, Pennsylvania. The Division has responsibilities in the area of Federal-Aid. The FHWA Division Office works in partnership with the Pennsylvania Department of Transportation, Metropolitan and Rural Planning Organizations (MPOs/RPOs) in Pennsylvania, as well as other customers.

The FHWA, Pennsylvania Division has ultimate responsibility for tribal consultation on Federally funded transportation projects in the state. The head of the FHWA Pennsylvania Division is the Division Administrator; most tribal consultation activities carried out by the Division Office are done through the Environmental Team. The contact person in that office is the Environmental Team Leader.

If you have any questions relating to highway transportation in Pennsylvania, you can call the Division Administrator (DA) at (717) 221-3461, or you may contact the official e-mail address at Pennsylvania.FHWA@fhwa.dot.gov, or you may write to the street address. Staff contact information can be found in the **Appendix B**.

Federal Highway Administration
228 Walnut Street, Room 508
Harrisburg, PA 17101-1720

Compliance with the National Environmental Policy Act and Section 106 of the National Historic Preservation Act is required for Federal-Aid projects in order to fulfill the responsibilities of the FHWA to take into account effects to historic resources. In the state of Pennsylvania, the FHWA utilizes the assistance of the Pennsylvania Department of Transportation in satisfying its NEPA and Section 106 responsibilities, but is ultimately responsible for all compliance issues. FHWA handles all consultation with the Advisory



Council on Historic Preservation and consults with the Advisory Council on the effects of projects on historic resources as prescribed in the regulations 36CFR800. FHWA is also involved with coordination and consultation with the State Historic Preservation Officer, and the Keeper of the National Register if there are questions on eligibility that can not be resolved.

Note

*In December 2000, FHWA Headquarters in Washington named its first Native American Program Coordinator. The Coordinator serves as the agency leader for coordination of activities involving Native American Tribal Governments and represents the agency in the development and execution of national policies, programs and regulations as related to Native American cultures. The FHWA recognizes tribal sovereignty and is committed to furthering the agency's efforts to work more closely with tribal governments. The program can be found at <http://www.fhwa.dot.gov/environment/natvamrc/>.

2.1.3 Advisory Council on Historic Preservation (ACHP) – is an independent Federal agency that promotes the preservation, enhancement, and productive use of the nation's historic resources. The ACHP has a responsibility to encourage Federal agencies to factor historic preservation into Federal project requirements. As directed by the National Historic Preservation Act (NHPA), the ACHP serves as the primary Federal policy advisor to the President and Congress; recommends administrative and legislative improvements for protecting the nation's heritage; advocates full consideration of historic values in Federal decision making; and reviews Federal programs and policies to promote effectiveness, coordination, and consistency with national preservation policies.

2.1.4 National Park Service (NPS) - The Keeper of the National Register is located within the National Park Service and may be requested to provide a formal Determination of Eligibility for historic resources when SHPO does not agree with the determination of the FHWA. FHWA does not send this information to the Keeper unless they are elevating a disagreement between FHWA and the SHPO concerning a determination of eligibility. The NPS provides guidance on standards of archaeological investigations in the issuing of “Secretary of Interior Standards for Archaeology and Historic Preservation” and on determining eligibility in NPS Bulletins.

2.2 State Government

2.2.1 Pennsylvania Department of Transportation (PennDOT) – is the lead agency responsible for developing, maintaining and enhancing the Commonwealth’s transportation system. Meeting Pennsylvania’s demands for high quality transportation services and facilities amid tight fiscal constraints and complex social and environmental regulations requires organizational agility and an integrated approach that is equal to the challenge. PennDOT is the State Highway Agency (SHA) in Pennsylvania.

The primary customers of the Department's highway administration units are the more than eight million Pennsylvanians who own or drive cars, trucks, and freight, as well as the millions of visitors who travel the Commonwealth by road. The Deputy Secretary for Highway Administration supervises the Chief Engineer and the eleven Engineering Districts which cover the state. This organization of over 12,000 employees works to satisfy its



customers by maintaining, restoring and expanding the nation's fifth largest state highway system.

PennDOT assists the FHWA in complying with NHPA including the identification and evaluation of eligible historic resources, and the assessment of effects for resources within the project's area of potential effect. PennDOT also initiates the coordination with the State Historic Preservation Office and other consulting parties and is an active participant in any consultation during the life of the project. PennDOT is responsible for assuring implementation of FHWA's commitments to any conditions or agreements reached on the treatment of historic resources.

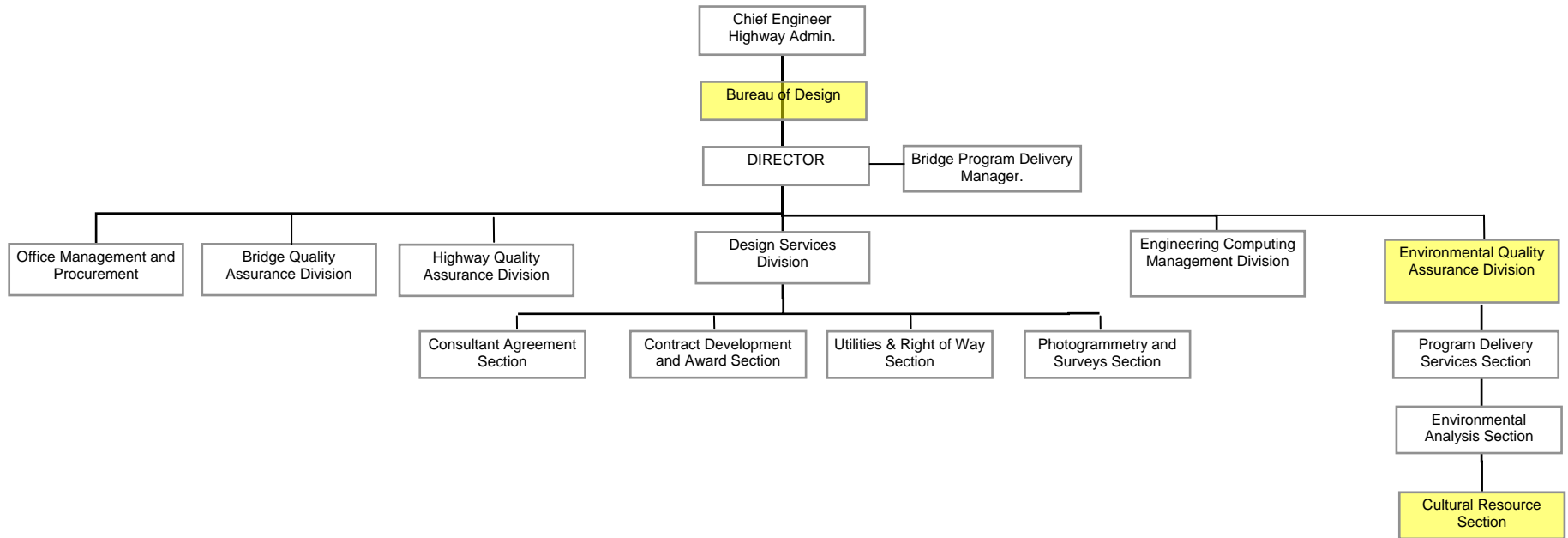


CHART 2.2 PENNDOT ORGANIZATIONAL STRUCTURE



2.2.1.1 PennDOT Bureau of Design, Environmental Quality Assurance Division, Cultural Resources Management Program - is responsible for day-to-day tribal consultation activities. This program is led by the Environmental Quality Assurance Division (EQAD) of the Bureau of Design (BOD) with the assistance of the Highway Quality Assurance Division (HQAD). EQAD's mission is to guide and assist PennDOT so that it may develop and maintain the Commonwealth's transportation system in an environmentally sound manner. This means providing Department leaders, organizations, personnel, contractors, vendors and consultants with the environmental information, analysis, guidance, agency coordination assistance, and other technical support needed to protect and enhance the natural and human environment.

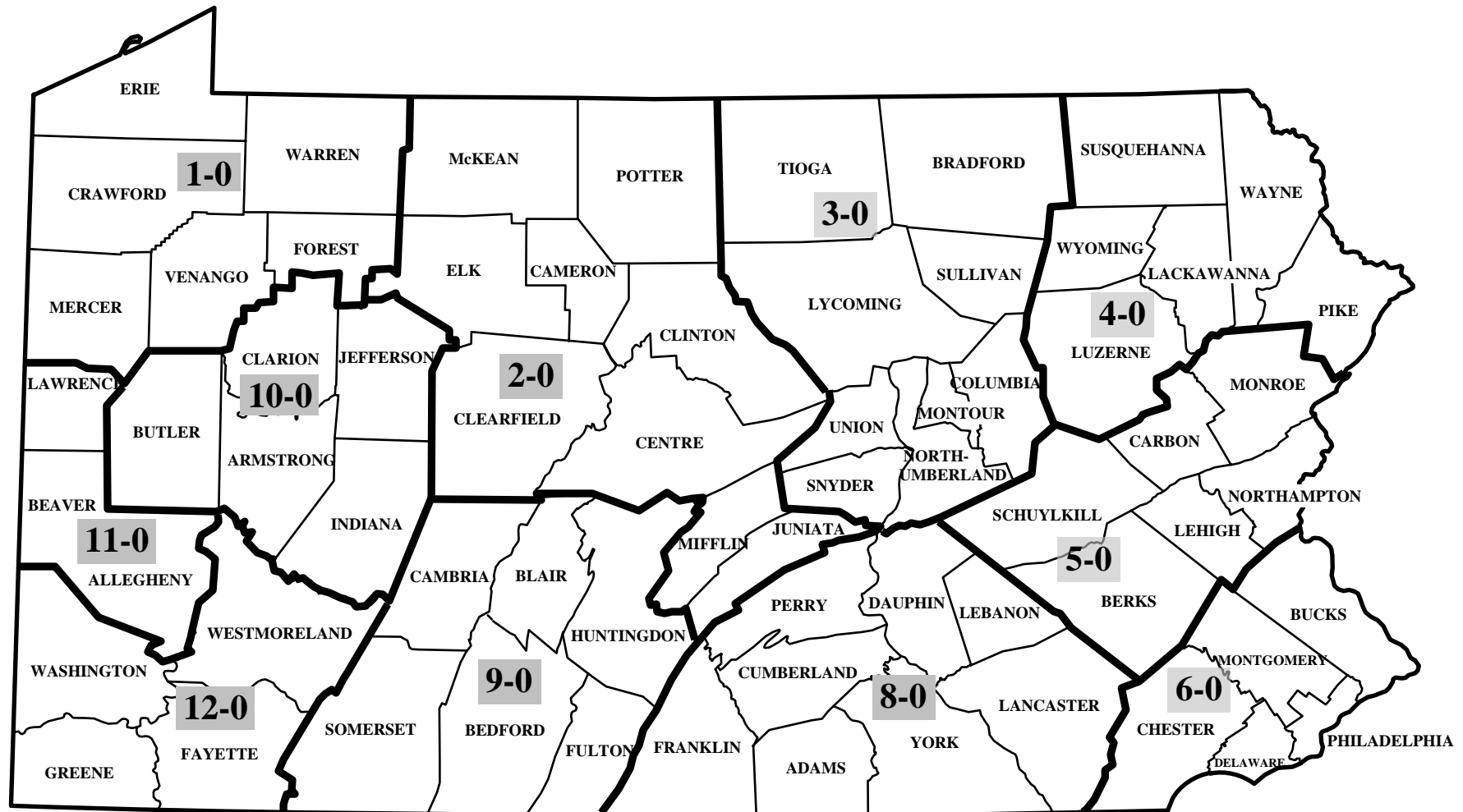
The Cultural Resources Management Program maintains a website at www.penndotcrmm.org which is designed to provide visitors with an overview of the program; to disseminate the results of their archaeological investigations, bridge and structures inventories and other research results; and to serve as an educational resource for students and teachers interested in the buried and above-ground evidence of Pennsylvania's heritage found along existing and proposed highways. PennDOT also maintains a website which has video of the majority of the roads in Pennsylvania. These videos are updated every two years.

2.2.1.2 PENNDOT ENGINEERING DISTRICTS

The eleven (11) Engineering Districts which cover the state are directly responsible for preparing environmental documents, final design, construction and maintenance of highway and bridge projects in their districts. Each Engineering District has been assigned a professionally qualified cultural resource team consisting of an archaeologist and an architectural historian. These District Cultural Resource Professionals (CRPs) assist the District Environmental Manager and the Project Manager in complying with Section 106. The CRPs all report to the Cultural Resources Management Program at the Central Office in Harrisburg. Responsibilities of the CRP team include participation in scoping field views, documenting a project's Area of Potential Effect (APE), and making recommendations of eligibility and effect, as well as tribal consultation for projects within their districts.

Most of the time, project-specific decisions and consultation are conducted through the District offices. A list of cultural resource contacts by District can be found in **Appendix B**. Projects which span districts, have public controversy, or other concerns may be overseen by Central Office. Central Office is located in Harrisburg and the cultural resources staff located there oversee the District cultural resource staff and develop policy and guidance. There is a separate District office located in Harrisburg which deals with projects in that region.

The Engineering Districts cover the entire Commonwealth as follows:



MAP 2.1 PENNDOT ENGINEERING DISTRICTS



2.2.2 Pennsylvania Historical and Museum Commission (PHMC) – was created in 1945 to consolidate the functions of the Pennsylvania Historical Commission, The State Museum and the State Archives. The PHMC is an independent administrative board, consisting of nine citizens of the Commonwealth appointed by the Governor, the Secretary of Education, two appointed members of the PA Senate, and two appointed members of the PA House of Representatives. The Executive Director serves as the appointed State Historic Preservation Officer.

As the official agency of the Commonwealth for the conservation of Pennsylvania's historic heritage, the powers and duties of the Commission fall into these principal fields; care of historical manuscripts, public records, and objects of historic interest; museums; archaeology; publications; historic sites and properties; historic preservation; geographic names; and the promotion of public interest in Pennsylvania history.

2.2.2.1 PHMC - Bureau for Historic Preservation (BHP) – is part of the PHMC and serves as the State Historic Preservation Office (**SHPO**) for Pennsylvania. The BHP is divided into three administrative units: Preservation Services, Archaeology and Protection, and Grant Programs and Planning. Federal law requires that the PHMC/BHP, as the **SHPO**, be consulted throughout any Federal-Aid project. The **SHPO** has a key role by providing assistance in the identification of eligible historic resource, the assessment of effects and the consideration of alternatives to avoid or reduce effects.

The **SHPO**, functions in an advisory capacity in reviewing projects for the responsible agency. Ultimately, the final decision of how the **SHPO**'s recommendations will be used to fulfill the legal requirement to consider historic resources rests with the responsible federal agency.

The **SHPO** is guided by *The Pennsylvania Historic Preservation Plan* (<http://www.phmc.state.pa.us/bhp/Plan/presplan.asp>). It has published guidelines for archaeological investigations conducted in Pennsylvania in the form of the *Cultural Resource Management in Pennsylvania: Guidelines for Archaeological Investigations*.

The **SHPO** houses archaeological site locations as recorded in the Pennsylvania Archaeological Site Survey (PASS) files. The files are the official repository of site information and in 2004 contain information on over 19,500 archaeological sites of all cultural periods, with 400-500 new sites added annually. The **SHPO** maintains survey files for Pennsylvania which consist of over 2500 archaeological reports.

The **SHPO** also maintains the Cultural Resource GIS (CRGIS) website. This website allows a qualified individual that requests a password from the **SHPO** to view information and locations of archaeological sites, surveys, and historic resources.

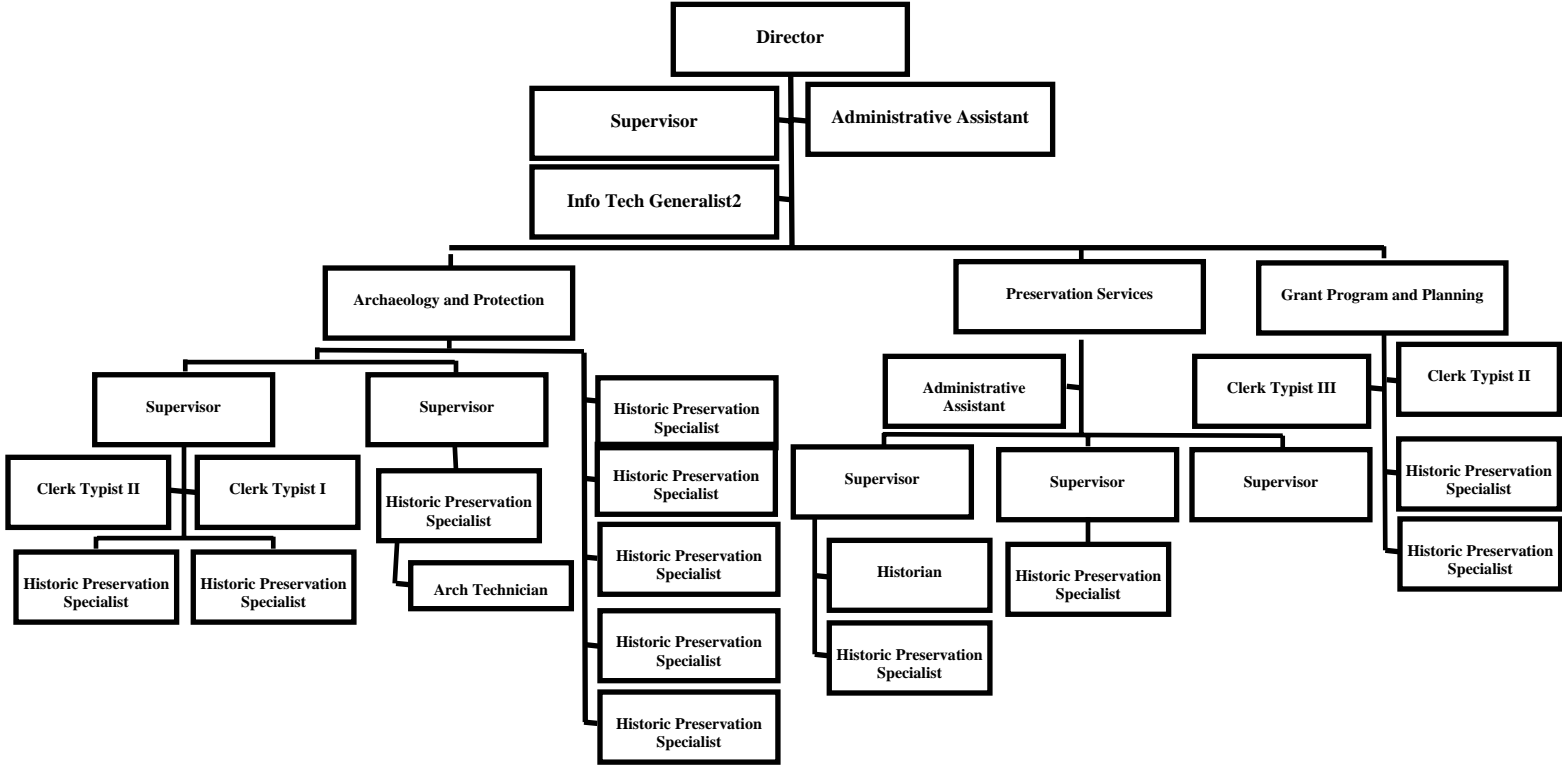


CHART 2.3 PHMC/BHP ORGANIZATIONAL STRUCTURE



2.2.2.2 The State Museum of Pennsylvania, Section of Archaeology - The Section of Archaeology curates nearly 3 million artifacts and excavation records, documenting 16,000 years of human habitation in the Commonwealth. Although the collection contains diverse artifact types found in each of Pennsylvania's counties, geographic emphasis is on the Susquehanna River Valley.

The State Museum is the Commonwealth's main repository per state law for archaeological collections, particularly ones unearthed as a result of compliance with state and federal preservation mandates. Detailed *Curation Guidelines* for the preparation of compliance collections are issued by the Section and updated periodically. Access to the collection requires the submission and approval of a written research proposal. Visitation and use are by scheduled appointment only.

The State Museum is also the office that coordinates NAGPRA for the Pennsylvania Historical and Museum Commission.

2.3 Regional

2.3.1 Metropolitan Planning Organizations (MPO) – By Federal regulation, MPOs are required for urbanized areas of 50,000 or more in population. The MPOs conduct a transportation planning and programming process for the urbanized counties. Their primary products are a long range plan of at least 20 years in length and a Transportation Improvement Program (TIP) for their area. All MPO TIPs are rolled up into the Statewide Transportation Improvement Program (STIP). Currently there are 15 MPOs in Pennsylvania.

- MPO members include:
 - Local elected officials
 - Representatives of the major modes of transportation
 - PennDOT
 - Others
- MPOs are required to develop and maintain a Long Range Transportation Plan of at least 20 years and a Transportation Improvement Program (TIP) that covers four years.
- MPOs are supported by Federal, State and Local Planning Funds.

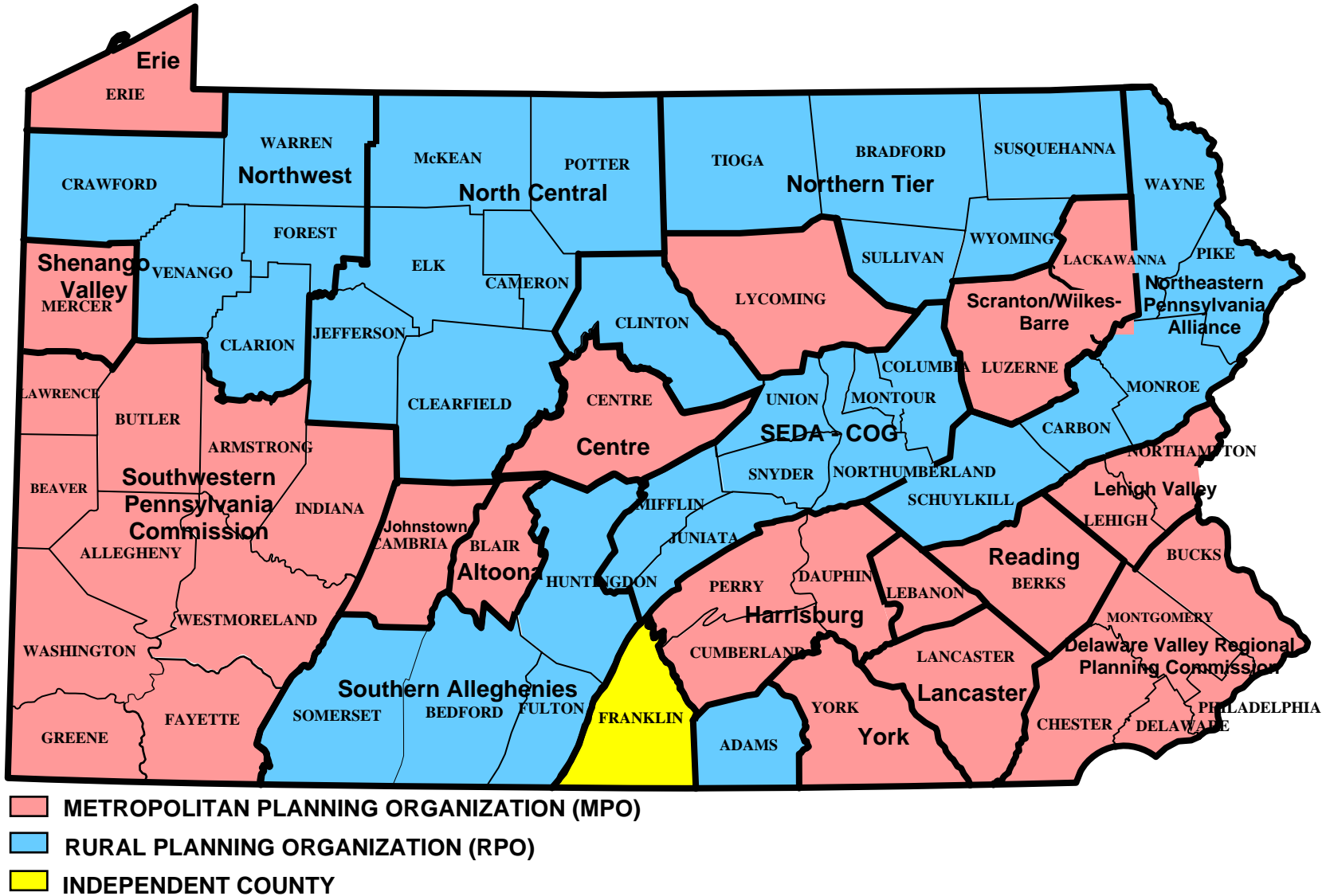
2.3.2 Rural Planning Organizations (RPO) - represent multiple counties outside of the MPOs. Their duties include planning and programming for transportation needs in their region through the creation of a TIP. Federal law does not require a rural transportation planning and programming process, but in Pennsylvania RPOs and Independent Counties serve a similar function as MPOs for the rural areas of the state. Federal law requires states to consult and coordinate with local officials in rural areas of the state. Currently there are 7 RPOs in Pennsylvania.

- RPO members include:
 - County officials
 - Representatives of the major modes of transportation



- PennDOT
- Others
- RPOs also develop and maintain a Long Range Transportation Plan of at least 20 years and a Transportation Improvement Program (TIP) that covers four years.
- RPOs are supported by Federal, State, and Local Planning Funds

2.3.3 Independent County (IC) - Independent Counties (ICs) are not affiliated with an MPO or RPO and do not have a formal transportation planning process. As with RPOs, the only Federal requirement is that the state consult and coordinates with local officials in the non-metropolitan areas of the state. Currently there is one Independent County in Pennsylvania – Franklin County.



MAP 2.2 PENNSYLVANIA'S TRANSPORTATION PLANNING ORGANIZATIONS



3. Tribal Histories and Contact Information

Although no Federally-recognized tribes currently reside within the Commonwealth, their ties to this region go back thousands of years. Currently, fourteen (14) Federally-recognized tribes have been identified by Pennsylvania FHWA and PennDOT as having ancestral ties to the lands currently comprising the Commonwealth. These tribes represent three broader groups (the Delaware, the Shawnee, and the Haudenosaunee or Iroquois).

A vital component of effective tribal consultation is mutual education:

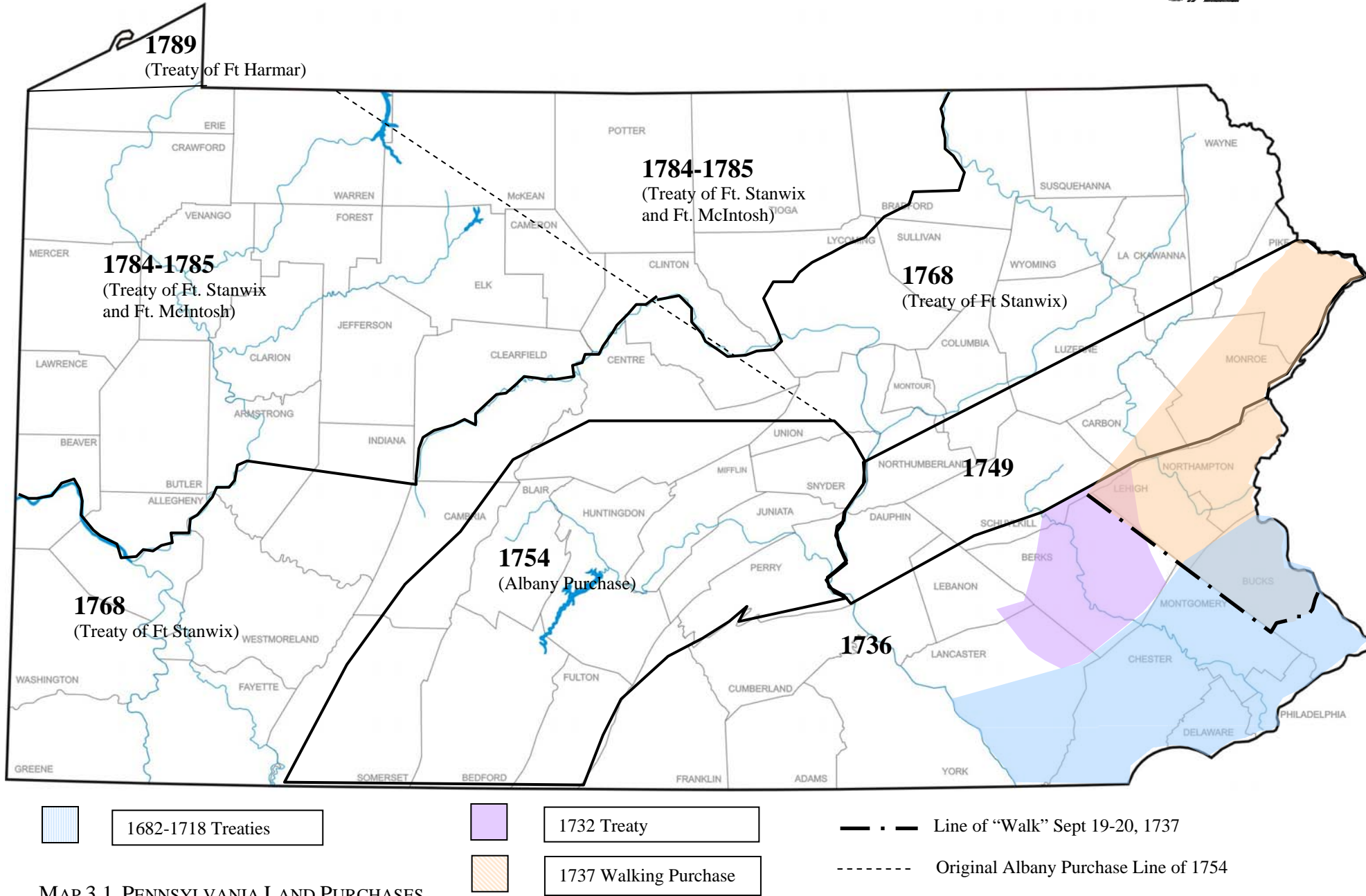
- *Educating the tribes on PennDOT and Pennsylvania FHWA policy and practice.*
- *Educating transportation staff on the history and current organization of the tribes.*

Political and economic factors drove the ancestors of these tribes from our region more than 200 years ago (Map 1). Groups related by culture have, over time, settled in geographically unconnected areas. This chapter addresses the history of the tribes' development and displacement, as well as their current culture and organization.

This handbook was written for the purposes of facilitating PennDOT's and Pennsylvania FHWA's tribal consultation responsibilities and provides a very brief introduction to the complex history and culture of these tribes, either during their residence in the state or later. A brief history of the development of each of the three groups mentioned above is outlined in this chapter.

Historic and organizational information specific to each tribe can be found in the *Handbook Appendix (PUB 592)*. Maps showing territories of historic interest for each tribe have also been included in the supplement. These territories were artificially created only for the purposes of streamlining tribal consultation with PennDOT and the Pennsylvania FHWA. While generally reflective of the original tribal homelands, they should not be considered reflective of use patterns or affiliated territory for research or any purposes other than this consultation. We appreciate the tribes' assistance in providing information for the *Handbook Appendix (PUB 592)*.

Eight of the tribal histories in the *Handbook Appendix* are labeled as "DRAFT TEXT" pending the review and comment by the respective tribe. The Tonawanda Seneca Nation requested that their pages be omitted pending review. The other six nations have provided comments which have been included in the document.



MAP 3.1 PENNSYLVANIA LAND PURCHASES

*From *Indian Iroquois I, History of Pennsylvania Purchases from the Indians*, D. Kent 1974



3.1 Delaware (Lenape) - Delaware Nation, Stockbridge-Munsee Band of Mohican Indians (DRAFT)

The Delaware called themselves “Lenape” which translated either as "original people" or "true men." The term “Delaware” may have come from an early European trading ship whose captain entered a large bay which he named in honor of Sir Thomas West, Third Lord de la Warr and the first governor of the Virginia. English colonists later used the name “Delaware” for the bay, the river and the native peoples who lived there.

For many Algonquin (the language family to which the Lenape, Mahican, Shawnee, and other tribes belong), the Lenape were the "grandfathers," a term of great respect stemming from the widespread belief that the Lenape were the original tribe of all Algonquin-speaking peoples. This often gave the Lenape the authority to settle disputes between rival tribes.

Stockbridge-Munsee Band of the Mohican Nation of Wisconsin (DRAFT)

The Delaware were never a single political unit prior to European colonization. The term “Delaware” refers to groups of people that originally lived across present day New Jersey, southeastern New York and eastern Pennsylvania. These groups spoke dialects of closely-related Algonquian languages (Munsee and Unami) with the Munsee living north of the Delaware Water Gap, groups of North Unami-Unalachtigo speakers living along the middle reaches of the Delaware River, and the Southern Unami speakers living below Trenton along the lower reaches of the Delaware and Schuylkill Rivers. The Delaware would unite often to deal with outsiders or to conduct large hunts, and intermarriage was quite frequent between groups. Delaware villages were semi-permanent and comprised of longhouse structures housing several families in a single structure. Families became more mobile in the summers and moved out of the villages into small field villages and hunting or fishing camps. The Delaware were agriculturalists, growing corn, beans and squash, as well as hunters and fishers.

Explorers and traders interacted with the Delaware throughout the 1500s and 1600s; the beaver fur trade had a particularly significant impact on the Delaware who were some of the first groups to take traders inland to hunt for furs and who controlled some of the access to lands inland. Violent incidents, massacres and raids increased between Delaware, neighboring tribes, and European fur traders as fur resources started to be depleted and hunting was moved inland in the 1630s and 1640s. By the end of the 1600s, the movement of the Delaware out of their traditional lands and away from the coast had already begun. The movement of the Delaware out of their traditional homelands occurred over many years and at many scales, from a few families to entire villages. The many divisions and consolidations of Delaware groups across the country are too numerous to detail, only the major movements will be summarized here.

William Penn was granted proprietorship of “Pennsylvania” by the English king in 1681. Upon reaching his new land, William Penn made treaties with the local inhabitants,



Delawares, for use of the land. Thus began the official sale of Indian lands in Pennsylvania; only one hundred and six years later, all but one tract of Indian lands in Pennsylvania would be sold. The Cornplanter Tract, given to Chief Cornplanter in 1791, in Warren County would remain until 1964 when the Kinzua Dam was shut and flooded the physical remains of the community. In the late 1600s and early 1700s, land sales and increased colonization continued to pressure the Delaware to move westward and gather in a reduced number of villages. Southern Unami groups from along the Schuylkill moved to Paxtang in 1709; more followed in 1732. Paxtang had originally been established by Shawnee in 1697 and other Shawnee had continued north to settle with Northern Unami groups in the Minisink area. Shawnee and Delaware settlement throughout Pennsylvania and west were intertwined from that time. In the 1720s, the Southern Unami moved north to Shamokin and east to Kittanning. The infamous Walking Purchase of Northern Unami lands occurred in 1737 which sold some of the last Delaware homelands. After 1742 Northern Unami groups were settled at Shamokin and Wyoming. Most of the Munsees remained in the Shamokin and Wyoming area until the end of the French and Indian War (1754-1763). After the war, some moved to the West Branch of the Susquehanna and most of the Munsees moved to Goschgosching in Forest County in 1765. From the 1750s to 1760s most of the Unami groups had moved into the lower Allegheny and upper Ohio valleys into Ohio. At this time, the modern group known as the Delaware began to emerge as a single, independent entity. This group was divided into three phatries or clans (Turtle, Turkey, Wolf) each with its own chief.

The Northern Unamis and Munsee who stayed behind in Pennsylvania and southern New York became satellites of the Iroquois Confederacy. In 1756 the Munsee remaining in the lower Hudson Valley were forced to move west and joined the Oneida in New York. Other Christianized Munsee groups joined them with the Oneida including, in 1786, those who had joined the Stockbridge Mohicans. In the 1800s, land speculation in New York placed pressure on all of the Iroquois nations and in 1822 most of the Oneida and those living with them moved to lands purchased in Wisconsin. The Stockbridge Munsee Community was given separate lands in 1856 in western Wisconsin. Throughout this period, Munsee and Northern Unami also moved up to Canada onto the Six Nations Reserve in Ontario, and other towns.

Delaware Nation

The Delaware at the beginning of the 1600s lived in approximately 40 villages with a total population of between 15,000 and 20,000 individuals (the total population would fall to approximately 3,000 by the end of the Revolutionary War). Again, the groups referred to in this context as “Delaware” were not yet a single unit or tribe, but were closely related villages. The earliest contacts between Delaware and Europeans were not recorded, but when in 1524 Giovanni da Verrazano sailed on the French ship *Dauphine* into nearby waters, the Delaware were prepared to trade and did not seem surprised by the visitors.

By the end of the American Revolution expansion westward was becoming an ever increasing reality for the Native people. In 1782 Chief White Eyes was murdered and 90



Christian Delaware along the Ohio River were also killed. This along with the movement west by settlers, pressured many of the Delaware to move to Spanish Missouri. By 1793 the governor of Louisiana granted land to the Delaware in the area of Cape Girardeau, Missouri. Problems between the tribes that were already in the area and the Delaware caused the Delaware to look for a different location. Members of the tribe had different ideas, some wanted to move to an area that is now Kansas and another group wanted to move to Texas, which at the time was still part of Spain. The group that moved close to the border of northeast Texas became the Absentee Delaware. The exact date has not been established, but was around 1819, the same time as a group of Cherokee made the move. Some documents say the Absentee Delaware were with the Cherokee around Nacogdoches by 1828.

By 1833 the Cherokee and the Affiliated Bands, including the Delaware, had finally gained some footing on the land they had claimed since 1815. In less than three years however, they were removed again by ever increasing pressure by the settlers of Texas. In 1839 the Absentee Delaware left for McCurtain County, Oklahoma until about 1842 when they in part returned to Texas at the request of Sam Houston who was president of the Republic of Texas for a second time. Houston felt it was a benefit to have the friendly tribes as a buffer between the settlements and the hostile tribes of the prairie. The Delaware had shown in the passed their ability as peacemakers with the other tribes.

In 1853 the Absentee Delaware once again were removed out of Texas to just across the border into Indian Territory, now Oklahoma. Even with this removal, Absentee Delaware members continued to serve Texas as scouts and interpreters. In 1856 Sam Houston again was in a position to change the policy of Texas and ask the tribes to return to the Brazos Reserve that had been set up in northern Texas. This reserve soon had many tribes, including Wacos, Comanches, Caddoes, and Anadarkos. The Absentee Delaware that were living on the reserve were listed under the Caddoes. In the same year however, Texas passed a law setting up a new county that included the area of the Brazos Reserve. This was once again a pre-cursor to problems that again and for the last time, caused the removal of the Absentee Delaware from Texas in 1859.

The removal took the Absentee Delaware to present day Okalahoma, which at that time was called Indian Territory. The tribe moved with the Caddoes, Anadarkos, and the other tribes from the Brazos Reserve to a reserve near present day Anadarko, Okalahoma.

Since the Absentee Delaware were routinely listed under other tribes the treaties providing land in Indian Territory never included the Absentee Delaware. There were instances, such as 1872 when the Alvord Agreement was signed and the chief of the Absentee Delaware, Black Beaver signed as a witness.

At the turn of the century the U.S. government began a system of allotment by which each member of a tribe would receive 160 acres. By doing this it was the feeling of the government that the tribes would drop claims for former lands. Members of the Absentee Delaware did not want allotment and traveled to Mexico at the request of the Mexican government to acquire land for a reservation. However several members of the tribe that



made the trip died during it due to illness. This never discouraged the tribe. By 1973 the Absentee Delaware passed their own constitution and changed the name to the Delaware Tribe of Western Oklahoma. In 1976 the Delaware Tribe of Western Oklahoma applied for funding as a separate tribe for the first time. By 1984 the Delaware Tribe of Western Oklahoma moved into a new building called the Delaware Tribal Complex.

In 1999 the tribe changed their name once more to the Delaware Nation. They have continued to maintain their offices in the Delaware Tribal Complex in Anadarko.

Sources:

<http://www.delawaretribeofindians.nsn.us/>

Goddard, Ives. "Delaware" in Handbook of North American Indians. Bruce Trigger, ed. Vol. 15, pp 213-239. Smithsonian Institution, Washington, D.C. 1978.

Hale, Duane Kendall. *Peacemakers on the Frontier: A History of the Delaware Tribe of Western Oklahoma*. Delaware Tribe of Western Oklahoma Press, Anadarko, Oklahoma 1987.

3.2 Haudenosaunee (Iroquois) – Cayuga Nation (DRAFT), Oneida Indian Nation (DRAFT), Oneida Nation of Wisconsin, Onondaga Nation, St. Regis Mohawk Tribe, Seneca Nation of Indians (DRAFT), Seneca-Cayuga Tribe of Oklahoma, Tonawanda Seneca Nation (DRAFT), Tuscarora Nation

"Iroquois" is not a term the Six Nations peoples use to name themselves. It is derived from a French version of a word used by the Huron Indians to name the Six Nations people. It was considered a derogatory word meaning "Black Snakes." The Six Nations peoples name themselves "Haudenosaunee" which means "People building an extended house" or "People of the Long House." The longhouse is an important metaphor to the Haudenosaunee; it signifies living together and as a family with common values and traditions.

The Haudenosaunee traditionally lived in villages of longhouses which were moved occasionally, perhaps every 20 years or so. They were agriculturalists and hunters; they grew the "Three Sisters" – corn, beans, and squash. Each nation of the Haudenosaunee typically lived in one primary and one or two smaller, secondary, villages. The villages held anywhere from several hundred to several thousand inhabitants. Longhouses were occupied by several related family groups, descendants of one or two women. The Haudenosaunee were matrilineal, meaning descent was traced through an individual's female ancestors; the Haudenosaunee were also matrilineal, meaning that husbands typically moved to live with their wife's family after marriage.

The Haudenosaunee are comprised of six nations (Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora) who each maintain a national identity and culture, along with their common identity and culture as part of the Haudenosaunee Confederacy. The "League of the Iroquois" or Haudenosaunee Confederacy was created several centuries



ago with five original members (the Tuscarora were adopted into the Confederacy in 1722). The Confederacy has had a profound effect upon United States history. It had a major influence on society and governmental theory from the founding fathers' ideas of the new United States government, to Suffragettes fighting for women's vote in the early 1900's, to anthropological theory in the early 20th century.

The Confederacy was formed when the Peacemaker brought his message of unity to the fighting nations, creating the most famous Native American government on the continent. The Peacemaker, who was accompanied by Hiawatha and with his aid urged the nations to be joined in cooperation, also brought the message the Haudenosaunee refer to as the Great Law of Peace. Under the Great Law of Peace, the nations became of one head, one heart, one spirit -- addressing one another as family members. Chiefs of the nations became members of the Confederacy's deliberative assembly.

The symbol of the Haudenosaunee Confederacy is the Hiawatha wampum belt which represents the Mohawk, Oneida, Onondaga, Cayuga, and Seneca nations. The Mohawk are the Keepers of the Eastern Door and Seneca are the Keepers of the Western Door and elder brothers of the Confederacy. The Oneida, Cayuga, and later the Tuscarora, are younger brothers of the Confederacy. The Onondaga are the Keepers of the Council Fire and the meeting place of the Haudenosaunee Grand Council.

Each of the six Haudenosaunee nations is traditionally lead by a set of chiefs, or sachems, each of whom had specific duties and responsibilities to lead their nation. This system is still in place at Tonawanda (Seneca), Tuscarora, and Onondaga as the primary form of governance; and at Akwesasne (Mohawk) and Oneida there is a traditional council of chiefs which operates independently from the elected tribal council. For the Seneca Nation at the Cattaraugus and Allegheny Reservations, the chiefs function in a religious way only, not as a form of government. At those two reservations the form of government is called the Seneca Nation of Indians.

Both today and in the past, chiefs are chosen by the Clan Mothers on the basis of individual merit and ability. Each nation has a different number of chiefs and their titles rest with their clans. Chiefs are installed to serve for life, but could be removed by the Clan Mothers if the situation required.

Traditionally, there were a total of fifty (50) Haudenosaunee chiefs which met regularly at the Grand Council in Onondaga where decisions concerning the entire Confederacy were made according to general consensus. Today, the chiefs continue to meet at the Grand Council and may undertake certain decisions that involve the entire confederacy; as in the past, daily governance of each nation is the right of that nation. There is another Grand Council on the Canadian side at the Grand River Reserve that has been in operation from about 1784, when nearly half of the Haudenosaunee left their homelands to live in Canada after the Revolutionary War. Both councils agree that the central fire and the position of Tadadaho (head chief of the Grand Council) rests within the Grand Council that meets at Onondaga, located near Syracuse, NY.



Much of what is now New York State was the traditional homeland of the Haudenosaunee. Haudenosaunee interaction with Europeans began in the 1500s and 1600s as the Nations dealt with French traders to the north and Dutch traders to the south and east. European trade became an important aspect of life in North America at that time, and many treaties, wars, settlements and other activities took place in the scramble by tribes and European countries to benefit the most from this new economy.

Prior to the 1600s, Haudenosaunee tribes lived in villages of several hundred inhabitants. The villages were comprised of longhouses surrounded by palisade wooden walls and moved approximately every 20 years. Often a tribe was divided into two villages at one time; one large village and a smaller village located nearby. As European trade changed into colonization in the 1600s and 1700s, land sales and other pressures including declining populations pushed the tribes to consolidate into fewer villages which moved more rarely.

Land sales and colonizing pressures in the 1700's and 1800's eventually pushed several of the Six Nation tribes out of their homeland permanently or split into geographically and eventually politically distinct groups; others were able to retain portions of their homelands, or were moved onto other lands within New York State.

The Seneca Nation of Indians, the Tonawanda Seneca Nation, the Cayuga Nation, the Oneida Indian Nation, the Onondaga Nation, the St. Regis Mohawk Tribe, and the Tuscarora Nation still reside in New York State; the Cayuga Nation, the Oneida Indian Nation, and the Onondaga Nation currently have land claims in New York State under litigation. The Seneca-Cayuga Tribe of Oklahoma and the Oneida Nation of Wisconsin represent groups of Haudenosaunee which were forced to leave their homelands in the 1700's. More information on each of these tribal nations can be found in the **Handbook Appendix (PUB 592)**.

Note

* On March 31, 2006 the St. Regis Mohawk Tribe stated in a letter that they no longer wished to be consulted on Federal-Aid projects in Pennsylvania, at this time. They did however still wish to be informed when archaeological materials are uncovered that are Mohawk in origin. Because of this wish the information about the St. Regis Mohawk Tribe is still included in this document and the **Handbook Appendix (PUB 592)**.

Sources:

www.sixnations.buffnet.net; www.oneida-nation.net

3.3 Shawnee - Absentee Shawnee Tribe of Oklahoma (DRAFT), Eastern Shawnee Tribe of Oklahoma (DRAFT), Shawnee Tribe (DRAFT)

The Shawnee traditionally spoke an Algonquian language which is the same language group the Delaware belong to, and different from the Iroquoian-speaking Haudenosaunee. The word "Shawnee" is probably derived from a word the Shawnee used to describe themselves which meant "person of the south". The Shawnee were



hunters and agriculturalists. They lived in semi-permanent villages, traveling in smaller groups in the winter season and gathering in the summer. Summer villages consisted of bark-covered structures similar to Iroquoian longhouses with a communal structure located in the center of the village. After European contact, Shawnee also began to build one-room, log homes similar to the colonists' own homes.

Historically, the Shawnee were a highly dispersed group and the earliest records place them in Ohio, Illinois, Maryland, West Virginia, and beyond. By the late 1600s to early 1700s the Shawnee had gathered in eastern Pennsylvania. Once in eastern Pennsylvania, the Shawnee conducted a close relationship with the Delaware and even lived in the same settlements on occasion.

After this relative ingathering into eastern Pennsylvania, the Shawnee dispersed west around 1720 due to a lack of game in the east and the sale of lands there by the Delaware and Haudenosaunee. With the move west, groups settled along the Juniata and Susquehanna Rivers in central Pennsylvania, at the headwaters of the Ohio River in western Pennsylvania, and in the Wyoming Valley. The Wyoming Valley group later moved to found Logstown near Butler in western Pennsylvania.

One group of Shawnee moved into Ohio to found Lower Shawnee Town around 1738. Conflicts with traders and the Pennsylvania colonial government would force the dispersed groups to gather for a second time, this time at Lower Shawnee Town in present-day Ohio. By 1758, the majority of the Shawnee Nation had gathered at Lower Shawnee Town, with a small band living in Alabama. Conflicts with encroaching settlers continued at Lower Shawnee Town until the Treaty of Greenville in 1795. One group of Shawnee opposed the treaty, moved away from the area, then returned to Greenville in 1805 and founded Tippecanoe in 1808. This group was lead by Tecumseh who, along with his brother Tenskwatawa (The Prophet), incited a pan-Indian uprising which was ended in 1811. By 1813, because of extended warfare with the European powers and the United States of America, the historic Shawnee Nation had dispersed again and split into eight (8) separate villages which were located throughout Ohio, Indiana, Missouri, and Canada.

Around 1780, one group of Shawnee migrated out of Lower Shawnee Town toward Mississippi. They were given land at Cape Girardeau in 1793, but most moved again due to various conflicts in the early 1800's to Arkansas, Oklahoma, and Texas. The Texas group moved for the final time to their present location in Oklahoma in 1839. This group was designated the Absentee Shawnee Tribe of Oklahoma in 1854.

In the 1820s, another group of Shawnee at Lower Shawnee Town moved into western Ohio, along with a group of Seneca, to settle at Lewistown. This mixed group was moved to Oklahoma in 1831 and was separated in 1867. At that time the Shawnee group was designated the Eastern Shawnee Tribe of Oklahoma.

A third group of Shawnee who remained in Ohio after the third dispersal were forced to move to land in Kansas between 1832 and 1835. In 1854, the US government decimated



the Kansas Reservation to 160,000 acres and some of the Shawnees moved into Indian Territory. The federal government caused the former Kansas Shawnees and the Cherokees to enter into a formal agreement in 1869, whereby the Shawnees received allotments and citizenship in Cherokee Nation. Known as the Cherokee Shawnees, they would also later be called the Loyal Shawnees, signifying their loyalty to the Union during the Civil War. Initial efforts to separate the Shawnee Tribe from Cherokee Nation begun in the 1980s culminated with the *Shawnee Tribe Status Act of 2000*, which restored the Shawnee Tribe to its position as a sovereign Indian nation; now officially recognized as the Shawnee Tribe.

Sources:

Callender, Charles. "Shawnee" in Handbook of North American Indians, Bruce Trigger, ed. Vol. 15, pp 622-635. Smithsonian Institution, Washington, D.C. 1978.



4. Federal and State Transportation Programming and Financing

Before any transportation improvement project is undertaken in Pennsylvania, before any designs are drawn, and long before any archaeological investigations are conducted, the decision to build a road is made through a planning and programming process. This process involves assessing the need for a project, prioritizing all projects for limited funding sources, and evaluating public input. Chapter 4 will briefly describe some of these early stages in the transportation process which ultimately lead to the decision to construct or repair roads, bridges, and other transportation projects.

4.1 2005-2016 Twelve-Year Transportation Program (TYP)

This document provides an overview of the Commonwealth's Transportation Program over the years 2005-2016. The TYP is part of the earliest plans for transportation projects. Pennsylvania's Twelve-Year Program is the guide for developing a transportation agenda over a twelve-year period, and for ensuring the Commonwealth's continuing near-term and future success in addressing transportation needs and opportunities.

4.2 Statewide Transportation Improvement Program (STIP) / Transportation Improvement Program (TIP)

Another important document is the Statewide Transportation Improvement Program, or STIP. This document represents the first four years of the Twelve-Year Program for highways and transit. The STIP is a roll up of the Transportation Improvement Programs, or TIPs, by the MPOs and RPOs. Federal law requires that a TIP be prepared and updated every two years and a Long Range Plan (LRP) be prepared for a 20 year period.

In Pennsylvania, as elsewhere, the need for transportation improvements exceeds available resources. The programming process is designed to help Pennsylvania prioritize its many transportation projects within the limited available funding. This approach has created a fiscally responsible program that provides resources for projects that can be realistically delivered.

These two documents, the TIP and the STIP, are the most current indicators of which projects will be undertaken in the future and where construction activity will be occurring over the next several years.



The following are key aspects and requirements of the Statewide Transportation Improvement Program (STIP):

- **All TIPs are part of the Statewide TIP (STIP).**
- **The TIP/STIP is the first four years of the Twelve Year Program.**
- The Federal Highway Administration and the Federal Transit Administration approve the STIP with review of the air quality conformity findings by the Environmental Protection Agency.
- Development of the TIPs and STIP is coordinated with the State Transportation Commission, elected officials, and the public.

The following are key aspects and requirements of the Transportation Improvement Program (TIP):

- A TIP is developed in each Metropolitan Planning Organization (MPO), Rural Planning Organization (RPO) and Independent County.
- The TIP lists all projects for which Federal and state funds are anticipated.
- The TIP is four years in length in Pennsylvania – based on the Federal fiscal year (October 1st to September 30th).
- The TIP must be fiscally constrained by year – based on resources that can reasonably be expected to be available.
- **The TIP must be updated every two years.**
- The public must be involved in TIP development.
- The TIP may be modified or amended.

4.3 Intermodal Surface Transportation Efficiency Act (ISTEA), Transportation Equity Act for the 21st Century (TEA-21) and Safe, Accountable, Flexible, and Efficient Transportation Act: A Legacy for Users (SAFETEA-LU)

In December 1991, the Intermodal Surface Transportation Efficiency Act of 1991 was signed into law, authorizing funding and programs for highways, highway safety, bike/pedestrian, and mass transit for the six Federal fiscal years of 1992 to 1997, inclusive. ISTEA brought new requirements and a renewed focus to the State Transportation Improvement Program (STIP) and county and regional Transportation Improvement Programs (TIPs), which are requirements for states to receive Federal funding. In Pennsylvania, the STIP and TIPs contain projects that are programmed over a four-year period. The programs are updated every two years. These four-year periods coincide with the first four years of the Commonwealth's Twelve-Year Transportation Program (TYP) and two-year update cycle.



The Transportation Equity Act for the 21st Century (TEA-21) was enacted June 9, 1998 as the successor to ISTEA. TEA-21 authorizes the Federal surface transportation programs for highways, highway safety, bike/pedestrian, and transit for the six Federal fiscal years of 1998 through 2003, inclusive.

On August 10, 2005 SAFTEA-LU was signed into law. While SAFTEA-LU has no major changes for Tribal Consultation, it does provide legislative programs to transfer some aspects of Federal authority to states, **but** not Tribal Consultation. Tribal Consultation will always be through the Federal agency, in most cases FHWA. The small change that SAFTEA-LU does provide is that FHWA has the authorization to fund tribes for expedited and above customary service (beyond normal comments on projects) to assist on project development.

4.4 Transportation Financing: Federal-aid

The Federal-Aid Highway Program is a reimbursable program; that is, the Federal Government only reimburses States for costs actually incurred. The authorized amounts distributed to the States represent lines of credit upon which States may draw as they advance Federally-assisted projects. This is in contrast to a grant program where the Federal Government issues a check up front for the entire estimated amount of a project. Funding for highway projects are drawn from the Highway Trust Fund which was created in 1956. Revenue for the Trust Fund is derived from dedicated highway user fees such as taxes on fuel, tires, and truck sales. Trust fund monies are distributed or "apportioned" to the States according to formulas written into "authorizing" legislation by Congress. These formulas are based on various factors including cost to complete the Interstate System, lane miles, vehicle miles of travel, population, historic levels of funding, and the States' share of receipts into the Highway Trust Fund.

The Pennsylvania Division Office provides reimbursement to the Commonwealth of Pennsylvania for authorized transportation projects in accordance with the legislative requirements of financial assistance programs. The FHWA administers these programs through a set of flexible regulations, policies, and guidelines to ensure that Federal funds are being used efficiently and to achieve the safety, economic development, and other goals of the Federal-aid Highway Program.

4.5 PennPlan and the Mobility Plan

One guide to upcoming transportation projects in Pennsylvania is the 25-year program. *PennPlan Moves!* (PennPlan) is a twenty-five year plan that identifies specific statewide corridors and planning objectives. The Mobility Plan for Pennsylvania will outline the long range project plans for the state.

The Mobility Plan for Pennsylvania is the long-range transportation plan that has been developed by PennDOT with the input of Pennsylvania residents, businesses, metropolitan and rural planning organizations, local governments, and other interested participants.



5. PennDOT Project Development Process

All PennDOT transportation projects follow the same five-phase development process which has been designed to take a project through all required permits, regulations, reviews, and more. The purpose of Chapter 5 is to provide a brief overview of this complex process. The Process can be explained at its most basic level by the five-phases: Planning, Programming & Prioritization, Design, Construction, and Maintenance & Operations.

The most important phase of this process from the perspective of tribal consultation is Phase 3 (Design) when environmental clearances are undertaken. We will focus more on environmental clearances, and more specifically the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA), in Chapter 6.

PENNDOT FIVE-PHASE PROJECT DEVELOPMENT PROCESS

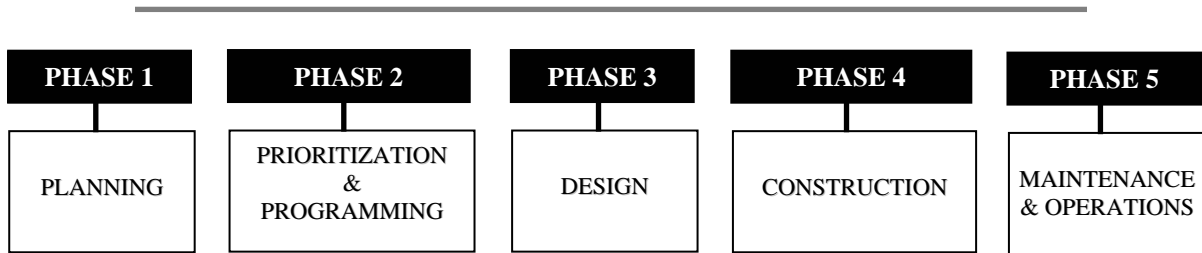


CHART 5.1 FIVE-PHASE PROJECT DEVELOPMENT PROCESS

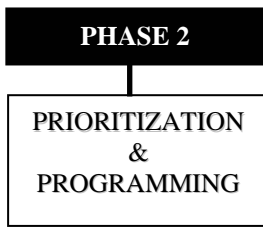
5.1 Planning (Transportation)

PHASE 1
 PLANNING

Planning is the first phase of the development process. Federal legislation requires planning agencies and SHAs (in Pennsylvania that is PennDOT) to develop fiscally constrained transportation plans and programs which respond to the transportation needs and priorities of their respective jurisdictions. In Pennsylvania, the Metropolitan Planning Organizations (MPOs), Rural Planning Organizations (RPOs), and Independent Counties are responsible for developing regional and local planning and programming activities. The Statewide Transportation Program (STIP) is continually updated and sets out the goals and projects for future transportation planning in Pennsylvania.



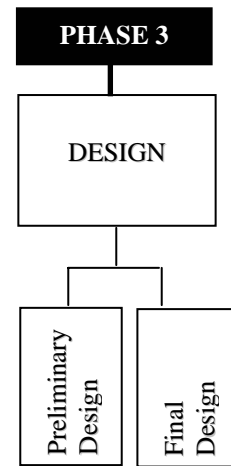
5.2 Prioritization and Programming



During this second phase of the development process, PennDOT in coordination with the MPOs and RPOs reviews and evaluates planning data, assesses the resources available to fund planned projects, and prioritizes and schedules projects for implementation. This activity includes estimates of available project funds, updates and refinements of transportation improvement programs, and submission of the reviewed and adopted STIP to the FHWA and

FTA for Federal approval.

5.3 Design



Design is the third phase of the development process and the most relevant for the purpose of discussing tribal consultation. It is at the beginning of the Design Phase that Section 106 consultation, and specifically tribal consultation, activities begin; however, there is nothing to preclude these activities to occur prior to the Design phase.

The goal of Design is to determine the type, scope, and location of the transportation improvements best suited to meet the requirements of safety and mobility. It is during the design stage, often called “Preliminary Engineering”, that environmental (natural, cultural and social) impacts must be evaluated and addressed prior to moving to the Final Design stage and, finally, to Construction. The Design process is affected by a host of factors and can become a highly complex and time consuming process. To streamline the flow of projects through what might otherwise become a complex maze of regulations reviews and approvals; PennDOT has defined the Design phase as an integrated system of parallel and interrelated processes.

The Design phase is comprised of two stages: Preliminary Design and Final Design.

5.3.1 Preliminary Design

Regardless of scope or complexity, every project is subject to an Engineering and Environmental Scoping Field View. The field view is held prior to the development of alternatives. The purpose of the field view is to define the project in terms of project limits, work effort (reconstruction, new alignment, or rehabilitation), and environmental effort. During a scoping field view on projects which have the potential to affect historic resources, PennDOT Cultural Resources Professionals (CRP) consider the Area of Potential Effect (APE) and the archaeological and architectural investigations required. The CRP discusses this information with the team.

The purpose of Preliminary Design is to consider engineering requirements, environmental constraints, and public involvement to develop a project that meets the needs, in engineeringly sound and is environmentally sensitive. This phase requires that the engineering, environmental, and public involvement occurs concurrently. The final product is environmental clearance:



- Engineering Studies –
- Environmental Studies -
- Public Involvement –

=> Environmental Clearance

Public involvement is a requirement of both NEPA and Section 106 of NHPA. Public involvement activities will reflect the magnitude and scope of the proposed undertaking. Section 106 public involvement may include a variety of public groups.

Consultation with Federally-recognized tribes is formally defined as government-to-government. The Division Administrator of the FHWA Pennsylvania Office initiated consultation with the tribes as the Federal representative in 2001. After initial correspondence, the fourteen tribes identified by the FHWA with interests in the state agreed to work with PennDOT staff, but there is, as yet, no formal delegation of authority. Thus, PennDOT initiates consultation and coordinates with the fourteen tribes on behalf of FHWA, but FHWA retains the ultimate responsibility for tribal consultation. Any tribe wishing to consult directly with FHWA and/or USDOT may do so at any time.

Tribal consultation takes place as part of the environmental clearance requirements during Preliminary Design. NEPA approval concludes Preliminary Design which involves the project description and any avoidance, minimization, and mitigation measures for any impacts. More detail on environmental clearance and how it relates to tribal consultation at PennDOT are found in Chapters 6 and 7.



Selected Environmental Protection Laws and Permits

- **National Environmental Policy Act (NEPA) of 1969** requires a Federal agency to take into consideration an activity's effect on the natural, cultural, and social environment. This applies only to Federal actions.
- **National Historic Preservation Act (NHPA) of 1966** (as amended) and the codes which regulate it specifically require consultation with Federally-recognized tribes. Tribal consultation requirements were strengthened after revised regulations became effective January 11th, 2001. NHPA applies only to Federally-funded, assisted and/or permitted projects.
- **Pennsylvania Historic Preservation Act** (Pennsylvania Consolidated Statutes, Historical and Museums – Title 37) is the state's version of the National Historic Preservation Act and provides for the preservation of historic resources and empowers the PHMC to work toward that end. This is sometimes also referred to as the "Pennsylvania History Code".
- **Section 4(f) of the US Department of Transportation Act of 1966** applies to all USDOT projects. Section 4(f) states that transportation projects must avoid historic sites unless there is "no feasible and prudent alternative" and requires "all possible planning to minimize harm" to historic places.
- **Pennsylvania Act 120** is the state "NEPA" requirement, and as such reflects the requirements to achieve a balanced, reasoned decision towards a preferred alternative. Section 2002 of PA Act 120 requires that a project must not adversely affect a cultural resource unless there is no "feasible and prudent" alternative.
- **Army Corps of Engineer's Section 404 Permits** are required to fill or obstruct waterways and wetlands. Since this is a Federal action, the Section 106 process of the NHPA must be completed in order to obtain a Section 404 permit.

5.3.2 Final Design

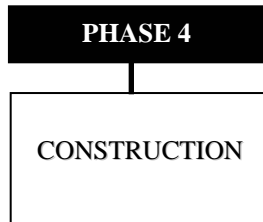
During Final Design, the selected alternative that was developed to obtain Environmental Clearance (NEPA approval) in Preliminary Engineering is further refined and detailed. Final Design results include refinements to minimize impacts, mitigation details, obtaining permits, right-of-way and utility clearance (acquisition and relocation), and the final PS&E (plans, specifications, and estimates) that provides information that a contractor will then bid on. Tribal consultation, begun in Preliminary Design, will continue through this stage as necessary.

Obtaining right-of-way is another action during Final Design. Occasionally, portions of the project area can not be tested for the presence of archaeological sites until right-of-way is obtained (for example, if the previous landowner did not allow testing). In such cases, a project-specific, Section 106 programmatic agreement would have been developed during Preliminary Design that ensures archaeological investigations will be completed before any construction activities precede. In addition, mitigation



commitments made during the environmental studies/Design phase. Tribes will be consulted when archaeological sites of religious and/or cultural significance are identified. Consultation will be consistent with all applicable agreements, laws, and regulations.

5.4 Construction



During the Construction Phase, design plans are constructed by contractors. Once construction is completed, PennDOT opens the facility to traffic operations and includes it in a regular maintenance program.

Although not common, it is possible that some archaeological investigations will need to be carried into the Construction Phase as agreed upon in an earlier project-specific programmatic agreement or Memorandum of Agreement. If that occurs, tribal consultation will be ongoing. As well, mitigation commitments, such as avoidance, made earlier in the process may be ongoing during Construction.

* Note* Although rare it is possible that during construction unanticipated finds can occur. Unanticipated finds do not necessarily mean shutting down all construction activities. Only construction in the immediate area of the find need to cease until proper clearance to proceed has been given. For phone numbers and procedures for contacting the correct agencies please contact the local PennDOT District office or the Harrisburg office of FHWA. Appendix C of this document is the PHMC policy on the treatment of human remains and provides some guidance on unanticipated finds.

5.5 Maintenance and Operations



State-owned or maintained roads, once built, enter their longest phase – Maintenance and Operations. The purpose of Maintenance and Operations is to extend the service life of the facility and maintain safety. This is the longest of the five phases, lasting the service life of the highway.

This chapter has provided a brief overview of the PennDOT Transportation Project Development Process. The most important phase of this process in terms of tribal consultation is the Design Phase, during which environmental clearance activities are undertaken. More explanation of these environmental clearances is provided in the next chapter.



6. Basics of NEPA and NHPA at PennDOT

Tribal consultation is directed at the Federal level on a government-to-government basis by several Executive Orders (such as E.O. 13007), laws (such as NEPA) and Acts. For states that contain tribal lands, tribal consultation may take place over dozens of issues.

Pennsylvania does not currently contain any tribal lands; so tribal consultation for Pennsylvania FHWA and PennDOT is focused primarily on transportation projects on non-tribal land that could affect places and objects of cultural significance to federally recognized tribes with ancestral connections to the Commonwealth. Pennsylvania FHWA has responsibilities to consult with the tribes mandated by regulations and policy. While the expressed purpose of this handbook is to explain the process of Section 106 consultation, the following discussion must at least cursorily cover the requirements of the National Environmental Policy Act or NEPA.

At PennDOT the entire Section 106 process (including tribal consultation) is carried out under the broadly inclusive umbrella of NEPA. In order to understand how and where tribal consultation activities are undertaken at Pennsylvania FHWA/PennDOT, it is important to first understand how NEPA and the NHPA intersect. The goal of Chapter 6 is to explain the basics of NEPA and NHPA. A more detailed explanation of the steps PennDOT undertakes to comply with these and other environmental laws follows in Chapter 7.

6.1 National Environmental Policy Act (NEPA)

All Federal actions, such as Federal-Aid highway projects must comply with the provisions of NEPA. NEPA provides an interdisciplinary framework for Federal agencies to identify and consider the potential for environmental damage, and contains procedures to ensure that Federal agency decision makers take environmental factors and public opinion into account.

NEPA acts as an umbrella for all other laws, regulations and Executive Orders, thus, when State Highway Agencies (which for Pennsylvania is PennDOT) assess environmental clearance documentation for a given project, they initially categorize it in terms of the NEPA requirements. In other words, we need to understand the NEPA process *before* we can understand the Section 106 process and tribal consultation activities.

The vast majority of transportation projects in Pennsylvania can be determined at their inception to have no significant impact on environmental or historic resources. Projects such as pavement resurfacing or reconstruction and the installation of traffic signals fall under this group. These projects do not necessitate the level or depth of environmental documentation to fulfill the requirements of NEPA as do projects with broader scopes. For example, the environmental documentation for installing new traffic lights and new curbs will be much less than the environmental documentation for the construction of an



entirely new section of highway. The scope of the environmental evaluation depends on the magnitude and extent of the anticipated environmental impacts.

For Federally-funded projects, NEPA has established three types which prescribe documentation requirements for the NEPA process. That is, projects must meet criteria for one of three categories:

Type I - An **Environmental Impact Statement (EIS)** is required by NEPA for projects that may have significant environmental impacts. An EIS is the document that assures that planners, engineers and environmental scientists have studied appropriate alternatives and that citizens are fully aware of the environmental, social, cultural and economic effects of all alternatives. An EIS ends in the preparation and approval by the FHWA of a **Record of Decision (ROD)**.

OR

Type II - A **Categorical Exclusion (CE)** describes actions that do not individually or cumulatively have a significant environmental effect and are excluded from the preparation of an EA or an EIS. A **Categorical Exclusion Evaluation (CEE)** is the document prepared in these cases.

OR

Type III - An **Environmental Assessment (EA)** is a document prepared in compliance with NEPA for Federally funded projects that do not fall under any CE category and do not appear to be of sufficient magnitude to require an EIS. An EA provides the analysis and documentation to determine if an EIS or a **Finding of No Significant Impact (FONSI)** should be prepared.

A project may be of such size and scope that an Environmental Impact Statement (EIS) must be prepared in order for the project to comply with the requirements of NEPA. Less than 1% of active PennDOT projects are EISs. EISs are made available for public review and comment following approved public involvement procedures. Public hearings are always part of these procedures. The FHWA considers public involvement an integral, necessary part of an effective, responsive, environmental process.

Most transportation projects in Pennsylvania fall into the category of Categorical Exclusion (CE). Once a project is determined to be a CE, there is a second determination as to the level of CE documentation required. The Pennsylvania Division of FHWA and PennDOT have agreed to two levels of review and approval for CEEs in order to comply with NEPA: Level 1 and Level 2.

The PennDOT Engineering Districts have approval authority for Level 1 CEEs (Level 1 CEEs are further divided into Level 1a and Level 1b); while the FHWA continues to hold



approval authority for Level 2 CEEs. Although Level 1 CEEs are not individually reviewed and approved by FHWA, FHWA retains ultimate responsibility for ensuring compliance with NEPA all Federal-aid documents. FHWA audits the approvals on a three year cycle.

CEE Level 1a projects under NEPA include, but are not limited to:

- Activities which do not involve or lead directly to construction, such as Planning
- Construction of bicycle lanes, paths, and facilities
- Installation of noise barriers
- Other projects which do not involve physical construction

CEE Level 1b projects under NEPA include the following types of project provided that they met a series of requirements including routine right-of-way acquisition, no public controversy, and do not involve or affect historic properties:

- Highway resurfacing and restoration
- Bridge rehabilitation
- Reconstruction of existing rail and bus facilities
- Construction of replacement wetlands
- And more which do not individually or cumulatively have a significant impact on the environment.

CEE Level 2 projects under NEPA include the activities outlined in Level 1b which *do not* meet the associated series of requirements.

- For example, a bridge rehabilitation that *does* involve Threatened and Endangered Species which may be adversely affected would be elevated to Level 2.

The regulations 23CFR771 which list all project types can be found under Section 117 at: www.fhwa.dot.gov/hep/23cfr771.htm

Finally, when the extent of a project's potential impact on the environment can not be readily determined, projects are categorized as Environmental Assessments (EAs) until the appropriate level of impact can be determined or it is determined that the project will result in no significant impact. Just as with an EIS, EAs are made available for public review and comments following approved public involvement procedures. Public hearings may be part of these procedures.

NEPA compliance requires a balance of consideration of multiple factors such as natural, cultural, and social impacts. A range of reasonable alternatives are investigated.



6.1.1 NEPA Steps in the PennDOT Preliminary Design Phase

NEPA – Environmental Impact Statement (EIS)

For EIS-level projects, PennDOT follows a process outlined in PennDOT's *Environmental Impact Statement Handbook* (Publication 278)*. The process brings together the requirements of NEPA and other Federal and state laws and regulations, establishes concurrence points (by the regulatory agencies) and a continued, open public involvement process. A Draft EIS document is published and a public hearing held for comments. An EIS-level project moves out of Preliminary Design once a Record of Decision (ROD) has been issued and a mitigation report is produced. This report includes mitigations of many types including air and noise, hazardous waste, wetlands, threatened and endangered species, as well as cultural resources. Section 106 documentation, if historic properties are to be affected, is also completed within the process as part of the larger EIS.

Step 1 – Internal Administrative Activities represents internal efforts toward project initiation.

Step 2 – Scoping kicks off initial notification of the project to a number of groups, including the tribes. At this time the study area is defined within which various alternatives will be developed.

Step 3 – Analysis and Review of Project Needs is an internal step that does not involve tribal consultation. This step established the transportation problems, known as needs, which the proposed project will resolve.

Step 4 – Preliminary Alternative Development and Review is the first step in identifying a reasonable range of alternatives and dismissing those that are not feasible, reasonable, prudent, or practicable and do not meet the project's needs. The large APE will be determined during this step, to be revised as alternatives are eliminated and/or added. An archaeological predictive model may be developed and expected to be used to either dismiss alternatives (Step 4) or as part of the detailed engineering and environmental analyses (Step 5).

Step 5 - Detailed Alternative Development and Review is the second step in identifying the alternatives to be evaluated in detail in the Draft EIS. A preferred alternative may be identified in the DEIS.

Step 6 - Draft EIS. All work is assembled into a Draft EIS document.

Step 7 – Comment. The Draft EIS is circulated in Step 7 for a 45-day public and agency comment period. A public hearing is held during the review period. All substantive comments are considered and additional work may be undertaken prior to publishing a Final EIS.



Step 8 - Final EIS. The Final EIS (FEIS) is circulated for a 30-day public and agency comment period.

Step 9 – the Record of Decision is adopted by the FHWA Division Office and it explains the basis for selecting a certain alternative to fulfill the needs of the proposed transportation improvement project and summarizes the mitigation commitments.

Step 10 – the Final Mitigation Report is a document informing the project team of committed project design features or environmental mitigation measures.

***NOTE:** This is an overview of the process. The process is subject to change depending on the project. For detailed specifics see the publication or contact PennDOT.

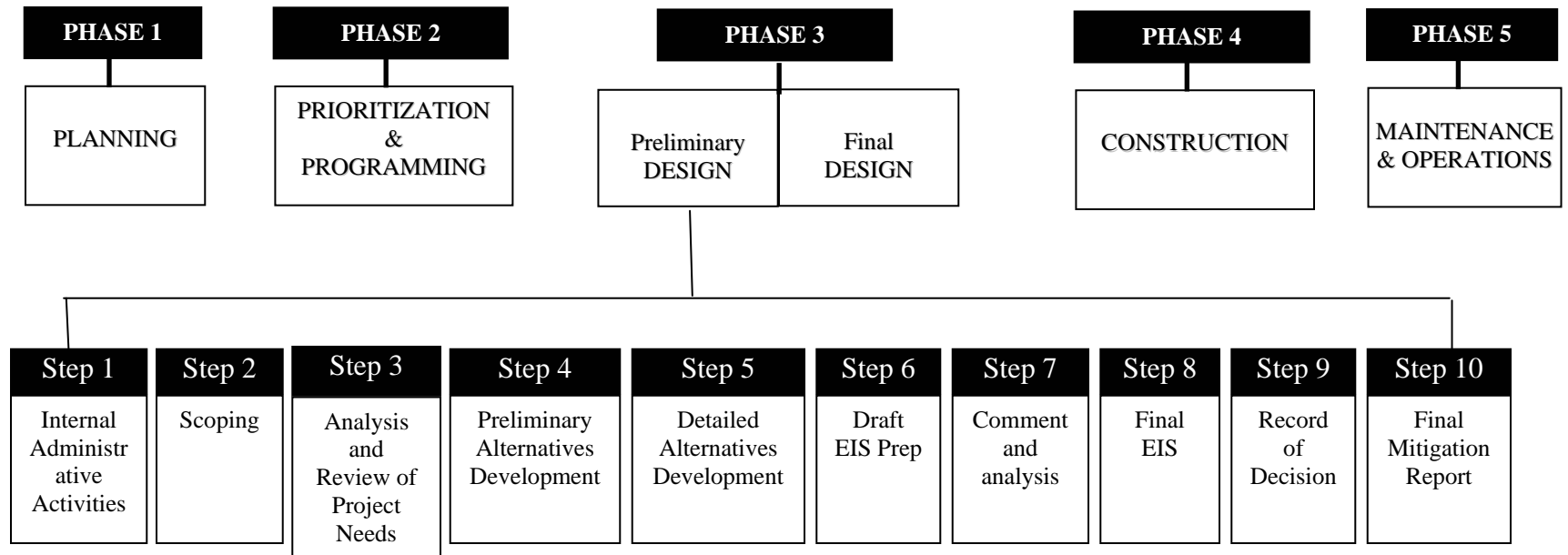


CHART 6.1 PENNDOT TRANSPORTATION PROJECT DEVELOPMENT PROCESS - EIS



NEPA - Categorical Exclusion Evaluation (CEE)

The Project Development Process for CEEs includes six steps which span Preliminary Design (Steps 1-4), Final Design (Step 5) and Construction (Step 6) and are laid out in PennDOT's *Categorical Exclusion Evaluation Handbook* (Publication 294)*.

Step 1 – Internal Administrative Activities represents internal efforts toward project initiation.

Step 2 – Scoping includes the determination of a project's required analysis and documentation with regards to environmental resources, as well as the establishment of the projects Area of Potential Effect (APE). Within Pennsylvania there are two levels of CEE-type projects, Level 1a or 1b and Level 2. The level of NEPA compliance for a CEE project depends on the proposed activity and its environmental impacts, none of which would be significant otherwise the project would not be classified as a CEE.

Step 3 – Categorical Exclusion Evaluation Preparation involves the completion of the CEE Form and the continued development of support data. If a CEE-level project is found to have an adverse effect on a historic resource, it can no longer be processed under the PA for Minor Transportation Projects (Section 6.2.2). The project could remain a CEE-level project, however, provided the effect can be mitigated and there is no significant public controversy.

****NOTE:** PennDOT's CE/EA Expert System is available for viewing by the public at <http://www.dot2.state.pa.us/ceea/ceeamain.nsf>. Approved CEEs can be viewed by the public at this site.

Step 4 – Processing for Concurrence and Approval is an internal PennDOT and FHWA action to approve the CEE prepared in Step 3. After approval of the CEE in Step 4, the project moves into Final Engineering Design.

Steps 5 and 6 – Final Design and Construction Activities.

***NOTE:** This is an overview of the process. The process is subject to change depending on the project. For detailed specifics see the publication or contact PennDOT.

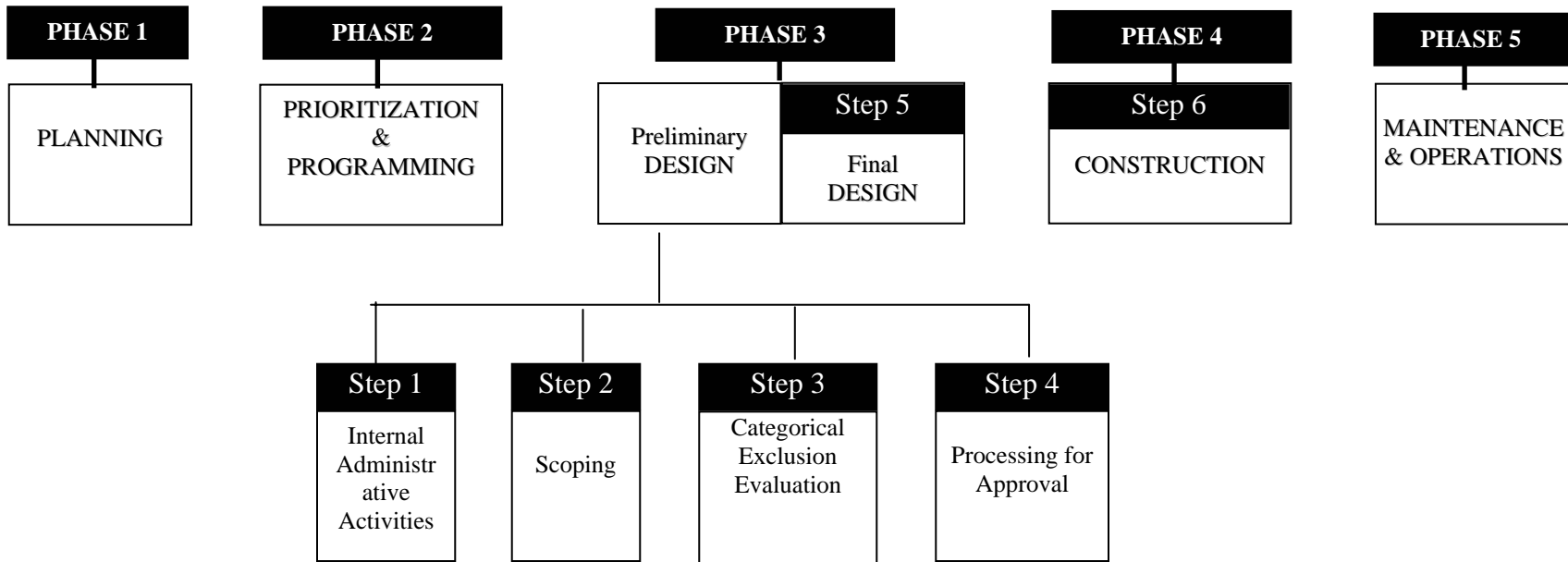


CHART 6.2 PENNDOT TRANSPORTATION PROJECT DEVELOPMENT PROCESS - CE



NEPA - Environmental Assessments (EA)

PennDOT follows a plan in processing EAs as laid out in PennDOT's *Environmental Assessment Handbook* (Publication 362)*. EA-level projects are completed at Step 6 as a final determination is made whether the project should continue as a CE, an EIS, or end at this point if a Finding of No Significance (FONSI) is rendered. All steps of the EA process are conducted during Preliminary Design.

Step 1 – Internal Administrative Activities represents internal efforts toward project initiation.

Step 2 – Scoping kicks off initial notification of the project to a number of groups. At this time a project's Area of Potential Effect (APE) is determined.

Step 3 – Alternative Development and Impact Analysis. During this step more detailed field analysis takes place to identify potentially effected historic resources. Avoidance and minimization measures are sought and incorporated into project development as appropriate.

Step 4 – Mitigation. Avoidance, minimization, and mitigation measures are explored for unavoidable environmental impacts.

At this time detailed field studies have been conducted and with this level of information it should be possible to determine the appropriate level of environmental documentation for the project. If it is clear that the project will result in significant impacts, the project may be elevated to an EIS. If it is clear that the project will not result in significant impacts, it should then be decided whether to downscope the NEPA level for the project to a CEE or to complete the EA and request a Finding of No Significant Impact (FONSI). The tribes involved in consultation would be notified of any change in project status.

Step 5 – EA Preparation and Availability. If it is determined to complete the project as an EA, a report is completed and made available for public and agency comment, then sent to FHWA for approval. A public hearing may be conducted at this time if so requested by the public.

Step 6 – The FONSI is issued by FHWA. Its availability is publicly announced.

***NOTE:** This is an overview of the process. The process is subject to change depending on the project. For detailed specifics see the publication or contact PennDOT.

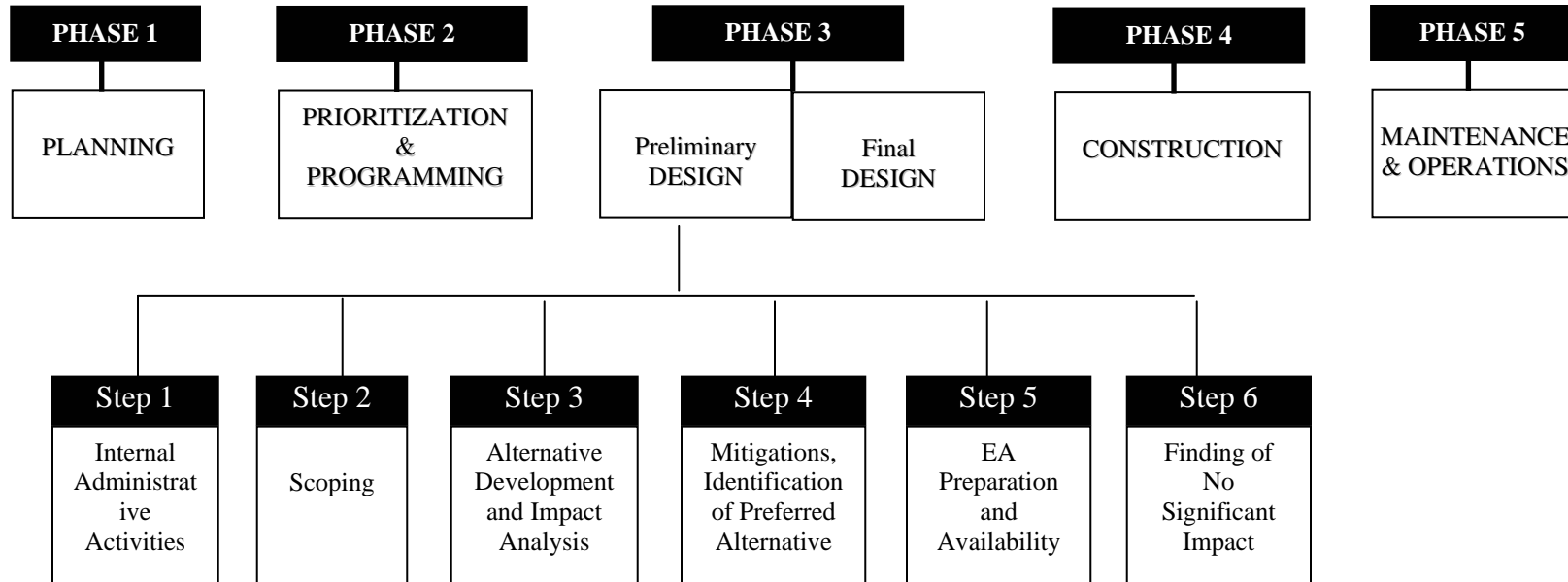


CHART 6.3 PENNDOT TRANSPORTATION PROJECT DEVELOPMENT PROCESS - EA



6.2 National Historic Preservation Act (NHPA)

Tribal consultation at PennDOT is conducted as part of the requirements for federal agency consultation as codified in the Advisory Council on Historic Preservation's (ACHP) revised regulations for the implementation of Section 106 of the National Historic Preservation Act (NHPA) (36CFR800, as amended). But, as was explained above, all environmental clearances are undertaken under the umbrella of NEPA. Therefore, consistent with NHPA regulations which call for integration of the Section 106 process with the NEPA process, at PennDOT the Section 106 process is done as part of the larger NEPA process.

NHPA is divided into many sections which deal with topics including:

- the purpose of the act,
- the establishment and keeping of a National Register of Historic Places,
- the establishment of State Historic Preservation Offices,
- and other issues which allow the act to function.

One of these sections, Section 106, requires Federal agencies to take into consideration the effects of their undertakings on historic properties and to allow the ACHP the chance to comment. A historic property can be a prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. The ACHP developed regulations 36CFR800 in the 1970s which detail the process by which Federal agencies should consider their effects. These regulations are revised as needed; the latest version of the Section 106 regulations can be found online at the ACHP website www.achp.gov/work106.html. In the past several years, the ACHP amended the Section 106 regulations (36CFR800) to emphasize and clarify tribal consultation activities including the establishment of Tribal Historic Preservation Offices (THPOs). Those revisions further clarified the role of Federally-recognized tribes in the Section 106 process by emphasizing the requirements for tribal consultation.

The Section 106 process begins with the same question regardless of whether the project is determined to be an EIS, EA or CEE. The first step is always to question whether an action is a Federal undertaking. If a project receives Federal funds or requires a Federal permit (such as a Section 404 US Army Corps permit or a FHWA Point of Access permit) then it is a Federal undertaking. An "undertaking" is defined as "any project activity, or program – and any of its elements – that has the potential to have an effect on a historic resource and that is under the direct jurisdiction of a Federal agency or is licensed or assisted by a Federal agency." If a project receives neither Federal funds nor Federal permits, then it is not required to comply with NHPA, although it does need to comply with state laws, the Pennsylvania Historic Preservation Act (State History Code) and Pennsylvania Act 120. Once it is established that a project is a Federal undertaking, then it must comply with Section 106 of NHPA as codified in the regulations 36CFR800.



There are four basic steps that are a part of the Section 106 process:

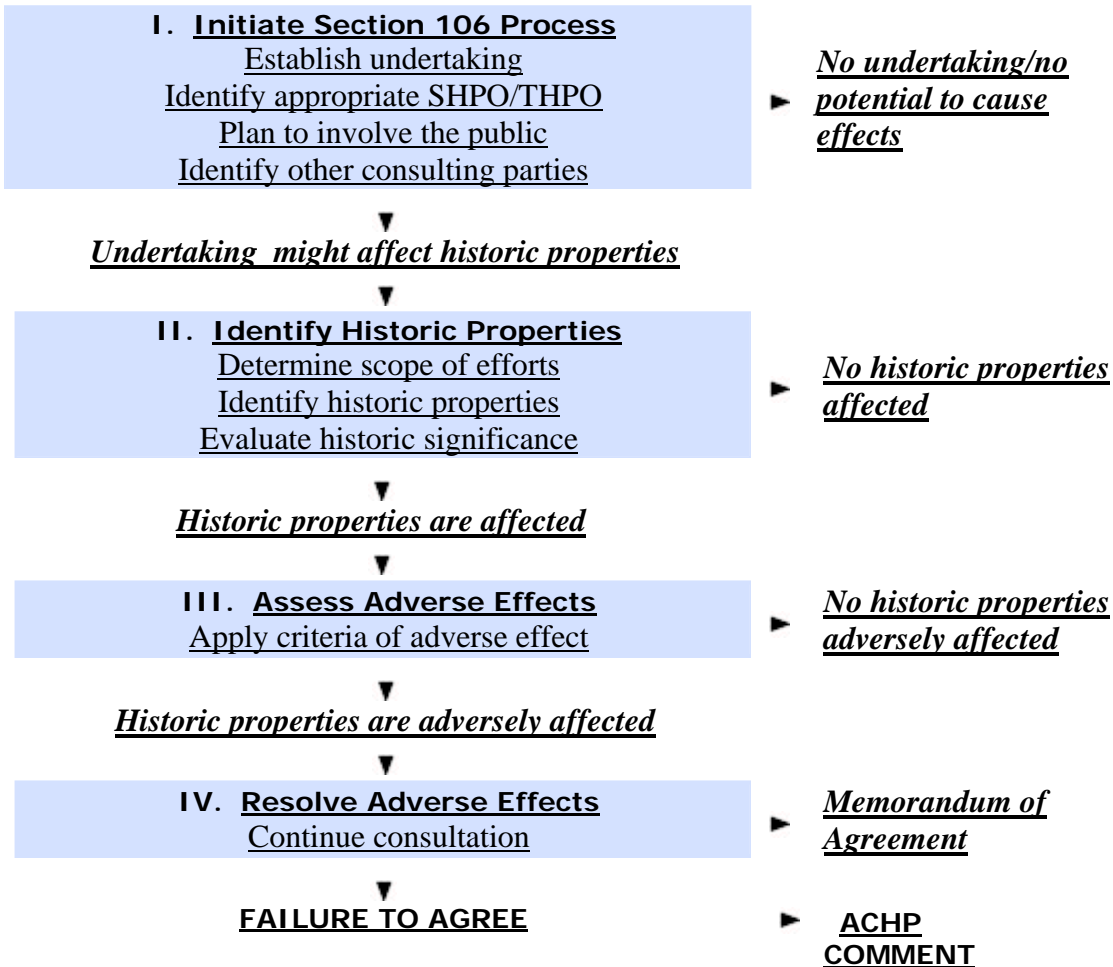


CHART 6.4 SECTION 106 PROCESS

(FURTHER GUIDANCE ON THE SECTION 106 PROCESS IS PROVIDED BY THE ACHP AT THEIR WEBSITE: WWW.ACHP.GOV)

6.2.1 NHPA - Environmental Impact Statements (EIS) / Environmental Assessments (EA)

Once it is determined that an EIS or EA-level project may potentially affect historic properties, the Section 106 process is completed under the umbrella of the NEPA steps according to the project's level designation. Details on the NEPA steps PennDOT follows for EIS and EA-level projects were provided in the sections above.

6.2.2 NHPA - Categorical Exclusion Evaluations (CEE)

Again, the NEPA steps followed at PennDOT for CEE-level projects are outlined above. However, some further explanation of how CEE projects differ from EIS and EA level needs to be included here.



It should be kept in mind that because of the low-level impacts that determine a project to be a CE, most of the time historic resources are not affected by the project at all. However, when historic resources may be effected by a CE-level project, compliance with Section 106 occurs either through regular Section 106 documentation (like what is done with EIS and EA-level projects) or through a statewide programmatic agreement (the Programmatic Agreement for Minor Transportation Projects) that is used only with CE-level projects.

Most CE-level projects are processed under the **Programmatic Agreement for Minor Transportation Projects (MPPA)**. The ACHP, FHWA, and Pennsylvania SHPO were signatories to the MPPA, while PennDOT was a concurring party. A copy of the MPPA can be found at www.penndotcrm.org under “Publications”.

BUT,

If a project is found to have an Adverse Effect on an historic property Section 106 compliance can not be handled under the MPPA and the project must go through the standard **Section 106 process**.

The MPPA was developed by the Pennsylvania FHWA, PennDOT and the SHPO to simplify the process of Section 106 compliance for CE-level projects, as defined by the FHWA regulations 23 CFR 771. These CEE-level projects make up the majority of projects undertaken by PennDOT and most do not affect historic resources. The MPPA shortens the time it takes to complete Section 106 consultation. It does not in any way compromise the quality or care taken to consider impacts to historic resources.

****NOTE:** A project which adversely affects historic structures or archaeological sites **cannot** be processed under the MPPA. It *must* be processed as a standard Section 106 project, similar to EIS and EA-level projects. Additionally, a project with public controversy related to cultural resources **cannot** be processed under the MPPA, but it can be a CEE level project. If the controversy reaches a certain level, FHWA has the discretion to elevate the project to the standard Section 106 process as well as an EIS or EA.

If a project is reviewed for Section 106 compliance under the MPPA, rather than the standard Section 106 process, FHWA and PennDOT have created two possible levels of review and processing. The PennDOT Engineering District Designees have approval authority for making exemptions under Stipulation C of the MPPA. These District Designees undergo specific training prior to receiving this authority. Stipulation C projects are further divided into Stipulation C.1 and C.2 levels, depending on the type of project. Stipulation C-level projects under the MPPA must be classified as CEEs under NEPA and must not have any known historic resources present.



The other level of projects under the MPPA are Stipulation D projects. Stipulation D-level projects must also be classified as CEEs under NEPA. There may be historic resources present, but they either must not be affected or must not be adversely affected. Again, if an historic resource is adversely affected, the project *may not* be processed under the MPPA. District Archaeologists and Architectural Historians are authorized to make findings of No Historic Properties Present or Affected (Stipulation D.2) or No Adverse Effect (Stipulation D.3).

(District Designee approval)

Stipulation C.1 and C.2 projects under the MPPA may include, but are not limited to:

- Road reconstruction or resurfacing
- Activity within a disturbed median
- Construction of bicycle paths, lanes, and facilities
- Replacement of curbs,
- And more with similar, low-level effects

(Cultural Resource Professional approval)

Stipulation D.2 and D.3 projects under the MPPA could include any of the project-types listed under Stipulation C as well as:

- noise barriers,
- landscaping,
- parking facilities, or
- weigh stations/rest areas.

However, Stipulation D projects *may* involve historic properties provided the undertaking will not have an adverse effect. These projects must also be classifiable as CE-level projects under NEPA (either Level 1a, Level 1b, or Level 2).

Go to www.penndotcrp.org and “Publications” for a copy of MPPA which contains a complete list of Stipulation C and D project types.

Although MPPA submissions are not reviewed by FHWA, FHWA retains ultimate responsibility for all Federal-Aid determinations under Section 106. A project undergoes reevaluation at the end of the process. Further, a project may be changed to a higher or lower documentation level at any time when appropriate. Circumstances that may trigger reclassification of the CEE-level include changes to project scope or design, heightened public controversy, unanticipated resource involvement, or changes in laws or regulations.



7. The Tribal Consultation Process

Chapter 5 briefly covered the PennDOT Transportation Project Development Process, particularly focusing on the Design Phase. Chapter 6 outlined the environmental laws, NEPA and Section 106 of NHPA, which direct tribal consultation activities within the PennDOT Process. The goal of this chapter is to put everything together and describe in detail tribal consultation activities at PennDOT.

PennDOT has outlined its process for consulting with Federally-recognized tribes on transportation projects in Appendix D of this publication. It describes where in the NEPA steps tribal consultation takes place. The guidance also provides important Notification Conditions including Timing, Ground Disturbance, and Geographic Areas of Interest to assist PennDOT Cultural Resource Professionals in knowing what activities will trigger a tribe's interest in a project.

Tribal consultation for all Federally-funded projects currently begins at the start of the Design Phase as part of the environmental clearance process. Towards the end of scoping activities, once an undertaking is defined, PennDOT will request consultation with the tribes as appropriate given the magnitude and scope of the undertaking and according to the Notification Conditions. Consultation will begin through correspondence between the PennDOT Cultural Resource Professional (CRP) for Archaeology for the appropriate Engineering District and the historic resource contact indicated by each tribe.

Tribal consultation will be conducted through several methods keeping in mind the preferences, in terms of mail, email and other technology, available to and preferred by the tribal contacts. Consultation will include sending a *PennDOT Initial Notification Form*, a *PennDOT Project Information Form*, and often informal telephone calls from the CRP to let consulting tribes know how the project is progressing and what steps are next.

The *Initial Notification Form* is the first form sent. It describes the project and indicates the current level of NEPA documentation. The *Project Information Form* is sent secondly and at every change in project status thereafter. This form again describes the project and indicates the current project status in terms of the Section 106 process. Both forms ask whether a tribe would like to be a consulting party on the project. The *Project Information Form* also asks that, if a determination of eligibility or effects has been made, whether the tribes agrees with the findings.

The PennDOT contact name listed in the first section of both forms will follow up on any returned forms check "Yes" or "Not Sure" after the consulting party question to further discuss and determine the tribes' desired level of consultation. As a project proceeds through the Section 106 process, follow up *Project Information Forms* will be sent at each change in status, except to tribes that have checked "No" to the consulting party question.



*NOTE: PennDOT is moving forward with creating an electronic notification form and website. This will cut down on the paper that the Tribes receive and make it easier to get more information to the Tribes in a quicker and efficient manner.

It is important for the CRP to know the correct tribal contact and for the tribes to notify PennDOT of any concerns. It is also important for the tribes to notify PennDOT or Pennsylvania FHWA of any changes to their contact information.

Beyond scoping, projects will follow slightly different trajectories and time frames depending on their NEPA documentation designations, i.e. EIS, CEE, or EA. Typically, the process of tribal consultation on EIS-level projects may last several years because of numerous alternatives under study and the complexity of other environmental issues under analysis, while the process for CEE-level projects often lasts only months.

30-Day Review Period

The process of developing a transportation project through Planning, Design and Construction Phases can require an enormous amount of time, money, and expertise. Tribal consultation is an important part of that process. However, it is one of dozens of Federal, state, and local laws, regulations, and policies required to complete a project. Time limits are included in many sections of the tribal consultation consistent with those in the Section 106 process due to the complexities and pressures of every project to get through the process. Every effort should be made to stay within those time limits, as this is the best way to ensure that all concerns are heard and accounted for in the development of the project.

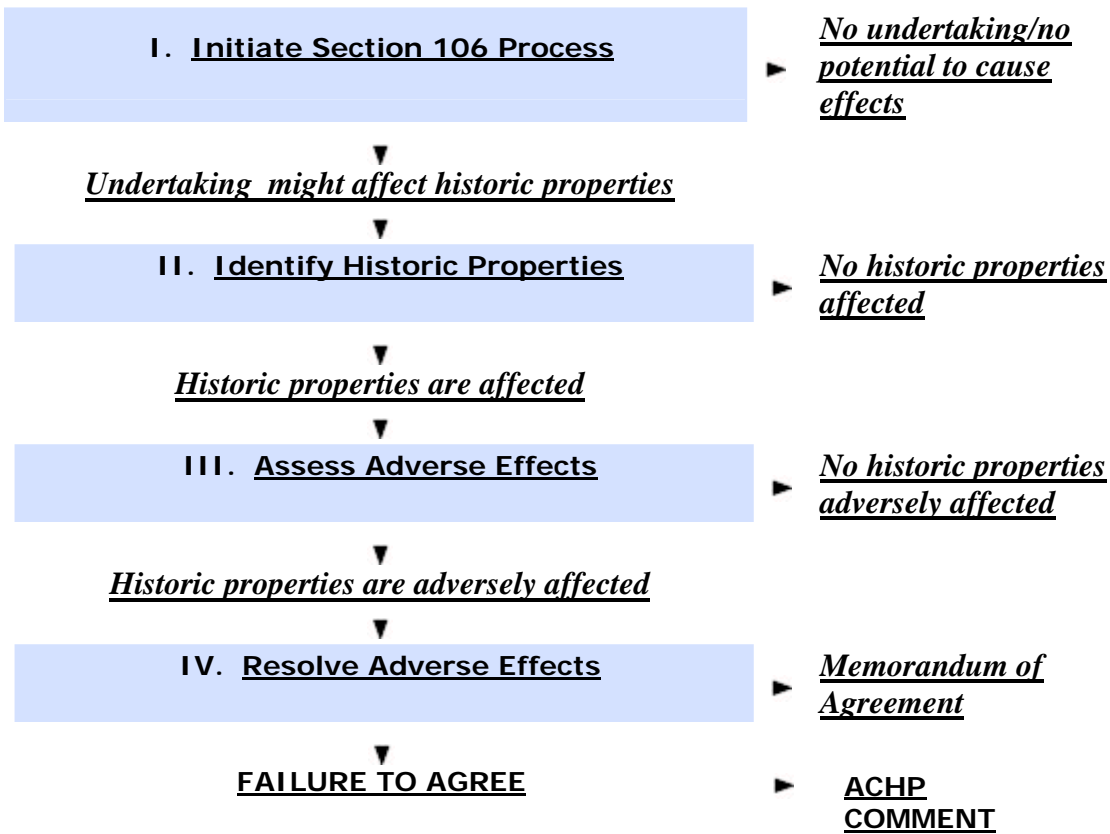
There are a couple of places during a project's life where late comments are exceedingly difficult to incorporate, particularly after an environmental clearance document has been approved.

It must also be understood that tribal cultural resource contacts may not be able to sign off on consultation without the approval of a chief, governor, council, committee or other group. That information has been requested of each tribe and is summarized in the **Nations' Contact Information Supplement** (as of September 2006). PennDOT Cultural Resource Professionals, Environmental Managers, and Project Managers should take note of the timetables indicated by the tribes and attempt to work within this schedule before the 30-day response limit becomes a significant concern. Many tribes can not obtain approval for significant decisions within a 30-day period because their council or advisory group does not meet that often. It is incumbent upon the environmental staff at PennDOT to understand the infrastructure and decision making process of each tribal nation in order to provide them a reasonable opportunity to comment and consult on a project. By the same token it is incumbent upon the Tribes to understand that delays in receiving comments can be very costly to a project. If tribes could provide a time table for decisions that will go beyond 30-days, this would be a big benefit to project time lines



Some of the tribes with ancestral ties to Pennsylvania have been removed from their homelands for over a hundred years. They are not always aware of what and/or where significant archaeological sites affiliated with their ancestors may be located. Do not assume an answer of “we don’t know” as “there aren’t any sites”. The Section 106 process should identify any potential archaeological sites and ongoing consultation with tribes may or may not help to identify some of the use and/or significance of those sites.

Below is another reference to the steps of the Section 106 process outlined by the ACHP. The following discussion of tribal consultation will refer to the steps of this process in order to describe when activities occur and what is expected in terms of consultation. It is important to remember that not all projects will necessarily go through each step. In many cases no historic resources are found or, if found, they can be avoided. In such cases, the process would end at the second step, “Identify Historic Properties”. In other cases, steps may be collapsed, as when Phase I and II archaeology are conducted back to back. Regardless, tribal consultation will be conducted throughout the entire process and each consultation will be taken on a case-by-case, project-by-project basis.



7.1 Initiate Section 106 Process

With the *PennDOT Initial Notification Form*, the tribes are informed of the project location and general scope.



The PennDOT CRPs will send notification at the beginning of the Design phase, at the end of project scoping. Notification will be conducted according to the conditions outlined in Appendix D of this document.

Initial notification on large projects may also include the submission of an Area of Potential Effects (APE).

Tribal Action: There is no strict time limit on responses to the *Initial Notification Form*, although the sooner a tribe indicates interest, the faster their concerns about the project can be transmitted to all those involved in the project's design.

7.2 Identify Historic Properties (Phased Identification)

On larger projects, PennDOT may have many different route alternatives that will get narrowed down throughout Preliminary Design. When PennDOT proposes construction over a large area, a new road for example, it is often more efficient to have a predictive model to identify areas of high, medium, and low potential for archaeological sites, rather than test through fieldwork many hundred acres of land. There are many factors built into the model to predict archaeological sites, some of them include distance to water, length of growing season, and presence of nearby recorded archaeological sites.

If an archaeological predictive model is developed and expected to be used to dismiss alternatives, it will be presented to the tribes at the same time it is presented to other agencies, such as the SHPO, for comment on the methodology. Early tribal information would be critical to avoiding potential impacts.

Once the alternatives have been narrowed down, archaeologists will then use the predictive model to guide their testing strategy.

It should also be noted that on some projects, early coordination may also include sending drafts of a project-specific programmatic agreement.

Tribal Action: After receipt of any reports, a 30-day response period is expected. If comments will take longer than the 30-days, notification of when full comments can be expected would be helpful. Comment received after that time may be incorporated, but the need to move through the process may also complicate the ability of PennDOT staff to include late comments.

7.3 Identify Historic Properties (Phase I)

With the *PennDOT Project Information Form*, the tribes are again informed of the project description, as well as the current status of the project in terms of the Section 106 process. In some cases, Phase I and II investigations will be conducted back to back, without a separate Phase I report. In such cases consultation will take place after Phase I investigations, but no report should be expected until the end of Phase II investigations.



Archaeological resource identification is often conducted through Identification (Phase I) archaeological investigations. “Phase I” indicates that fieldwork will be conducted only to establish the presence or absence of archaeological sites. It is a way to identify archaeological resources in the project area. For Pennsylvania, Phase I fieldwork could mean 1) “pedestrian survey” (meaning archaeologists will systematically walk over the project area to find artifacts on the ground surface) and/or 2) “subsurface testing”. Subsurface testing involves the excavation of shovel test pits (STPs) or test units that are dug until the surface of bedrock is reached. STPs are dug in undisturbed areas, however, on floodplains where the soil can be more than 1 meter deep, shovel test pits are too narrow to reach down to bedrock. In these cases archaeologists will dig 1 meter x 1 meter square test units.

The archaeological fieldwork requirements vary by state and geography. In the southwest, almost all testing for eligibility (presence/absence) is done by walking the surface area and little subsurface testing, or actual digging, is done.

In Pennsylvania, STPs are usually round and must be 50 centimeter-by-50 centimeter in diameter. SHPO guidelines currently recommend STPs to be dug at 15 meter intervals. Test units are 1 meter by 1 meter square and to be dug at 30 meter intervals and used in areas of deeply buried soils.

PennDOT CRPs and private consultants will also conduct background research and data gathering to determine the presence of historic resources in a project area. Reports of all Phase I archaeological investigations will be distributed to tribes that have requested to be consulting parties or have indicated they are “Not Sure”.

Tribal Action: After receipt of reports, a 30-day response period is expected. If comments will take longer than the 30-days, notification of when full comments can be expected would be helpful. Comment received after that time may be incorporated, but the need to move through the process may also complicate the ability of PennDOT staff to include late comments.

****NOTE:** For most EIS-level projects, Phase I or II archaeology is done much later in the process than on EA or CEE projects. This is due to the extraordinary cost of archaeological fieldwork and the realization that only one alternative may actually impact archaeological resources.

7.4 Identify Historic Properties (Phase II/Determination of Eligibility)

Again, in some cases Phase I and II investigations will be conducted back to back, without a separate Phase I report. In such cases consultation will take place after Phase I investigations, but no report should be expected until the end of Phase II investigations.



“Phase II” fieldwork is conducted when a site found during Phase I has the potential for intact and significant information and will likely be impacted. If any historic resources are identified in a project area, there will be a determination of its eligibility to be listed on the National Register of Historic Places, generally through Evaluation (Phase II) archaeological fieldwork and by applying criteria outlined by the National Register.

The purpose of Phase II fieldwork is to determine whether the site has integrity and meets the National Register criteria, and if so, to determine its horizontal and vertical limits. Most archaeological sites determined eligible in Pennsylvania are eligible under Criterion D for the important information they will yield about prehistory or history.

For PennDOT, Phase II fieldwork is usually done in conjunction with Phase I work. Usually, more shovel test pits and square 1 meter-by-1 meter test units will be dug where artifacts were found during Phase I work. The archaeologists will try to determine 1) the boundaries of the site, 2) the integrity of the site; if it has been disturbed or plowed, 3) the type of artifacts and features that might be present. If Phase II fieldwork and consultation with Federally-recognized tribes and the SHPO indicates that the site may be eligible for the National Register, PennDOT will try to avoid the site if possible. When sites cannot be avoided, PennDOT will consider ways to minimize harm to the site.

The Phase II archaeological report will make recommendations as to a resource’s eligibility. Reports of all Phase II archaeological investigations for which a tribe has requested to be a consulting party or has indicated they are “Not Sure” will be distributed to the tribe, if they desire.

A determination of eligibility made by PennDOT on behalf of the FHWA is sent for concurrence to the SHPO and any tribe who so requested. The SHPO can agree or disagree with a determination; likewise, the tribes may also agree or disagree with a determination. Disagreements on eligibility of historic properties off tribal lands may be elevated, through FHWA, to the NRHP for their opinion.

Tribal Action: After receipt of reports, a 30-day response period is expected. If comments will take longer than the 30-days, notification of when full comments can be expected would be helpful. Comment received by PennDOT after that time will be considered, but the need to move through the process may also complicate the ability of PennDOT staff to adequately address comments received well after the 30-day review period. On the *Project Information Form* the tribe can indicate their agreement or disagreement of a finding of eligibility, as well as include further comments. If a tribe has further questions, recommendations, or indicated disagreement, PennDOT will initiate follow up consultation to resolve differences.

7.5 Assess Adverse Effects (Determination of Effects)

PennDOT on behalf of the FHWA and in consultation with the SHPO and any tribe who expresses an interest and any other consulting party makes a determination as to whether a project will have an effect on a historic resource in accordance with the regulations stated in 36CFR800.5. The Phase II report will document the effect. There are three



possible findings: No Historic Properties Affected, No Adverse Effect, or Adverse Effect. Ultimate responsibility and authority for the effect finding rests with FHWA.

Tribal Action: On the *Project Information Form* the tribe can indicate their agreement or disagreement of a finding of effect, as well as include further comments. If a tribe has further questions, recommendations, or indicated disagreement, PennDOT will initiate follow up consultation to resolve differences.

7.6 Resolve Adverse Effects (Consultation and Mitigation)

If the project is determined to have an Adverse Effect on an eligible resource, a Resolution of Adverse Effects would occur. Resolution is the discussion of avoidance, minimization, and consultation which may lead to an MOA. If a project is determined to have an adverse effect on an archaeological site which is unavoidable and it is determined to be valuable for the information it contains (but is not worthy of preservation in place), a mitigation plan is developed and codified in a MOA, then implemented. Mitigation of Adverse Effect is generally carried out after the execution of an MOA. The consultation for any mitigation would take place during the final steps of the Preliminary Design phase.

Data recovery excavations are the most common form of mitigation for adverse effects to eligible archaeological sites because these sites are generally determined eligible for the information they contain. However, other types of mitigation, referred to as “alternative or creative mitigation”, are also becoming a commonly utilized method for mitigating adverse effects. Sometimes data recovery excavations are not the best way to resolve adverse effects. Based on consultation among the various consulting parties, including tribes the SHPO and other interested parties, other forms of mitigating adverse effects may be more appropriate. Different approaches may include:

- preservation in place,
- alternative research projects,
- synthesis of existing data from the region,
- protection of the non-impacted portion of the site through an easement,
- interpretation of the local history through an exhibit.

Regardless of what type or types of mitigation are employed, public outreach will be a part of any mitigation plan.

When Phase III data recovery is considered by the parties involved in consultation to be the appropriate mitigation the data recovery may be conducted during Final Design phase, and possibly even during Construction. Solutions worked out prior to Final Design and codified in an MOA may be more satisfactory to all parties. When conducted, Phase III fieldwork typically involves the excavation of a substantial portion of the site being impacted and usually takes the form of systematic and scientific removal of contiguous 1 m x 1 m blocks of earth. Due to the high costs of archaeology and the fact that archaeology is inherently a destructive science, meticulous planning must be



done prior to fieldwork. In Section 106, this planning takes the form of a data recovery workplan which not only lays out which blocks to excavate, but also what is expected to be learned from the excavations, what specific field techniques are warranted, and what methods of analysis are appropriate. Data recovery plans are developed in consultation with Federally-recognized tribes who wish to participate, as well as the SHPO and other consulting parties. The data recovery workplan may be referenced or attached to an MOA which concludes the resolution of adverse effects and formally concludes the Section 106 process for the purposes of NEPA.

Tribal Action (Consultation): Tribes indicating an interest to consult on a project at this level may be asked to review, comment, and/or meet to discuss mitigation plans, workplans, and may provide suggestions on how to successfully resolve any adverse effects. Consulting parties are also likely to request to review and sign any agreement documents which spell out agreed upon mitigation commitments. More information on Memoranda of Agreement (MOA) and Programmatic Agreements (PA) is presented in the next section.

Tribal Action (Mitigation): Consulting tribes may choose to review, comment on, and/or monitor mitigation activities which could include public education documents, lesson plans, excavation, and/or preservation in place. Reports of all mitigation including archaeological investigations will be distributed to tribes that have requested to be consulting parties or have indicated they are “Not Sure”. After receipt of reports, a 30-day response period is expected. If comments will take longer than the 30-days, notification of when full comments can be expected would be helpful.

7.7 Project-specific Programmatic Agreements (PA)/ Memorandum of Agreement (MOA)

A project-specific programmatic agreement, when developed, is typically drafted early in the Design Phase of a project to ensure that all investigations will be completed prior to construction in the area. In cases where access to property is denied by the landowner or several alternatives are under consideration, a project-specific PA lays out the process by which potential impacts to historic resources will be addressed. The development of a project-specific PA does not affect the quality or consideration of historic resources within the APE; it simply allows Section 106 consultation to be concluded after NEPA approval. The PA must be executed prior to adoption of a Record of Decision, FONSI, or Categorical Exclusion Evaluation.

With a project-specific programmatic agreement in place, Phase I archaeology will often not proceed until later in the Project Development Process. Phase II and III archaeological investigations, if required, could come during or after the final environmental clearance document is completed.



A **Memorandum of Agreement (MOA)** is a binding legal document which details how the signatories will mitigate any adverse effects to historic resources.

A **Programmatic Agreement (PA)** is a binding legal document that lays out a process whereby decisions on similar, repetitive actions can be made.

A **project-specific PA** could be drawn up to dictate the process of consultation specific to the project and the consulting parties.

A **process PA** may be drawn up to dictate repetitive, process decisions. For example, the Minor Transportation Projects PA is a process PA; it applies to many projects that PennDOT undertakes, not one specific project.

In both types of agreement, all signatories (except concurring parties) have the option to break the contract and return to the beginning of negotiation if they feel the process is not working and they notify the other signatories consistent with the terms of the document.

If mitigation of adverse effects is required, consultation and comment on the development of a Memorandum of Agreement or project-specific programmatic agreement will be part of the Section 106 consultation process and will include tribes, as requested, the SHPO and other interests. As described in 36CFR800, the FHWA may invite a tribe to be a signatory party, if they are to be legally bound for implementing an activity, or a concurring party as appropriate. Tribes may choose to sign or not sign a MOA or project-specific PA. A decision not to sign an agreement does not invalidate the agreement, nor does it prevent tribes from continued involvement in a project as a consulting party or extinguish government to government responsibilities. However, it is the responsibility of FHWA and PennDOT to make a good faith effort to address tribal concerns that could possibly preclude the agreement. If a tribe is a signatory party, they have the authority to terminate or amend the MOA consistent with the terms of the MOA. A concurring party does not have this authority.

Tribal Action: A project would rarely have both a project-specific PA and an MOA. Both agreements outline how the signatories and concurring parties will be identifying and/or dealing with eligible historic resources during a project. If commenting on or reviewing a draft MOA or project-specific PA, the tribal contact should expect to work within the 30-day response period. If comments will take longer than the 30-days, notification of when full comments can be expected would be helpful.



8. Additional Information

8.1 Funding

The FHWA can fund aspects of tribal consultation under certain project-specific circumstances, but is not required to do so as detailed in FHWA policy letter dated April 6, 2000. FHWA's current environmental regulations provide for participation in costs necessary or appropriate to mitigate the adverse impacts of the project to the human and natural environment so long as (1) the impacts actually result from the federal action and (2) the proposed measure is deemed a reasonable public expenditure after considering the impacts of the action and the benefit of the proposed mitigation measure (23 CFR 771.105(d)). This may include the cost associated with tribal consultation regarding the National Register eligibility of an historic property or in determining the presence of sites with traditional religious and cultural significance. *Note, however, that FHWA cannot fund tribal participation to perform non project-specific activities.* If project-specific activities are to be undertaken, a Memorandum of Understanding (MOU) or other written agreement must be executed to specify the exact nature of the consultation that will be covered.

Examples of reimbursable costs may include those costs associated with tribal experts or elders to identify and/or evaluate the significance of historic properties. This may include field visits to provide information about specific places or sites, monitoring activities, research associated with the tribes' project level historical investigation and travel expenses associated with these activities. FHWA cannot participate in funding the tribes' review of documents, or in the establishment and general operating costs of a THPO such as the cost of securing office space and utilities, paying salaries of administrative personnel, and purchasing office equipment. As with other Federal-aid funding decisions, specific eligibility determinations related to project level costs and maintenance expenses are the discretion of the FHWA at the time of the funding request.

8.2 Role of Consultants at PennDOT

Once it has been determined that a project has the potential to affect historic resources by a PennDOT CRP, consulting firms will be asked to bid on a scope of work to conduct the necessary cultural resource investigations. Any private consulting firm undertaking cultural resource investigations for Section 106 compliance in Pennsylvania must have supervisory staff who meet the Secretary of Interior's Standards for such investigations (36 CFR 64), which minimally calls for a Master's Degree and prior professional experience.

During these investigations, consultants are required to consult regularly with the CRPs, who ensure that all cultural resources investigations comply with regulations. As investigations are completed, CRPs review and comment on consultant reports, requiring document revisions or additional work when necessary, prior to submitting the reports to the SHPO for review.



All tribal consultation is to be completed only by PennDOT CRPs, defined as professional department employees or cultural resource management consultants designated by PennDOT central office. Consultants are not to directly contact a tribal cultural resource contact on behalf of PennDOT or FHWA.

8.3 Archaeological Resources

Archaeological sites represent the location of a pre-Contact or post-Contact occupation or activity. Post-Contact archaeological sites may be associated with either standing or non-extant historic structures. In Pennsylvania, archaeological sites are most often determined eligible under 36CFR60.4(d) of NHPA, also known as “Criterion D”, for their potential to yield information important to prehistory or history. Other criteria may also apply.

The Section of Archaeology for the State Museum of Pennsylvania and the PHMC have identified criteria and definitions for prehistoric and historic sites as inventoried in the Pennsylvania Archaeological Site Survey (PASS) files held at the BHP. Pre-Contact sites are defined as:

- Three or more culturally modified objects, excluding fire-cracked rock (FCR), found within a 15 diameter area while surface collecting a plowed field.
- Three or more flakes or any combination of flakes and tools, pottery sherds, etc. found within 15 m of each other represent a site in plowed contexts
- Single points are usually considered isolated finds, however, all Paleo-Indian point localities should be recorded as sites because of the sparseness of debris from Paleo-Indian sites.
- Flakes and/or other culturally modified items in adjacent 15 m spaced shovel tests, regardless of the number (minimum of 2) of objects recovered.
- Five or more finished tools recovered within an acre should indicate the presence of a site, and the consultant should further refine site boundaries within that area (unless it is a village site covering more than an acre).
- The presence of any subsurface culturally derived feature.

8.4 Tribal Cultural Resources

A variety of artifacts, site types, and locations in Pennsylvania may be of interest to the tribes. A list showing this variety follows;

- Pre-Contact and Contact period sites including palisades, residential structures, trash pits, shell mounds, camp sites, hunting sites
- Burial grounds, human remains and associated artifacts
- Sacred sites including significant geographic features (rivers, waterfalls, rock outcrops, caves)
- Battlefields with Native American participants



- Sacred objects including masks, condolence canes, wampum, beads, clothing, pots, combs
- Sacred landscapes

8.5 Artifacts

FHWA has a regulatory responsibility to consult with all consulting parties concerning how, when, and where artifacts are to be treated and curated, on a project-by-project basis. After consultation, FHWA will take into consideration all comments and Federal and Pennsylvania state laws and regulations.

8.6 Human Remains

For many tribes and tribal members, burials are more than just scientific objects of study; they are sacred, tied to the past and the present by invisible threads. Human remains are not “artifacts” but the remains of once living, vital people and disturbance of their grave sites and remains can be viewed as extremely destructive depending on the cultural standards of their people. For many Native American cultures, any disturbance of a grave site or of human remains creates disastrous consequences to the ancestor’s family, community, and world in general. Some rituals and special activities may help allay those consequences, but will not erase completely the negative effects of the disturbance. It is considered by many a human rights violation to disturb the graves of their ancestors.

This is often a point of difference between those involved in project consultation. Avoidance of grave sites and human remains should be the primary option and every effort made not to disturb them. This is not always possible and in such cases, significant and ongoing consultation will help to move the process forward but will never fully make amends for the disturbance.

NOTE

** Typically, at the beginning of all archaeological field investigations there will be an assessment based on the background research on the potential for encountering human remains. If there is a high potential that human remains exist in the study area, the subsequent research proposals will provide a respectful treatment plan which includes the notification and consultation with the affiliated tribal groups and the SHPO. The plan should also allow for an appropriate course of action for preservation or mitigation.

Under certain circumstances, tribal representatives may have restrictions regarding contact with archaeological artifacts, particularly artifacts associated with grave sites and human remains. Tribal members may not even be able to be in the same room as the artifacts and/or remains or look at photographs. Please be sure to notify tribal representatives before they come in contact or into a room with remains and/or artifacts and ask how they would like to participate or proceed.

The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) provides a process for the disposition of certain Native American cultural items to lineal descendants and culturally-affiliated tribes. NAGPRA applies to items found on federal and tribal lands and to museums receiving federal funds. Because there are currently no



tribal lands and few federal lands in Pennsylvania, NAGPRA is not activated until the items are submitted to the State Museum of Pennsylvania for permanent curation. The State Museum's process for respectful treatment of human remains is included at the end of this document in Appendix C.

8.7 Inadvertent Finds

The Section 106 regulations provide a mechanism by which FHWA can quickly comply with the Section 106 process to identify eligible archaeological resources and assess effects after a project has begun construction (36CFR800.13). Under the regulations, several courses of action may be taken by the FHWA: (1) prepare a plan prior to construction which outlines what measures will be taken during the project if resources are discovered; (2) comply with 36CFR800.6 by providing the ACHP an opportunity to comment, either by developing a MOA or requesting ACHP comment; and (3) develop an action plan in consultation with the SHPO and taking into account the comments of the ACHP.

Section 106 requires that project construction stop within the area of the inadvertent find. Construction may continue in areas that will not damage or affect the resource.

8.8 Protocol for Transportation Staff

Tribal consultation is a diplomatic undertaking between sovereign nations. Respectful diplomacy demands protocol. The best source of advice on acceptable protocols for tribal consultation is obviously the attending tribes, and like any society or culture, different tribes may have very different customs and protocols. The transportation agency representative should not be afraid to broach the subject of proper protocols and etiquette with a tribal representative. The tribes are the best source to provide any additional information to help avoid awkward or embarrassing moments. Please note that, while some of these protocols are unique to specific Native American tribes, some of these are simply points of respectful behavior.

Among most of the tribes we consult with:

- The elected leader of a federally recognized tribe should be addressed as the ranking official of the nation, much like the President of the United States. The title of that official may be Chief, Chairman, Governor, President or a similar title. In some tribes the term "chief" may indicate a traditional or ceremonial leader, not necessarily the civic leader of the tribe. Be sure to approach the appropriate level of correspondence, i.e. Bureau Head to Tribal Administrator/THPO; Governor to tribal civic leader; transportation staff to tribal historic preservation staff.
- Photography generally will require permission of the subject, and is especially inappropriate during prayers or other rituals. Often traditional and ritual knowledge is sacred and known only to participants; be sure of the protocol before taking pictures and/or writing about traditional and ritual practices. ***(The*



Shawnee Tribe prefers that certain information on the culture and traditions of the Shawnee People not be printed.)

- Don't interrupt conversations. Be respectful of speakers.
- The kind of forceful and direct commentary that is common in agency meetings can be viewed as pushy and overbearing in a diplomatic setting like a tribal summit. Use respectful and polite language when expressing opinions, asking questions, or requesting something.
- Late spring, summer, and early fall are often devoted to traditional gatherings such as dances, lacrosse games, and other activities. It may be more difficult to schedule a meeting at these times or for a contact to get a quick answer on consultation. Meeting and discussion time is traditionally held until the winter, scheduling at this time is often more open and it may be easier to contact everyone to make a decision.
- Take note of the government to government relationship between the US government and Federally-recognized tribes. The FHWA upon agreement with the tribes has delegated daily correspondence with the tribes to PennDOT's CRPs only, however, FHWA retain the ultimate responsibility for contacting and consulting with the tribes. A tribal member may request to speak only with a Federal government representative. In some cases correspondence may need to be directed to the tribal leader rather than the cultural resource contact, if the two are different, and may need to come from FHWA. Be aware of these distinctions.
- Federally-recognized tribes have achieved a particular status as sovereign nations; it is often inappropriate to share meeting or consultation time for a federally-recognized tribe with non-federally recognized tribes or non-enrolled individuals identifying themselves as Indian.
- Prayer at the beginning or end of a formal event, such as a conference, is often welcomed. However, for less formal occasions and depending on circumstances prayer may not be appropriate and may even offend the attendees of different religious backgrounds (including tribal members who subscribe to different religious ideologies). Be sure to consider whether prayer is appropriate for the occasion and who might be asked prior to the event to offer it. The prayer may be given by the host tribe or sometimes the eldest member present.



Direct thoughts from a tribal preservation officer:

“Be aware of Indian time. I say that not completely in jest. We can work on a slightly different time clock than others.

Here’s something else people should know – we will look a lot like everybody else in the room, dress like them, sound like them when we talk, drive the same cars, etc. - and that can be a real smoke screen for what we’re really like. It can be deceiving – and downright distressing to some folks – when we suddenly don’t respond to an issue in the same way that it looks like we should. Indians are still different. We still have a different worldview and a different set of interpretive conventions and filters. Stuff just doesn’t strike us just the same way.

I think that some agency folks are genuinely surprised about how friendly we are and how easy it is to work with us, when they had a preconceived notion that we would be difficult.”



Appendix A Terms and Resources

Glossary

Adverse Effect – an undertaking is considered to have an adverse effect on a resource when the effect on a historic resource may diminish the integrity of the resource’s location, design, setting, materials, workmanship, or association. Adverse effects on historic resource may include, but are not limited to, physical destruction, damage, or alteration to all or part of a resource; isolation of the resource from or alteration of the character of the resource’s setting when that character contributes to the resource’s qualification for the National Register; introduction of visual, audible, or atmospheric elements that are out of character with the resource or its setting; neglect of a resource resulting in its deterioration or destruction; and the transfer, lease, or sale of the resource.

Area of Potential Effects – the geographic area or areas within which an undertaking may cause changes in the character or use of historic resources, if any such resources exist there. This area always includes the actual site of the undertaking, and may also include other areas where the undertaking will cause changes in land use, traffic patterns, or other aspects that could affect historic resources.

Archaeological Resources – all evidences of human occupations which can be used to reconstruct the lifeways of past peoples. These include sites, artifacts, environmental and all other relevant information, and the contexts in which they occur. Archaeological resources are found in prehistoric and historic sites, as well as historic Native American and European areas of occupation and activity.

Council on Environmental Quality (CEQ) - is responsible for making sure Federal agencies comply with NEPA; similar to the way the ACHP oversees compliance with NHPA and Section 106.

Contributing Resource – a building, site, structure, or object adding to the historic significance of a property.

Effect – an undertaking has an effect, either harmful or beneficial, on a historic resource when the undertaking may alter characteristics of the resource that may qualify that resource for inclusion in the National Register.

Eligible Resource – a resource that has been determined eligible for National Register listing by the Secretary of the Interior or one that has not yet gone through the formal eligibility-determination process, but which meets the National Register Criteria. For Section 106 purposes, an “eligible” resource is treated as if it were already listed.

Federally-recognized Tribe – The Bureau of Indian Affairs (BIA) maintains a list, which is updated annually and published in the *Federal Register*, of the Federally-recognized Native American tribes. In addition, the BIA separately publishes a list of tribal leaders, as well as BIA area and agency offices.



Historic Property - any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.

Memorandum of Agreement (MOA) – the legal agreement, resulting from consultation, which states measures the agency will take to mitigate or reduce effects on historic resources as the agency carries out its undertaking. The MOA is signed by the agency, the State Historic Preservation Office, and the ACHP, if participating.

National Register of Historic Places – the nation’s master inventory of known historic resources worthy of preservation. The National Register is administered by the National Park Service on behalf of the Secretary of the Interior. National Register listings include buildings, structures, sites, objects, and districts that possess historic, architectural, engineering, or cultural significance. Properties listed may be significant at the national, state, or local level.

No Adverse Effect – when an undertaking has an effect on a historic resource, but the effect would no be harmful to those characteristics that qualify the resource for inclusion in the National Register. A determination of No Adverse Effect can be determined in several ways; either the nature of the project itself is not harmful, the harmful effects are avoided through preservation covenants, or by following the Secretary of the Interior’s Standards for Rehabilitation and guidelines for Rehabilitating Historic Buildings.

No Effect – when an undertaking has no effect of any kind (either harmful or beneficial) on historic resources.

PennDOT Transportation Project Development Process – defines the various steps required to systematically formulate programs and advance projects from Planning, to Programming, through Design and Construction, to regular Maintenance and Operations.

Site – the location of a significant event, a prehistoric or historic occupation or activity, or a building or structure, whether standing, ruined, or vanished, where the location itself possesses historic, cultural, or archaeological value regardless of the value of any existing structure. Examples include battlefields, campsites, shipwrecks, and rockshelters.

State Historic Preservation Officer (SHPO) – the official in each state or territory who (among other duties) consults with Federal and state agencies during Section 106 review. The SHPO administers the national historic preservation program at the state level, reviews national Register nominations, and maintains file data on historic resources that have been identified but not yet nominated. In Pennsylvania the SHPO is the Pennsylvania Historical and Museum Commission’s Bureau for Historic Preservation (PHMC, BHP).



Strike Off Letter (SOL) – internal PennDOT document/correspondence.

Study Area – for cultural resource studies, the term study area is the Area of Potential Effects.

Traditional Cultural Property (TCP) – defined as a property associated with cultural practices or beliefs of a living community. These practices or beliefs must be rooted in that community’s history and be important in maintaining the continuing cultural identity of the community. TCPs are a subset of National Register eligible properties. National Register Bulletin 38 gives guidelines for evaluating and documenting TCPs. Examples of TCPs may include: a mountaintop used by generations of a Native American group for rituals; and ethnic neighborhood in a large city that reflects the cultural values and traditions of its inhabitants through architectural details, organization of space, and activities; or a market place where Amish farmers from the surrounding country side have traditionally gathered.

Tribe: see *Federally-recognized Tribe*

Undertaking – under NHPA, a Federal action that is subject to Section 106 requirements. The term “undertaking” is intended to include any project activity, or program – and any of its elements – that has the potential to have an effect on a historic resource and that is under the direct jurisdiction of a Federal agency or is licensed or assisted by a Federal agency. Included are construction, rehabilitation, repair projects, demolition, planning, licenses, permits, loans, loan guarantees, grants, Federal property transfers, and many other Federal activities.

Acronyms

ACHP – Advisory Council on Historic Preservation

CE/CEE – Categorical Exclusion (Evaluation)

DOT – Department of Transportation

EA – Environmental Assessment

EIS – Environmental Impact Statement

FHWA – Federal Highway Administration

MOA – Memorandum of Agreement

NEPA – National Environmental Policy Act

NHPA – National Historic Preservation Act



NPS – National Park Service

PA – Programmatic Agreement

PennDOT – Pennsylvania Department of Transportation

ROD – Record Of Decision (*e.g. EIS-level clearance*)

SHPO – State Historic Preservation Office

THPO – Tribal Historic Preservation Office

Websites

FHWA

www.fhwa.dot.gov

Native American Coordination Program:
www.fhwa.dot.gov/environment/natvamrc/

website on Tribal Issues
<http://environment.fhwa.dot.gov/histpres/tribal.asp>

US Department of Transportation (USDOT)

www.dot.gov

PennDOT

www.dot.state.pa.us

www.penndoterm.org (PENNDOT cultural resources program)

Pennsylvania Historical and Museum Commission/Bureau of Historic Preservation (PHMC/BHP)

www.phmc.state.pa.us

www.phmc.state.pa.us/bhp/

www.phmc.state.pa.us/bhp/Inventories/ (contact information and state guidelines for archaeological investigations)

Advisory Council of Historic Preservation (ACHP)

www.achp.gov (information on NHPA and working with Section 106)



National Park Service (NPS)

www.nps.gov

Legislation

US Federal Government

Executive Order 13175 - Consultation and Coordination with Indian Tribal Governments (November 9, 2000) www.epa.gov/fedrgstr/eo/eo13175.htm

Executive Order 13084 - Consultation and Coordination with Indian Tribal Governments (May 14, 1988) www.epa.gov/federalregister/eo/eo13084.htm

Executive Order 13007 – On Sacred Sites (May 1996)

USDOT

Order 5301.1 – Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes (November 16, 1999)

Commonwealth of Pennsylvania

State History Code

Pennsylvania Act 120 is the state “NEPA” act, and as such mimics the requirements to achieve a balanced, reasoned decision towards a preferred alternative. Section 2002 of PA Act 120 requires that a project must not adversely affect a cultural resource unless there is no “feasible and prudent” alternative.

PennDOT

Programmatic Agreement for Minor Transportation Projects (MPPA) – agreement between FHWA, PA Division, ACHP, PHMC/BHP, and PennDOT to streamline the Section 106 compliance process for CE-level projects which may affect historic properties, but do not have an Adverse Effect. <ftp://ftp.dot.state.pa.us/public/bureaus/BEQ/programatic.pdf>

Interim guidance on consulting with Indian Tribes (Strike Off Letter 438-03-03) – outlining the PennDOT’s guidance on consulting with Federally-recognized tribes; includes matrix of notification conditions provided by each tribe. <ftp://ftp.dot.state.pa.us/public/bureaus/BEQ/TribalSOL.pdf>



Appendix B Contact Information

Contacts

Federal Highway Administration (FHWA)

FHWA, Pennsylvania Division Office

228 Walnut Street, Room 508
Harrisburg, PA 17101-1720

James Cheatham, Division Administrator - (717) 221-3461
Pennsylvania.FHWA@fhwa.dot.gov

Karyn Vandervoort, Environmental Team Leader – (717) 221-2276
Karyn.Vandervoort@fhwa.dot.gov

Deborah Suciu-Smith, Division Tribal Coordinator – (717) 221-3785
Deborah.Suciu-Smith@fhwa.dot.gov

Spencer Stevens, Transportation Planning Team Leader – (717) 221-3735
spencer.stevens@fhwa.dot.gov

Native American Coordination

400 7th Street S.W. Room 3301
Washington, DC 20590

Tim Penney, Native American Program Coordinator – (202) 366-2698
tim.penney@fhwa.dot.gov

Pennsylvania Department of Transportation (PennDOT)

Richard H Hogg, PennDOT Deputy Secretary, Highway Administration (717)
783-1776
rhogg@state.pa.us

Environmental Quality Assurance Division (EQAD)
P.O. Box 3790
Harrisburg, PA 17105-3790

Ira Beckerman, Cultural Resources Section Leader - (717) 772-0834
ibeckerman@state.pa.us

Chris Kula, Cultural Resource Specialist, Archaeology – (717) 783-9700
ckula@state.pa.us



Joe Baker, Cultural Resource Specialist, Public Outreach – (717) 783-9147
josebaker@state.pa.us

Pennsylvania Historical and Museum Commission

400 North St.
Harrisburg, PA 17120

Barbara Franco, Executive Director and State Historic Preservation Officer –
(717) 787-2891
bfranco@state.pa.us

Bureau of Historic Preservation

Jean Cutler, Director, and Deputy State Historic Preservation Officer –
(717) 705-4035
jecutler@state.pa.us

Other BHP Staff Contacts found at www.phmc.state.pa.us/bhp/staff/overview.asp.

State Museum of Pennsylvania

Steve Warfel, Senior Curator – (717) 783-2887
swarfel@state.pa.us

Janet Johnson, Curator – (717) 705-0869
janjohnson@state.pa.us



**PennDOT Cultural Resource
Professionals (as of 2006)**

PennDOT Engineering District 1-0

255 Elm Street
PO Box 398
Oil City, PA 16301-0398
Joe Verbka (Archaeology CRP)
(814) 678-7098; jverbka@state.pa.us

PennDOT Engineering District 2-0

1924-30 Daisy Street
PO Box 342
Clearfield, PA 16830
Scott Shaffer (Archaeology CRP)
(814) 765-0456; scoshaffer@state.pa.us

PennDOT Engineering District 3-0

715 Jordan Avenue
PO Box 218
Montoursville, PA 17754
Scott Shaffer (Archaeology CRP)

PennDOT Engineering District 4-0

PO Box 111
Scranton, PA 18501
Vacant

PennDOT Engineering District 5-0

1713 Lehigh Street
Allentown, PA 18103
Steven Barry (Archaeology CRP)
(610) 798-4263; stbarry@state.pa.us

PennDOT Engineering District 6-0

7000 Geerdes Boulevard
King of Prussia, PA 19406
Catherine Spohn (Archaeology CRP)
(610) 205-6711; cspohn@state.pa.us

PennDOT Engineering District 8-0

2140 Herr Street
Harrisburg, PA 17103-1699
Steven Barry (Archaeology CRP)

PennDOT Engineering District 9-0

1620 North Juniata Street
Hollidaysburg, PA 16648
Vacant

PennDOT Engineering District 10-0

Route 286 South
PO Box 429
Indiana, PA 15701
Vacant

PennDOT Engineering District 11-0

45 Thoms Run Road
Bridgeville, PA 15017
Joe Verbka (Archaeology CRP)

PennDOT Engineering District 12-0

PO Box 459 North Gallatin Avenue
Extension
Uniontown, PA 15401
Vacant

PennDOT Central Office

Bureau of Design, EQAD
PO Box 3790
Harrisburg, PA 17120
Cultural Resources Management
Program
(717) 772-0834

* For Districts 4-0, 9-0, 10-0, and 12-0 contact Mike Stanilla in PennDOT Central Office at c-mstanill@state.pa.us or (717) 214-8713 for tribal issues.



Appendix C

PHMC Policy on the Treatment of Human Remains

Adopted March 10, 1993

The PHMC developed this policy to serve as a guide for persons conducting agency programs for PHMC, persons excavating for any reason on Commonwealth land, and persons excavating under a permit authorized by a state agency, other than PHMC, who discover human remains or a burial site. It serves to prevent the destruction of unmarked burials, encourage respectful treatment of all human remains, and the role of Native American groups, in compliance with NAGPRA. The policy further attempts to balance the scientific and research value of skeletal material and associated funeral objects.

This policy offers more guidance in two specific areas:

- 1) Deals with burial sites discovered during CRM projects, archaeological field investigations, grant funded projects, and all earth moving projects on state land. The discovery of human remains should trigger a process that encourages careful and dignified treatment and mandates the notification of appropriate parties. The issue of human remains and burial sites is not directly addressed in NAGPRA; however, the PA policy hopes to follow this legislation as closely as possible.
- 2) The treatment of existing collections of skeletal material, associated and unassociated funerary objects, sacred objects and objects of cultural patrimony.

Definitions

For the purposes of this policy, the following definitions should apply:

Burial site: any natural or prepared physical location below, on, or above the surface of the earth into which, as part of a death rite or ceremony of a culture, human remains have been deposited whether marked or unmarked.

Policy I – Discovery of Human Remains

This policy is activated when the discovery of human remains falls within one of three categories:

- 1) When human remains are uncovered, disturbed, or exposed in the course of archaeological field investigations undertaken during Commonwealth funded, permitted, or assisted projects.
- 2) When human remains are inadvertently discovered during earth moving activity on Commonwealth lands.
- 3) When human remains are discovered during state permitted activities occurring off Commonwealth land, when the permit is granted by any agency of the state government, except the PHMC.



This policy outlines the procedures to be followed if the discovery of human remains fall within category 1 or 2. It is further designed to give guidance to discoveries that fall within category 3. It will be implemented in part through PHMC archaeological guidelines, through its Grants Program, through its contract documents, and through archaeological permits granted for archaeological investigations on state lands.

1. In field situations, human remains may be encountered under two sets of circumstances – (1) during a planned archaeological investigation, or (2) during routine ground disturbance from excavations and construction, known as unexpected discovery.

Archaeological Investigations (Category 1)

Any person doing archaeological excavations through permits or grants through the PHMC must have a contingency plan for the treatment of human remains or a burial site as part of their research proposal. This plan should identify expected lineal descendants or culturally affiliated groups

- When human remains are encountered in the manner they were anticipated, the treatment plan should be activated.
- If, during the course of investigation, it appears that human remains are encountered that were unanticipated, then work at the site should stop. The coroner and the BHP should be notified of the find.

Unexpected Discoveries (Category 2 required action, Category 3 guidance)

Any person while undertaking earth moving activities occurring off Commonwealth land who becomes aware that human remains or a burial site are being disturbed shall cease all activity in the area of the site. If it appears that the remains may be of a historic or prehistoric nature, the PHMC should be notified of the find.

2. Whether human remains are encountered through archaeological investigation or through unexpected discovery, it is the intention of this policy to allow an opportunity for consultation with groups that may be culturally affiliated with or may be lineal descendants of the deceased. This will give all parties involved an opportunity to develop a plan for the remains.

Archaeological Investigation (Category 1)

The treatment plan developed as part of the scope of work should be implemented.

Unexpected Discovery (Category 2 and 3)

The Commission has one week to notify potential lineal descendants or culturally affiliated groups.

3. Based on the above notification and following consultation, the PHMC will consider the concerns and recommendations of all parties who are able to



- establish lineal descent or cultural affiliation with the individual(s) associated with the burial site.
4. Once consultation is completed, the PHMC will develop and direct a final treatment plan. This should be completed within fifteen days. The plan may recommend any of a number of treatment plans. These include:
 - Leaving the human remains *in situ* if the burial will not be disturbed and can be protected in this manner
 - Removal and immediate reburial by the appropriate culturally affiliated group or direct lineal descendant
 - Removal of the human remains and examination undertaken by a qualified osteologist to gather basic information
 - Removal and examination of the remains
 5. Funerary objects and grave goods directly associated with unmarked human remains should be treated in the same manner as human remains.



Appendix D

VI. Tribal Consultation A. General Guidance

The 1992 amendments to the National Historic Preservation Act, and changes made in 1999 to the implementing regulations (36 CFR Part 800) of Section 106 of that Act (effective January 11, 2001); obligate federal agencies to consult with Native American Tribes. The Federal Highway Administration (FHWA) is required to make a reasonable and good faith effort to identify and consult with Indian Tribes that may attach religious and cultural significance to historic properties affected by FHWA-aid projects. Historic properties of importance to tribes may be located on tribal lands or may be located on ancestral, aboriginal or ceded lands. Pennsylvania has no current tribal lands but a total of 14 Federally recognized Tribes have been identified that are likely to have an interest in Pennsylvania projects because of ancestral ties to the state.

Federal recognition is a key component of 36 CFR Part 800. Federally recognized Tribes have special status as a consulting party under the regulations (as defined under **36 CFR § 800.2(C)(2)**) even when historic properties are located off tribal lands. Tribes that are not federally recognized may also participate in the Section 106 process; however, their status is equivalent to other interested parties. Non-federally recognized tribes must have a demonstrated interest in a project and must send a written request to FHWA if they wish to be a consulting party. The use of the word Tribe throughout this guidance refers to a federally recognized Indian tribe, as defined in 36 CFR Part 800, unless otherwise noted. A list of federally recognized Tribes is maintained at the Bureau of Indian Affairs web site: www.doi.gov/bureau-indian-affairs however, this information can also be found at other sites, including <http://www.artnatam.com/tribes.html>, on the PennDOT Shared Drive, under ***PENNDOT Shared/BEQ/Cultural Resources/Tribal Consultation/FHWA CD/***

Each federally recognized Tribe is a sovereign nation. Therefore, the FHWA as part of the Federal government engages in government-to-government relations with Tribes. These responsibilities are established by treaty and cannot be delegated. As has been demonstrated in other states, developing a good working relationship with Tribes takes time. In the long-term, the FHWA and the Department hope to reach specific protocols, or understandings, with each of the Tribes that would outline the procedures used to fulfill our obligation to consult. Reaching that specificity will involve ongoing discussions with each of the Tribes. It is important to note that the foundation for these protocols needs to be trust and good communication, which cannot be forced or rushed. This guidance will continue to undergo a refinement over the next few years.



The purpose of consultation with Tribes is no different from consultation with the SHPO or consultation with other interested parties. That purpose is to reach an informed and supported decision on how to treat the effects of projects on historic properties. Where historic properties are of religious and cultural significance to Tribes, the Tribes bring a unique and added perspective to the consultation process. When Tribes are provided with a reasonable opportunity to provide advice on the identification and evaluation of such properties, when Tribes articulate views on the project's effects on such properties, and when Tribes participate in the resolution of adverse effects to such properties, the decisions and results will be better.

B. Specific Guidance

PennDOT has been delegated certain activities on behalf of the FHWA and with the consent of the Tribes. PennDOT is responsible for initiating consultation with Tribes on a project specific basis, transmitting documentation and information to the tribes, and determining a tribe's level of interest in a project.

While the tribes have consented to coordinate with PennDOT, they may at any time choose to consult exclusively with the FHWA. The FHWA will also take the lead in consulting with tribes when burials are found or other issues of a sensitive nature to the tribes are identified.

1. Initiating Consultation

Consultation between the Department and each Tribe is to be done in a manner that is sensitive and respectful of tribal sovereignty. In principle, consultation should begin **early** in a project's planning process so that all parties have ample time to identify and discuss relevant historic preservation issues and resolve concerns about the confidentiality of information *concerning historic properties of religious and cultural significance to tribes* (our emphasis).

a) When to Initiate Consultation

- For projects where an **Environmental Impact Statement (EIS)** will be prepared, initial notification to the Tribes should occur during Step 2 of PennDOT's ten-step process (**Publication 278**), after the publication of the Notice of Intent, but by the project's introduction at ACM. Materials to be transmitted should include a copy of the Notice of Intent, as well as summary materials that have been prepared for ACM. In the initial notification, a statement should be added that informs the Tribes that subsequent information will be sent, certainly by the time that an archaeological predictive model would have been developed (**Section IX.A**) and expected to be used to either dismiss alternatives (Step 4) or as part of the detailed



engineering and environmental analyses (Step 5). The predictive model should be presented to the Tribes at the same time it is presented to other agencies, such as the SHPO.

- For projects where an **Environmental Assessment** (EA) will be prepared, initial notification would take place during Step 2 at the conclusion of the scoping field view. Subsequent notification would occur during Step 3 identification efforts, or during the development of any archaeological predictive model.
- For **Categorical Exclusions** (CE), initial notification should occur shortly after the project or cultural resource scoping field view. Normally, formal archaeological predictive models are not used on CE projects to evaluate alternatives. The initial notification should indicate the project's archaeological potential.

b) *What Information to Send to the Tribes*

The District Archaeologist is responsible for transmitting information and documentation to the Tribes. Two forms have been developed to facilitate that coordination: a PennDOT Project Initial Tribal Notification Form, and a PennDOT Project Information Form (**Appendix to be determined**). Use of these forms precludes the preparation of individual letters.

- The **Initial Tribal Notification Form** is used to begin consultation and indicates the type of project and level of environmental documentation. A Scoping Field View Project Description Form or similar documentation describing the project should be attached.
- The **Project Information Form** is to be used for subsequent submissions to the tribes and indicates project status. Archaeology reports, summaries, or other relevant documentation should be attached.

The Cultural Resource tracking database has been modified to electronically generate tribal forms that contain the basic project information (e.g. County, SR/Section, type of project) and the names and addresses of tribal contacts. The back of the forms can be *self-addressed* to the attention of the District Archaeologist and *stamped* to ensure a timely response, or a self-addressed, stamped envelope can be enclosed.

Copies of the Initial Notification and Project Information forms are to be provided to the FHWA, attention the environmental review team member, and the Bureau of Design Environmental Quality Assurance Division. The Department contact should be the District Archaeologist that covers the District in which the project is located.



Please note that consultants have not been authorized to consult with tribes. At the discretion of the District Archaeologist, consultants may prepare project information and fill out the forms for submission to the tribes. However, consultants may not contact tribes directly or send any information on consultant letterhead. All information prepared by consultants for submission to the tribes must be sent to the District Archaeologist, who will sign the forms and forward to the tribes.

A matrix identifying relevant Tribes, notification conditions, tribal concerns, and tribal contacts is provided in **Appendix (Pub 592)**, along with a map identifying approximate boundaries for each tribe's geographic interest. The tribal contact list also includes the names of tribal officials to be copied during the consultation process. EQAD, in consultation with the FHWA, will update the list on an ongoing basis. It should be noted that tribal contacts change frequently.

The matrix also identifies which circumstances trigger a Tribe's interest and at what point a Tribe would want to be notified of a project. In almost all cases, Tribal interest is limited to archaeological resources of either the Pre-Contact or Contact periods. Consequently, only projects involving ground-disturbing activities in previously undisturbed areas are likely to be of interest. Not all Tribes will be requesting notification at the same stage in a project, so it is important to check each tribe's notification interest at the start of a project.

Some of the Tribes, such as the Oneida Indian Nation or the Seneca Nation of Indians, have geographically proscribed areas of interest. Other Tribes, such as the Eastern Shawnee Tribe of Oklahoma, lived in all parts of Pennsylvania. However, the Eastern Shawnee Tribe of Oklahoma and the Absentee-Shawnee Tribe of Oklahoma occupied Pennsylvania during a defined period of time. In cases where more than one Tribe could have occupied a project area, notification should be to all of these Tribes. As the project advances and as archaeological sites are identified and associated with specific cultures, we expect that some of the Tribes would end consultation or that one of the Tribes would be designated as lead tribe by those Tribes already notified.

2. Initiating Consultation for Pre-Existing Projects

Projects that have begun prior to the issuing of this guidance can and should still benefit from tribal consultation, and the fact that a project has begun does not alleviate FHWA's and PennDOT's responsibilities to consult. Changes to the National Historic Preservation Act were made in 1992, and both regulations and other Federal Directives have been in place for more than two years.

When tribal notification comes after studies have begun, both the **PennDOT Project Initial Tribal Notification Form** and the **PennDOT Project Information Form** should be used. The Initial Notification Form should contain



the project description, while the Information Form should contain any documentation or information to be provided at this stage of study. Until a tribe's interest in a project is determined, it is recommended that summary information such as report abstracts, management summaries, or recommendations be initially submitted to the tribes. Interested tribes can then be sent the complete reports. Copies of the PennDOT Project Initial Tribal Notification Form and attachments should be provided to both FHWA and the Bureau of Design Environmental Quality Assurance Division.

Bringing tribal consultation into an ongoing Section 106 process should be dictated by a common-sense approach that emphasizes the potential value of that consultation, not only for the purposes of Section 106, but also for the National Environmental Policy Act (NEPA), and to an extent Environmental Justice. Enough information should be provided for a tribe to decide if they want to be involved but should avoid inundating the tribes with papers and reports.

3. Continuing Consultation

Once a Tribe has received notification of a project, the District will continue to transmit relevant information to the Tribe, until the Tribe directs otherwise. Tribes may choose to be a consulting party on a project at any time, but even when not choosing to be a consulting party may still request project information. All responses received from the Tribes must be copied to the FHWA, the SHPO and EQAD by the District Archaeologist. If a tribe does not respond to the initial notification, this should not be interpreted as disinterest on the part of the tribe. Sometimes, a tribe may not be interested until an archaeological site or a burial is found. In other cases, workload and tribal priorities may prevent a tribe from responding in a timely manner.

Informal consultation, including telephone conversations, on-site meetings, web sites, and e-mail is to be encouraged, and documented in the project file. At critical decision points and where decisions are documented, each consulting Tribe should receive a copy of that documentation, like the SHPO and FHWA. Each document transmittal must have the PennDOT Project Information Form as its cover, and should contain a brief synopsis of the material being transmitted.

As consulting parties, Tribes are to be given the opportunity to be involved in the resolution of adverse effects. Archaeological reports, data recovery or alternative mitigation plans should be sent to consulting tribes when they are submitted to the SHPO. Tribes may sign a Memorandum of Agreement or a Programmatic Agreement, although they are not required to do so. When a draft MOA or PA is sent to the SHPO, FHWA or other consulting parties for review, the tribes who have expressed interest in the project should also receive a copy.



4. Burials and Sacred Objects

The discovery of burials or objects considered sacred by a tribe is likely to be of most concern to the Tribes. If the consultant and the District Archaeologist determine that there is a high potential for burials at an archaeological site, the District Archaeologist shall so inform the tribes. If burials are found during any stage of archaeological investigations or during construction (See **Section XIV.B**) the District Archaeologist will immediately contact EQAD and the FHWA. The FHWA will notify all tribes within whose geographic area of interest the burial is located, even if the Tribes previously did not express interest in the project. The FHWA will consult with the Tribes to seek an equitable solution for the treatment of the burials that takes into consideration both the views of the Tribes and the SHPO. Although the Native American Graves Protection and Repatriation Act (NAGPRA) protects Native American graves and sacred objects, this law only applies to discoveries on **Federal and tribal lands**. Because the FHWA does not own land and there are no tribal lands in Pennsylvania, NAGPRA does not specifically apply to FHWA-aid projects. However, it is the intent of the FHWA to follow the spirit of NAGPRA where burials are concerned, through the Section 106 consultation process. In the event that burials or sacred objects are claimed by more than one tribe, the FHWA will consult with the Advisory Council.

Under Pennsylvania state law, artifacts from private lands belong to the landowner. PennDOT does try to get Deeds of Gift for artifacts from private lands in order to have them accessioned at the State Museum. On Commonwealth land, the State Museum has the right of first refusal for artifacts, under the State History Code. Once artifacts are provided to the State Museum, NAGPRA does apply (since the State Museum does receive Federal funds). If a tribe is interested in artifacts from an archaeological site, the FHWA will discuss the request with the State Museum of Pennsylvania and the landowner, if applicable. For additional information on the curation of archaeological materials see **Chapter XVI**.

5. Sources

The FHWA has prepared a CD-ROM collecting information on tribal consultation from both a national perspective and some state examples. Existing legislation and Executive Orders are available in folders, along with some specific guidance, reference materials, and maps. The CD-ROM files are currently available in the PennDOT Shared Drive, under the BEQ/Cultural Resources/Tribal Consultation folder.



Appendix E

Pertinent Pennsylvania History Legislation

Section 2002(a)(15) of Pennsylvania Act 120 of 1970 states that,

No highway, transit line, highway interchange, airport, or other transportation corridor or facility, shall be built or expanded in such a way as to use any land from any recreation area, wildlife and/or waterfowl refuge, historic site, State forest land, State game land, wilderness area or public park unless (i) there is no feasible and prudent alternative to the use of such land, and (ii) such corridor or facility is planned and constructed so as to minimize harm to such recreation area, wildlife and /or waterfowl refuge, historic site, State forest land, State game land, wilderness area or public park.

Section 2002(b)(2) indicates that it must be shown that there are no feasible and prudent alternatives to the effects of the project and that all reasonable steps have been taken to minimize the effects. Guidance for the completion and circulation of Section 2002 Evaluation is contained in PennDOT's Section 4(f) Resource Handbook, Publication No. 349.

NOTE: PA Act 120 applies to all transportation projects. Section 4(f) applies only to those projects that involve a USDOT action, such as a Federal funding. On projects involving USDOT action and the use of Section 4(f) resource(s), Act 120 requirements are generally satisfied by including the Act 120 review agencies in the distribution of the Federal environmental document and publishing the Secretary's findings in the Pennsylvania Bulletin. For projects that do not involve USDOT actions, but that use Section 2002 resources, a Section 2002 Evaluation must be completed.