

I. Introduction

The regulations at 36 Code of Federal Regulations (CFR) § 800.8 provide for use of the National Environmental Policy Act (NEPA) process to fulfill a Federal agency's National Historic Preservation Act (NHPA) Section 106 review obligations in lieu of the procedures set forth in 36 CFR § 800.3 through 800.6. This process is commonly known as "NEPA substitution for Section 106" and the Bureau of Ocean Energy Management (BOEM) plans to use the process and documentation required for the preparation of an Environmental Impact Statements (EIS) and Record of Decision (ROD) to comply with Section 106 on all future offshore wind project Construction and Operations Plans (COPs) for which you may be invited to participate as a Consulting Party.

This document is intended to act as a guide for Consulting Parties on the "NEPA substitution for Section 106" process to aid understanding of how this process works, how it compares to BOEM's traditional Section 106 process approach, and where in BOEM's NEPA substitution process you will be involved.

More information regarding integration of NEPA and Section 106 reviews can be found at:
https://www.achp.gov/integrating_nepa_106.

II. Why is BOEM implementing a NEPA substitution process?

BOEM is using the NEPA substitution process under 36 CFR § 800.8(c) as part of a multi-faceted approach to meet the Office of Renewable Energy Program's needs. With a large number of COPs submitted for BOEM's review, there is an increased need for streamlining and efficiency in the NEPA process. In addition to efficiency, BOEM anticipates several other benefits from implementing the NEPA substitution process for its Section 106 review of COPs, including the following:

- Earlier and more direct input from Consulting Parties into the development and selection of alternatives and avoidance, minimization, or mitigation measures.
- Better integration of comments and responses, especially concerning natural and cultural resources, historic properties, visual effects, environmental justice issues, and traditional cultural practices.
- Providing a more holistic and meaningful approach to government-to-government consultation with Indian Tribes, as defined at 36 CFR § 800.16(m).

III. What are the major differences between the standard Section 106 and the "NEPA substitution for Section 106" approaches?

The key differences between the standard approach for Section 106 as set out in 36 CFR § 800.3 through 800.6 and how BOEM will comply with the 36 CFR § 800.8(c) approach for Section 106 review of COPs include the following:

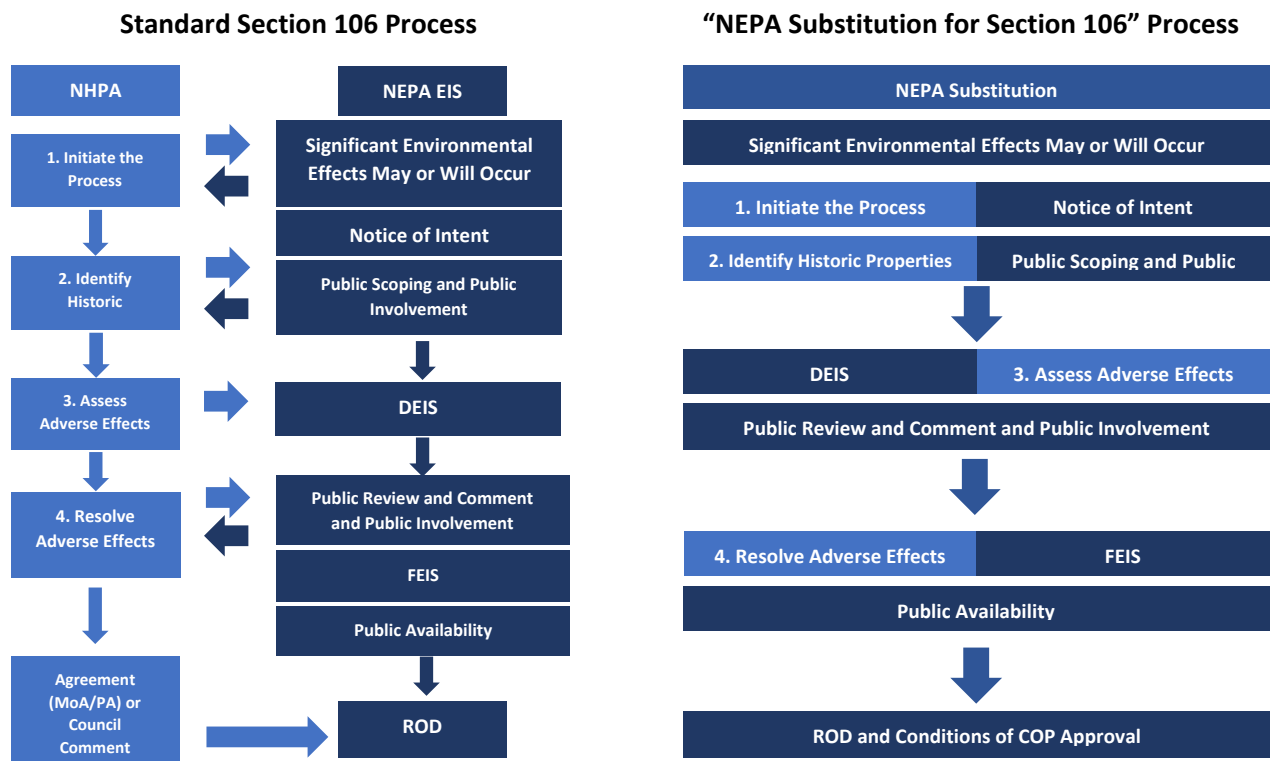
- BOEM will seek formal consultation earlier, during significant NEPA milestones (at scoping and after publication of the Draft EIS); parties may comment throughout the development of the EIS.
- The identification of historic properties, finding of effects, and resolution of adverse effects will be documented in the Draft and Final EIS rather than in a separate Section 106 Finding

National Environmental Policy Act (NEPA) Substitution for Section 106 Consulting Party Guide
 Updated August 4, 2022

document. BOEM will provide the reports documenting the identification of historic properties along with the Draft EIS. These include:

- the Marine Archaeological Resources Assessment,
 - the Terrestrial Archaeological Resources Assessment, and
 - the Report of Visual Effects on Historic Properties, along with viewshed analyses and visual simulations.
- Resolution of adverse effects may be documented in a binding ROD and as conditions of COP approval. This differs from the standard Section 106 process in which a Memorandum of Agreement (MOA) is developed to resolve adverse effects. The combination of BOEM’s binding ROD and application of conditions of COP approval provide effective and equivalent legal requirements on itself and on the lessee.
 - BOEM’s government-to-government consultation responsibilities to Federally recognized tribes remain unchanged and efforts to consult with tribes are likely to expand under NEPA substitution.

Below, the graphic on the left illustrates the standard approach to NEPA and NHPA Section 106 review, showing the major milestones in each process when executed in parallel. The graphic on the right shows the “NEPA substitution for Section 106” approach, and how these milestones will be combined.



IV. How will BOEM meet the requirements of 36 CFR § 800.8(c) under the “NEPA substitution for Section 106” process?

As provided in 36 CFR § 800.8(c), four standards must be met:

1. The first standard is to identify Consulting Parties and invite them to participate in the process. Under the “NEPA substitution for Section 106” process, BOEM will identify Consulting Parties for each project pursuant to 36 CFR § 800.3(f) prior to or with issuance of its Notice of Intent (NOI) to prepare an EIS. During the NEPA scoping period BOEM will send a formal letter to these parties inviting them to participate in the process. These letters will also state that BOEM intends to use the NEPA process for Section 106 purposes as laid out in 36 C.F.R. § 800.8(c) to comply with Section 106 in lieu of 36 CFR § 800.3 through § 800.8.
2. The second standard is to identify historic properties and assess the effects of the undertaking in a manner consistent with 36 CFR § 800.4 through § 800.5. Under NEPA substitution, the Draft EIS will identify historic properties and assess the effects of the undertaking using the lessee’s cultural resources reports from the COP as well as Consulting Party and public input provided during the scoping period. BOEM’s regulations require that lessees include in their COPs information about historic properties, any adverse effects from their project on these historic properties, and how they propose to resolve those adverse effects (through avoidance, minimization, and mitigation measures). This information will be sent to Consulting Parties with the Draft EIS for their review, so that final measures may be developed in consultation. The Final EIS will reflect continued consultations, as well as Consulting Party comments received on the Draft EIS.
3. The third standard is to consult with Consulting Parties during NEPA scoping, environmental analysis, and preparation of the EIS regarding the effects of the undertaking on historic properties. Under the “NEPA substitution for Section 106” process as laid out in 36 CFR § 800.8(c), formal consultation will occur during the scoping period as well as during the public comment period after publication of the Draft EIS. However, Consulting Party comments will be accepted at any point during the preparation of the EIS. Additionally, if necessary, Section 106-specific consultation meetings with Consulting Parties can be arranged. Comments submitted by Consulting Parties during NEPA comment periods will help inform the effects analysis for historic properties in the Draft and Final EIS.
4. The fourth standard is to involve the public in accordance with BOEM’s NEPA procedures and develop alternatives and proposed avoidance, mitigation, and minimization measures in consultation with Consulting Parties. Proposed measures to avoid, minimize, or mitigate any adverse effects on historic properties will be first presented in the lessee’s COP, which Consulting Parties will be able to review, as well as through consultation with Consulting Parties during scoping and the Draft EIS comment period. These measures will be further developed and refined in consultation, and those changes will be reflected in the Draft and Final EIS. Public involvement will take place during the NEPA comment periods and through standard public participation practices for the NEPA process, including posting of relevant information on BOEM’s website and through Federal Register notices.

V. When and How do I provide input?

Opportunities for formal and informal consultation will occur throughout the development of the EIS. Consulting Parties will be formally invited to submit comments twice during this process: first, during the NEPA Scoping Period (so that comments can be incorporated into the Draft EIS) and second, during the Draft EIS public comment period (so that comments can be incorporated into the Final EIS). While comments can be submitted by Consulting Parties at any time, we encourage you to submit these during the scoping comment period, thus allowing BOEM to consider these comments in the development of the Draft and Final EIS.

Furthermore, BOEM is encouraging lessees to coordinate with Consulting Parties *prior to* their COP submission to request input as they develop their proposed avoidance, minimization, and mitigation measures.

VI. Will sensitive information regarding historic properties or traditional practices or places remain confidential under NEPA Substitution?

All sensitive information provided during the “NEPA substitution for Section 106” process will be treated the same way it would have been under the standard Section 106 review process as set out in 36 CFR § 800.3 through 800.6. Please note that all comments submitted through the NEPA process are submitted through regulations.gov and are available for viewing by the public. However, BOEM will provide a different means for Consulting Parties to provide comments that contain sensitive information, if requested. For Indian Tribes, as defined at 36 CFR § 800.16(m), BOEM’s Tribal Liaison Officers can provide additional guidance on sharing sensitive information for Section 106 review purposes.

VII. What is the role of third-party contractors in the “NEPA substitution for Section 106” process?

A third-party contractor has been contracted to aid with the preparation of each EIS assessing the environmental effects of a renewable energy COP. The lessee pays for the third-party contractor’s services, but BOEM is responsible for providing all work direction as well as reviewing all work performed by the third-party contractor. Third-party contractor support is essential so BOEM can meet deadlines for multiple projects occurring simultaneously. Throughout the “NEPA substitution for Section 106” process you can expect to be contacted by the third-party contractor. The third-party contractor will support BOEM by performing various administrative and logistical tasks, including but not limited to coordinating communication with the consulting parties; distributing BOEM-approved documents; providing technical assistance; and hosting and facilitating NEPA and/or NHPA meetings, webinars, and calls with consulting parties. It is important to note that it is BOEM’s responsibility to comply with Section 106 and all decisions and content of the Draft EIS, Final EIS, and ROD as well as other documents are determined by BOEM.

Additionally, BOEM fully recognizes that the responsibility to consult with the appropriate federally recognized tribes (as defined at 36 CFR 800.16(m)) is its own and cannot be delegated, per 36 CFR Section 800.2(c)(4). Due to the special legal relationship between BOEM and federally recognized Tribes, third party contractors will not participate in government-to-government consultations between BOEM and federally recognized Tribes.