

Frequently Asked Questions

Why should I consult with state recognized tribes in Virginia?

The Commonwealth of Virginia has a special relationship with its state recognized tribes and acknowledges their historical contributions and interests and concerns as living communities. For this reason the Secretary of Natural Resources recommends that the state recognized tribes be included in decision-making on projects that may affect their peoples and their ancestral territories. The advantages of consultation with the state recognized tribes are that you will:

Gain knowledge and understanding of the cultural heritage of Virginia's First Peoples

Achieve greater project efficiencies and planning

Avoid project disruptions and lawsuits.

What are the legal requirements for consultation with state recognized tribes on federal projects?

A number of federal statutes require federal agencies to consult or coordinate with Indian tribes. A list of federal authorities that require tribal consultation is available on the Advisory Council on Historic Preservation's webpage at <http://www.achp.gov/pdfs/consultation-with-indian-tribes-handbook-june-2012.pdf> (provide a direct link; pages 3 -5). The term "Indian tribe" in these statutes typically refers only to federally recognized Indian tribes.

National Historic Preservation Act, as amended 916 U.S.C. 470 et seq., 1966) *In carrying out its responsibilities under section 106 of this Act, a Federal agency shall consult with any Indian Tribe or Native Hawaiian organization that attaches religious or cultural significance to properties(Section 101 (d)(6)(B).* That means that only federally recognized Indian tribes that attach religious and cultural significance to historic properties that may be affected by the proposed project have a statutory right to be consulting parties in the Section 106 process. Section 106, however, is a process of consultation and requires identification of consulting parties. Under the Section 106 regulations at 36 CFR Section 800.2(c)(5), a state recognized tribe may be invited to consult as an "additional consulting party" if they have a "demonstrated interest", that is, if the tribe can demonstrate it has ancestral ties to the area where the project will occur or if the tribe is concerned with the project's effects of the undertaking on historic properties for other reasons.

National Environmental Policy Act (43 U.S.C.4321 and 4331-35, 1969). As part of the scoping process the lead agency shall: (1) Invite the participation of...any affected

Indian tribe ... (40 CFR 1501.7(a)). NEPA requires the preparation of an environmental impact statement (EIS) for any proposed major federal action that may significantly affect the quality of the human environment. The Council on Environmental Quality regulations and guidance require agencies to contact Indian tribes and provide them with opportunities to participate at various stages in the preparation of an environmental assessment or EIS. State recognized tribes in the NEPA process have the same status as members of the general public.

Presidential Executive Order 12898 of February 11, 1994, “General Actions to Address Environmental Justice in Minority Populations and Low-Income Populations” requires all federal agencies to consider environmental justice in their decision-making by identifying and addressing the disproportionately high or adverse human health or environmental effects on minorities and low income populations and communities. According to the Environmental Protection Agency’s *Guide on Consultation and Collaboration with Indian Tribal Governments and the Public Participation of Indigenous Groups and Tribal Members in Environmental Decision-making*, state recognized tribes may lack recognition as sovereign nations, yet they may have environmental and public health concerns that are different from other groups or from the general public. These differences may exist due to a subsistence lifestyle and/or unique cultural practices. For this reason agencies should seek to identify such groups and to include them in the decision-making processes.

(<http://www.epa.gov/compliance/ej/resources/publications/nejac/ips-consultation-guide.pdf>; provide a direct link)

What are the legal requirements for consultation with state recognized tribes on state projects?

State laws and regulations relating to historic preservation may be accessed through <http://www.dhr.virginia.gov/review/orcLawsRegs.html>.

Virginia Antiquities Act (§ 10.1-2300 Code of Virginia). Pursuant to the Virginia Antiquities Act (§10.1-2305 Code of Virginia), the Department of Historic Resources may permit archaeological field investigations involving the removal of human remains and artifacts from graves. All permit applications must include a provision for appropriate public notice prior to issuance of a permit, a treatment and analysis plan, and a plan for the disposition of the remains upon completion of the research. In addition to the public notice in the case of both prehistoric and historic Native American burials, the regulations require the Department of Historic Resources to notify and consult with appropriate tribal leaders.

Pursuant to the Virginia Antiquities Act (§10.1-2301 through 2303 Code of Virginia), the Department of Historic Resources has the responsibility to coordinate all archaeological study on state-owned and -controlled land and is given exclusive right and privilege to

conduct field investigations on state lands, but may grant those privileges to others through a permit process. At its own discretion when field investigations may involve the identification, evaluation or data recovery of prehistoric or historic Native American sites, the Department of Historic Resources will notify and consult with appropriate tribal leaders.

Cave Protection Act (§ 10.1-1000 Code of Virginia). Pursuant to the Cave Protection Act a permit must be obtained from the Department of Conservation and Recreation prior to excavating or removing any archaeological, paleontological, prehistoric, or historic feature of any cave or rock shelter. The Department of Historic Resources' concurrence that the permit is in the best interest of the Commonwealth is requested. When field investigations or recovery of prehistoric or historic period Native American sites is proposed, the Department of Historic Resources will advise the Department of Conservation and Recreation to notify and consult with appropriate tribal leaders.

Underwater Recovery Permits (§ 10.1-2214 Code of Virginia). The Virginia Marine Resources Commission has the authority to permit underwater archaeological investigations on historic resources on state-owned bottomlands. The Department of Historic Resources is charged with determining which properties are historic and its concurrence that the permit is in the best interest of the Commonwealth is requested. When recovery may include submerged prehistoric or historic period Native American sites, the Department of Historic Resources will advise Virginia Marine Resources Commission to notify and consult with appropriate tribal leaders.

Virginia Environmental Impacts Reports Act (§ 10.1-1188 Code of Virginia). The Department of Environmental Quality provides comments on the environmental impacts of all major state projects (new state facility construction, expansion of existing facilities or acquisition of land interests for purposes of construction costing more than \$500,000, with exceptions specified by law). The Department of Environmental Quality requests the comments of all state agencies with applicable responsibilities or interests. The Department of Historic Resources is invited to submit comments when an environmental impact report describes a project that might affect historic properties or archaeological sites. At its own discretion Department of Historic Resources may recommend to Department of Environmental Quality that the state agency proposing the project notify and consult with appropriate tribal leaders. The Department of Environmental Quality provides the state agencies' comments to the sponsoring agency in time to permit modifications necessary because of environmental impact. The Secretary of Administration has approval authority as delegated by the Governor through Executive Order.

Road and Transportation Projects. Pursuant to §10.1-1188B the Secretaries of Transportation and Natural Resources shall jointly establish procedures for review and

comment by state natural and historic resource agencies of highway and construction projects. The Virginia Department of Transportation has a specific process agreed upon with the state recognized tribes. For state funded locally administered projects, the Virginia Department of Transportation will ensure that the local governments have the information to enable the locality to do this.

Sale or Lease of Surplus State property (§ 2.2-1156 Code of Virginia): Pursuant to the sale or lease of surplus state property the Department of General Services requests the opinion of the Secretary of Natural Resources regarding whether the property is a significant component of the Commonwealth's natural or historic resources, and if so how to protect the associated resources in the event of its sale. The Department of Historic Resources comments through the Secretary on potential effects to significant architectural and archaeological resources and may recommend that Department of General Services notify and consult with appropriate tribal leaders when prehistoric or historic period Native American sites are known to be present on the property. The Secretary of Natural Resources' comments are provided by the Department of General Services to the Governor. The Governor's approval is required prior to the sale or lease of the property.

Is consultation only about giving notice on projects?

No, that's not enough. *Consultation* means the process of seeking, discussing, and considering the views of other participants. Respectful and on-going communication can clarify issues, define concerns, exchange information and result in meaningful discussion.

The Advisory Council on Historic Preservation advises all that effective consultation occurs when you:

- Keep an open mind;
- State your interests clearly;
- Acknowledge that others have legitimate interests, and seek to understand and accommodate them;
- Consider a wide range of options; and
- Identify shared goals and seek options that allow mutual gain.

How do I know what tribes to contact?

The tribes have defined areas of interest in Virginia. Notifying each of the 11 Virginia tribes is recommended.

When should I contact the tribes?

As a general rule tribes should be contacted as early in the process as possible when the broadest range of alternatives is available for consideration. Waiting until an effect is known and cannot be avoided may lead to difficult and prolonged consultation.

Each of the state tribes has indicated its preferences on **when and how** they wish to be consulted. Click in the appropriate tribe and you will see the information provided.

What information should I provide to tribes?

Initial contact should include the information suggested in Best Management Practices.

What should I do if a tribe does not respond?

Federal and state agencies providing funding or issuing permits or licenses are often bound by program regulations. Applicants are often under time pressures and other restraints. All rely heavily on specific time frames, such as the 30-day review periods in the 106 regulations. If no response is received, a phone call to the right contact person may help to move things forward. Keep in mind that tribes typically work by consensus and decisions are often made at regularly scheduled Tribal Council meetings. When necessary, an extension of time limits can be negotiated and agreed to by all parties. However, agencies are not required to wait more than the specific response time for a specific request.

What should I do if a tribe indicates that a property of significance to it may be affected?

When a tribe informs an agency that a site of religious and cultural significance to the tribe may be affected by the project, the agency should consider the “special expertise” of the tribe in identifying this property.

In the Section 106 process any disputed eligibility determinations can be referred to the Keeper of the National Register of Historic Places (36 CFR Part 63; <http://archnet.asu.edu/topical/crm/usdocs/36cfr63.html> ; consider direct link for explanation?) for a formal determination of eligibility. This 45-day review typically involves consultation between the National Register staff and the tribe. The keeper’s decision is final and cannot be challenged.

In the Section 106 process if a tribe indicates a project may have an effect on a site of cultural or religious significance, the tribe should be given consulting party status in the 106 process and provided with appropriate information.

While agencies are not required to wait more than the specific response time for a specific request, there should be no hard-and-fast time limit for overall consultation. Consultation on a specific project should proceed until agreement is reached or until it becomes clear to the agency that agreement cannot be reached.

Is there a difference in tribal consultation regarding permitting, licensing, and assistance versus property management projects?

Yes. The involvement of applicants and the limitation of both state and federal agencies to control the actions of its applicant often challenge the nature of consultation in permitting, licensing, and assistance undertakings. Keep in mind that it is not generally

appropriate for applicants to work directly with tribes. The agency itself must initiate consultation directly. On-going consultation may be less formal, depending on the wishes of the tribe.