

Guidance for Implementing the Monarch CCAA/CCA Section 106 Compliance Protocol

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Intent

Appendix C of the Agreement outlines the Service's protocol for compliance with Section 106 of the National Historic Preservation Act (NHPA). This guidance is intended to help Applicants and Partners understand when and where activities are subject to review, roles involved with the Agreement's Section 106 compliance, and ways to limit the potential triggers for this requirement to minimize administrative compliance.

Key Takeaways

1. Covered activities and conservation measures "reasonably certain" to cause take of monarchs are required to adhere to the Section 106 protocol (Appendix C of the Agreement).
2. Most conservation measures, and many operations and maintenance activities are likely exempt from formal Section 106 consultation and agency review under the protocol.
3. Understanding what triggers the need for review can help limit the Section 106 compliance requirements for Partners.

When is Section 106 compliance triggered?

Under the Agreement, Formal Section 106 consultation by the USFWS are required when an activity is:

- ✓ Located on enrolled lands, and
- ✓ Included as a covered activity or conservation measure in the Partner's Certificate of Inclusion, and
- ✓ Not subject to Section 106 review as part of another Federal nexus (i.e. funding, permit, work on Federal lands or other authorization), and
- ✓ Reasonably certain to cause take monarch butterflies by removing or disturbing milkweed or flowering nectar resource (during the time of year when monarchs are present), or by taking monarchs directly, and then
- ✓ One of the following applies
 - Located within the boundaries of a known cultural site, or
 - Does not occur within a known cultural site, but involves ground disturbance beyond the extent of land previously disturbed, or
 - Likely to have effects on any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in the National Register of Historic Places (aka "Historic Property").

When a review is required, the Partner should coordinate with other consulting parties as described in Step 5 of the CCAA's Section 106 protocol, and briefly summarized in this guidance document.

Who is responsible for ensuring Section 106 compliance under the Agreement?

USFWS: The issuing of a permit by the Service triggers a Federal undertaking. Thus, compliance with Section 106 of the NHPA is required. However, the Service regards its Federal handle as weak since many of the activities included in the Agreement outside of the Service's direct control. Therefore, to meet the requirements of Section 106, the Service should only be considered the lead Federal agency when/if no other Federal agency is involved with the proposed activity.

Partners: Partners are the primary party responsible for implementing the Section 106 compliance protocol outlined in Appendix C of the Agreement, and this guidance document. Partners are tasked with considering when, where, and what activities may have potential to effect historic resources or cultural sites, and trigger the requirements for Section 106 review by a Federal agency.

Some Partners may already have their own procedures or protocols in place for ensuring Section 106 compliance. The protocol provided in Appendix C of the Agreement allows for other suitable procedures established by Partners to replace the Agreement-specific protocol.

Other Consulting Parties: This includes other historic preservation offices administered by state and Tribal offices such as SHPO (State Historic Preservation Offices) and THPO (Tribal Historic Preservation Offices). When a 106 review is required, a Partner is required to coordinate with "other consulting parties". When coordinating with other consulting parties, the Partner should clearly state to the consulting parties that this is a Service undertaking.

Other Federal Agencies: The Service considers its regulatory handle as weak. Situations where other Federal agencies are already reviewing the same activities for Section 106 compliance, are considered to fulfill the requirements for this Agreement's Section 106 protocol. These reviews fulfill the Service's stated role as the lead Federal agency only when/if no other Federal agency is involved with the proposed activity.

How can a Partner limit the extent to which Section 106 compliance is required?

While compliance with Section 106 of the NHPA is important to preserve historic and culturally-significant resources, the Program Administrator recognizes that additional compliance requirements for routine operations and maintenance can pose difficulties. If the extent of review is a concern for Applicants or Partners, we suggest the following approaches to limit the extent to which Section 106 compliance is triggered by the Federal authorization of the CCAA:

- **Limit the scope of enrolled lands.** Limiting the extent of enrolled lands to only those previously disturbed, or with a low probability for cultural or historic resources can reduce the potential for conflicts or added review as part of Agreement implementation.
- **Limit the scope of covered activities.** Covered activities are more likely (than conservation measures) to require a formal Section 106 consultation with the Service because some of these activities involve ground disturbance that has potential to impact cultural resources. Activities (e.g., conservation measures and covered activities) listed in a Partner's Certificate of Inclusion are subject to the Section 106 protocol in areas when/where take of monarchs is "reasonably certain" and where ground disturbance occurs and is not an exempted project under Step 4 of the protocol, or structural disturbance to a historic property are likely.

Limiting the scope of covered activities to only those activities that either are a) unlikely to result in ground disturbance beyond the extent of previously disturbed lands and are exempted as explained under the protocol, or b) unlikely to create a structural disturbance to a historic property, will result in most (or all) covered activities being exempt from agency review under the Section 106 protocol.

- **Review program-level approaches to avoid removing monarch habitat during times of year when monarchs are present.** If enrolling all, or most, covered activities, a Partner may consider reviewing those activities and implementing program-wide guidelines for their organization's operations and maintenance activities to consistently address or avoid a Section 106 review trigger to the extent possible. Such program-level guidance may include:
 - a) *Define a list of activities exempted from triggering a Federal agency 106 review.* Typically this would include those activities known to never result in ground disturbance, or only occur within areas previously disturbed (See Steps 2 and 4 in the protocol).
 - b) *Define activities that already require Section 106 review as a result of other Federal nexus.* Many activities already trigger a Federal agency review of Section 106 compliance as a result of Federal funding, permit approvals, land management, or other Federal authorizations and these do not need an additional review.
 - c) *Establish organization-specific protocols for evaluating and avoiding "reasonably certain" take of monarch butterflies.* Since consideration of Section 106 compliance is associated with activities in Partner's Certificates of Inclusion, which are directly related to the take of monarch butterflies by removing or disturbing milkweed or flowering nectar resource (during the time of year when monarchs are present), or by taking monarchs directly, a Partner can establish approaches or criteria by which they determine when take may be "reasonably certain", and therefore require consideration of the Section 106 protocol and avoid activities that may trigger 106 during these times.

How do I initiate Section 106 review, if the protocol indicates an agency review is needed?

The Section 106 protocol under Appendix C envisions that the Partner themselves will review (with qualified personnel) most activities. In doing so, we anticipate most activities may be exempt from further review. However, the Partner will need to consult with the appropriate State Historic Preservation Offices (SHPO) when an activity cannot be exempted by a Partner using the Agreement's Section 106 protocol, nor is it undergoing review by another lead Federal agency.

In these instances, the Partner will need to do the following:

1. Compile information explained in Step 5 of the protocol. Some States and Service Regions use specific SHPO's review forms. These forms can be used, or correspondence with equivalent information, and supporting documentation including maps and database searches.
2. Submit this information, to the appropriate State Historic Preservation Offices, and copy the CCAA Program Administrator (UIC). Some SHPOs/THPOs may choose to engage the Service directly, rather than the Partner, and, if so, the review process and timing will be different depending on the Service Region involved.
3. The SHPO and the other parties should review the project within 30 calendar days (a THPO or tribe may need a longer time frame) and may request a field visit or "survey". If no response is given or no survey is requested, activities can begin as planned and the Partner shall document this for their records, to provide to the Program Administrator and Service on request. This would conclude the Service's Section 106 compliance for this activity.