

**107.04 ENVIRONMENTAL PROTECTION AND CULTURAL RESOURCE PRESERVATION RESPONSIBILITIES**

**A. Contractor-Optioned Areas.**

**1. General.** At least 30 calendar days prior to any ground disturbance, the Contractor shall provide the Project Engineer with completed SFN 58466 and map. The map shall include any contractor optioned material sources (including rip-rap and material from commercial sources), and any other area of planned ground disturbing activities, such as staging area(s), plant site, stockpile area(s), and access road(s).

The completion of Section 107.04 review process is weather dependent and may take longer than 30 days; surveys cannot be completed during adverse weather conditions or poor ground visibility.

**2. Environmental Review Process.** The Department's Environmental Section, in cooperation with the US Fish and Wildlife Service (USFWS), will investigate the proposed material source area(s) to determine if there is a potential for threatened or endangered species, wetlands, or Department of Transportation Act Section 4(f) properties (easement wetlands, grassland easements, waterfowl production areas, wildlife management areas, or National Wildlife Refuge properties).

If environmental resources are not identified, environmental approval will be granted at that time. The Department's Cultural Resource Section will be notified of the findings by the Environmental Section and will begin the Cultural Review Process, as identified in Section 107.04 A.3.

If the potential for environmental resources exists, the Environmental Section will coordinate with the USFWS to conduct an onsite review of the proposed material source area(s) to ensure avoidance of environmental resources. If approved, the Cultural Resource Section will be notified of the findings by the Environmental Section and will begin the Cultural Review Process, as identified in Section 107.04 A.3. If not approved, the Contractor will be notified by the Project Engineer.

The Department's review and subsequent approval does not relieve the Contractor of the responsibility of complying with all Federal and State laws and regulations which govern the protection of wetlands protected under the Clean Water Act and Executive Order 11990, threatened and endangered species protected under the Endangered Species Act, and Section 4(f) properties protected under Section 4(f) of the Department of Transportation Act.

**3. Cultural Review Process.** The Cultural Resource Section will investigate the proposed material source area(s) to determine what may be necessary to ensure compliance with Section 106 of the National Historic Preservation Act (NHPA). There may be a need for cultural resource investigations. These investigations typically would include a Class III cultural resource inventory of the proposed material source area(s). The Project Engineer will notify the Contractor if additional cultural resource work is required. After completion of all required cultural resource work, the Project Engineer will provide the Contractor written approval to proceed.

The Contractor is responsible for all costs associated with Section 106 (NHPA) compliance, including Class III cultural resource inventory, testing, and data recovery. The Contractor will not receive payments or compensation for delays resulting from the Department's review. Discoveries will be handled pursuant to Section 107.04.C.

If cultural resource work is recommended for a proposed material source area(s) that is located on Indian Trust (allotted) lands, an Archaeological Resources Protection Act (ARPA) permit must be obtained from the Bureau of Indian Affairs (BIA) prior to this work beginning. The Contractor must obtain written permission from the property owners and the tribe before the BIA will issue the ARPA permit. The Department will not be responsible for, nor participate in, costs that are incurred or claimed by the Contractor resulting from delays or other inconvenience encountered in obtaining the permit.

The Department's review and subsequent independent completion of the Section 106 (NHPA) process will not relieve the Contractor of the responsibility of complying with all Federal and State laws and regulations which govern the discovery of human remains and the salvage and preservation of cultural resources that are discovered during material source operations.

**4. Out of State Sources.** If the contractor optioned material source is located out of state, the Contractor must provide the Project Engineer documentation from the out of state agency showing the material source is available for use according to each state's review process. The Contractor will be notified by the Project Engineer of the need for any additional review prior to using the proposed material source(s) in the state of North Dakota.

**B. Department Owned or Optioned Areas.**

**1. General.** All necessary clearances will be obtained prior to bidding.

**C. Discoveries.**

**1. Environmental Process.** When the Contractor is operating within the right-of-way, easement areas, or within Contractor optioned, or Department owned or optioned material source area(s) and encounters a threatened or endangered species at the project site, work at that location shall be temporarily discontinued. The Contractor shall report the sighting immediately to the Project Engineer and shall not resume work until the Department obtains clearance from the US Fish and Wildlife Service and approval to proceed is provided in writing from the Department.

If the Contractor fails to notify the Project Engineer within 24 hours of the sighting, the Contractor shall be liable for all standby costs, all damage incurred, and all costs associated with the preservation and protection of the species pursuant to the resource and regulatory agencies guidance. In addition, the Contractor is liable to the Department for any violation penalties because of the failure to comply with Federal and State laws.

**2. Cultural Process.** When the Contractor is operating within the right-of-way, easement areas, or within Contractor optioned, or Department owned or optioned area(s) and encounters prehistoric dwelling sites, human remains, or concentrated historic or prehistoric artifacts, work at that location shall be temporarily discontinued. The Contractor shall inform the Project Engineer immediately of the discovery and shall protect the discovery area from further disturbance until directed otherwise by the Project Engineer. The Contractor shall not resume work in the vicinity of the discovery until approval to proceed is provided in writing from the Department.

If cultural resources are discovered, procedures identified in 36 CFR 800.13 will be followed. If the discovery includes human remains, the procedures in North Dakota Administrative Rule 40-02 in accordance with State Law 23-06-27, or 43 CFR Part 10 in accordance with Public Law 101-601 will be followed, as applicable and defined in each.

If the Contractor fails to notify the Project Engineer within 24 hours of the discovery, the Contractor shall be liable for all standby costs, all damage incurred, and all costs associated with salvage and preservation activities that may result from the discovery. In addition, the Contractor is liable to the Department for any violation penalties because of the failure to comply with Federal and State laws.

**D. Reporting.**

**1. General.** The permittee is responsible for complying with all reporting requirements contained in the regulatory permit(s).

Documentation of all reporting pursuant to the conditions of the permit(s) shall be copied to the Project Engineer and Environmental Section for inclusion in the project record.