

ADVISORY COUNCIL ON HISTORIC PRESERVATION

36 CFR Part 800

RIN XXXX-XXXX

Protection of Historic Properties

AGENCY: Advisory Council on Historic Preservation.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Advisory Council on Historic Preservation (ACHP or Council) is submitting proposed amendments to the regulations setting forth how Federal agencies take into account the effects of their undertakings on historic properties and afford the ACHP a reasonable opportunity to comment, pursuant to Section 106 of the National Historic Preservation Act (NHPA).

The ACHP is proposing revisions to the Council's Section 106 regulations to enhance clarity, provide greater regulatory certainty, and align the rule with statutory and policy directives. As discussed herein, the current regulatory language and its interpretations have resulted in uncertainties, delays, and regulatory burdens that are not intended and do not represent the best reading or further the purposes of the NHPA. They have also given rise to significant uncertainty and inconsistent interpretations, leading to burdens on Federal agencies and industry stakeholders, complicating compliance, and delaying actions. The proposed revisions aim to align the definition with the best reading of the NHPA and implement recent Executive Orders focused on regulatory reform and burden-reduction. By clarifying procedural steps and requirements, the ACHP seeks to improve the efficiency and effectiveness of the regulations in a manner consistent with the NHPA.

DATES: Send comments on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: You may submit comments, identified by docket number and/or Regulation Identifier Number (RIN) number and title, by any of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments.
- Email: kfanizzo@achp.gov.
- Mail: Advisory Council on Historic Preservation, 401 F Street, NW, Suite 308, Washington, DC 20001.

Instructions: All submissions received must include the agency name and docket number or RIN for this Federal Register document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Kelly Fanizzo, General Counsel,
Advisory Council on Historic Preservation, (202) 517-0193, kfanizzo@achp.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The ACHP is an independent federal agency that promotes the preservation of America’s historic places and advises the President and Congress on national historic preservation policy (see 54 U.S.C. Chapter 3041). Section 106 of the National Historic Preservation Act (NHPA), 54 U.S.C. 306108, requires federal agencies to take into account the effects of undertakings that they propose to carry out, license, approve, or assist on historic properties and provide the ACHP a reasonable opportunity to comment. Pursuant to 54 U.S.C. 304108(a), the ACHP “may promulgate regulations as it considers necessary to govern the implementation of section 306108 of this title in its entirety.” The ACHP has promulgated regulations for implementing Section 106 of the NHPA at 36 CFR Part 800.

When Congress passed the National Historic Preservation Act (“NHPA”)¹ in 1966, it did so in the wake of one of the greatest, yet most destructive, building streaks in American history. The Federal Aid Highway Act of 1956 and the resultant Interstate Highway System had cut vast swathes through the heart of America’s cities. The Urban Renewal Program had “renewed” with concrete neighborhoods our forebears built with brick and stone. By the end of it all, “almost half of the 12,000 structures listed in the Historic American Buildings Survey of the National Park Service ha[d] ... been destroyed.”² Small wonder, then, that Congress enacted a requirement that all Federal agencies take into account historic preservation concerns in future Federal actions.

Consideration, however, was not the same thing as a mandate that historic preservation concerns trump all others. This makes sense: After all, we have a rich heritage of building things. Some of our most treasured buildings and landmarks, such as Grand Central Station or the U.S. Capitol Building, were built on top of prior structures that would have had strong cases for historic preservation. Aware of this and other policy needs, such as that of economic development, the Congress framed the NHPA as a “consideration” statute, rather than a substantive roadblock.

The current regulations implementing Section 106, however, create confusion and uncertainty for both the public and regulated entities and contribute to agency delays. A 2019 study of the NHPA review process found that in extreme cases, Section 106 consultation can take nearly 7 years. Even on average, electricity transmission projects take 2.7 years, pipeline projects 2.0 years, and renewable energy projects 1.6 years.³ These delays are part of a larger modern

¹ Pub. L. 89-665, 80 Stat. 915 (Oct. 15, 1966).

² See 112 Cong. Rec. 2629 (Feb. 9, 1966) (statement of Sen. Edmund Muskie) (quoting First Lady Johnson’s Forward in *A Heritage So Rich* (1966)).

³ Federal Permitting Improvement Steering Council—Office of the Executive Director, Baseline Performance Schedules for Environmental Reviews and Authorizations at 10-12 (2020),

pathology: “modest procedural requirement[s]” have been transformed into “blunt and haphazard tool[s] employed by project opponents (who may not always be entirely motivated by” the concerns animating such procedural requirements) “to try to stop or at least slow down new infrastructure and construction projects.”⁴ This leads to “[d]elay upon delay,” and thus, “[f]ewer projects make it to the finish line,” or even “to the starting line,” as the Supreme Court remarked in issuing a “course correction” recently regarding the National Environmental Policy Act (“NEPA”).⁵ Projects that “survive often end up costing much more than is anticipated or necessary, ... [a]nd that in turn means fewer and more expensive railroads, airports, wind turbines, transmission lines, dams, housing developments, highways, bridges, subways, stadiums, arenas, data centers, and the like,” as well as “fewer jobs, as new projects become difficult to finance and build in a timely fashion.”⁶

Section 106 of the NHPA is a flexible, purely procedural statutory provision that imposes no substantive mandate, but simply prescribes the necessary process for considering, as one factor among many, the impact of an undertaking on historic properties.⁷ Section 106 consists of only two simple sentences:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.

54 U.S.C. § 306108. As both sentences make clear, the textual obligations of Section 106 fall on one actor: the agency official. It is the agency official who is to “take into account the effect of the undertaking on any historic property.” And even when it comes to the ACHP—the only other entity named in Section 106—the agency is still the actor: The agency head is to “afford the Council a reasonable opportunity to comment with regard to the undertaking.” This assignment of responsibility makes sense, because historic preservation concerns are only one consideration among many for the agency in reaching its decision. The agency’s various considerations may be qualitatively, quantitatively, and directionally different from one another: economic,

https://www.permits.performance.gov/sites/permits.dot.gov/files/2020-04/FPISCRcommendedPerformanceSchedules2020_04062020.pdf.

⁴ *Seven Cnty. Infrastructure Coal. v. Eagle Cnty., Colorado*, 605 U.S. 168, 183 (2025). NEPA and Section 106 of the NHPA are both purely procedural, and claims under NEPA and Section 106 are often brought, and reviewed, together. See, e.g., *WildEarth Guardians v. Provencio*, 923 F.3d 655, 676 (9th Cir. 2019); *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep’t of Interior*, 608 F.3d 592, 607 (9th Cir. 2010).

⁵ *Id.* at 184.

⁶ *Id.* at 184.

⁷ See, e.g., *Nat’l Min. Ass’n v. Fowler*, 324 F.3d 752, 755 (D.C. Cir. 2003) (An “essentially ... procedural statute,” Section 106 imposes no substantive standards on agencies, but it does require them to solicit the Council’s comments and to “take into account the effect of [their] undertaking[s].” (quoting *City of Alexandria v. Slater*, 198 F.3d 862, 871 (D.C. Cir. 1999)). Cf. *Seven Cnty.*, 145 S.Ct. at 184.

environmental, social, aesthetic, historic, and many other types of impacts, benefitting or harming different parts of the community with different degrees of intensity at different times.⁸ Balancing such disparate value judgments is inherently a policy question, and it therefore makes sense that Section 106 charges the responsible agency official with performing this function.⁹ It follows from this conclusion that the comments of others are intended to inform the responsible agency official in fulfilling its responsibility under Section 106 of the NHPA.

At base, the existing regulations for governing Section 106 compliance¹⁰ reflect a commonsense intuition regarding the way in which agencies can comply with the statute: by identifying historic properties (if any) that may be affected by a project; assessing what impact the project will have on them; and then deciding either to try to ameliorate those impacts by certain remedial measures or to allow the responsible agency official to decide that the benefits in other spheres outweigh the costs to historic preservation. However, this regulatory language and its interpretations have resulted in uncertainties, delays, and regulatory burdens that are not intended and do not represent the best reading or further the purposes of the NHPA.

II. Proposed Revisions

The ACHP is proposing revisions to its Section 106 regulations to align the Section 106 process with the flexible, easily administrable process Congress envisioned. Under the proposed revisions, the agency official (having determined that there is a federal “undertaking” consistent with the statutory as definition in 54 U.S.C. § 300320) would prepare a “Section 106 report” that consolidates into one document the process of identifying historic properties (if any) that may be affected by an undertaking, assessing the impacts that the undertaking will have on them, and then deciding what to do about it. That document is then circulated to the Council, the appropriate state or tribal historic preservation officer, and all relevant consulting parties, who are given an opportunity to comment on any aspect of its findings. Finally, the agency reviews the responses and issues a memorandum of decision explaining its determination as to how it will address effects to historic properties or whether other considerations outweigh those of historical preservation as to certain effects, certain properties, or the project as a whole.

In aligning the regulations to the statutory text of Section 106, the proposed revisions reaffirm that the agency official has ultimate responsibility over any federal decision, and expand from the existing “memorandum of agreement” process. The proposed revisions to the regulations would also narrow the types of program alternatives, eliminating under-utilized ones (for example, “standard treatments”) while streamlining and promoting the use of those that remain. Notably, the new regulations strongly encourage the use of procedures that serve roughly the same function as Categorical Exclusions from the need to prepare an environmental impact statement (EIS) or an environmental assessment (EA) under NEPA. The current regulations

⁸ Cf. *Seven County*, 605 U.S. at 180 (noting that the result of a NEPA analysis is “only one input into an agency’s decision and does not itself require any particular substantive outcome”).

⁹ Cf. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400 (2024) (the government must implement the “single, best meaning” of a given statute).

¹⁰ In the NHPA, Congress delegated to the ACHP the authority to issue regulations governing the Section 106 process. 54 U.S.C. 304108(a). The ACHP last made significant changes to the Section 106 regulations in 2004. 69 Fed. Reg. 40,544 (July 6, 2004).

permit the ACHP and other agencies to propose exemptions from the Section 106 process if certain conditions are satisfied, but do not require them to do so.¹¹ As a result, relatively few actions have been exempted.¹² The number of exempted programs and categories of undertakings are far fewer under Section 106 than the number of actions categorically excluded under NEPA.¹³ Therefore, many activities that federal agencies have determined will have no or minimal environmental effects under NEPA are still subject to potentially burdensome and lengthy Section 106 consultations. The proposed revisions will ensure that agencies strike a more appropriate balance between evaluating effects on historic properties and advancing critical federal projects, and that Section 106 reviews keep pace with streamlined reviews under NEPA.

Other notable changes proposed through this rulemaking include:

- Clarifying that applicants for federal funding or permits subject to Section 106 consultation should be invited to become consulting parties.
- In parallel to most agencies' new NEPA procedures, providing a clear set of on- and off-ramps from the Section 106 process to guide agency practice.
- Providing an expedited process for approving an undertaking where there are no historic properties present.
- Making public comment an optional, not mandatory, part of the Section 106 process. This accords with the text of Section 106, which provides explicitly for comment by the Council but not for public comment.
- Incorporating economic impacts and cost considerations into the process of identifying avoidance, minimization, and mitigation measures. This ensures that practical concerns about how to address effects to historic properties are not minimized or overlooked altogether.
- Revise the criteria for "adverse effect" to, *inter alia*, remove references to indirect and cumulative effects and including "only those reasonably foreseeable effects that have a reasonably close causal relationship to the undertaking."
- Removing language that provided that "[c]hange of the character of the property's use or of physical features within the property's setting that contribute to its historic significance" and "[i]ntroduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features" constituted adverse effects. Section 106 focuses on the "effect of the undertaking on any historic *property*," not on the surroundings of that property or its atmospherics. There is a necessary distinction between effects on the property, which would otherwise be handed on to other generations intact, and effects on its surrounding environment, which is likely to change from generation to generation. Including the latter impermissibly broadens the remit of the statute, while providing a target for litigation and obstructionism.
- Clarifying revising, or adding key definitions, including:

¹¹ 36 C.F.R. § 800.14(c).

¹² See ACHP, Exempted Categories, https://www.achp.gov/program_alternatives/exempted_categories (last accessed Dec. 31, 2024).

¹³ 42 U.S.C. § 4336c (allowing agencies to adopt each other's categorical exclusions); 40 C.F.R. § 1501.4(a) (requiring agencies to establish categorical exclusions); *e.g.*, 43 C.F.R. § 46.210 (Department of the Interior agency-wide categorical exclusions under NEPA); U.S. Department of the Interior, DOI Handbook of NEPA Procedures at Appendix 2 - Bureau Categorical Exclusions (Feb. 2026), <https://www.doi.gov/media/document/doi-handbook-nepa-procedures>.

- The definition of “address adverse effects,” which has been added to introduce a term of art referring to those measures adopted to avoid, minimize, or otherwise mitigate the adverse effects of the undertaking on historic properties.
- The definition of “area of potential effects,” to make it clear that only direct effects of an undertaking must be considered;
- The definition of “consultation,” to clarify that the goal of consultation is to inform the decision-maker about whether a proposed undertaking may cause adverse effects to historic properties and consider options for resolving any such adverse effects, i.e., agreement among the parties is not required;
- The definition of “effect,” to add a materiality threshold;
- The definition of “historic property” to clarify that any historic property, including a tribal historic property, must include, or have included at some point in the past, tangible human improvements, or has been the location for specific human activities, and must also be geographically compact.
 - This accords with the best definition of the term under the statute.¹⁴
- The definition of “undertaking,” which has been revised to explicitly exclude state, tribal, and local permits issued under delegated federal authority.

III. Request for Comments

The ACHP solicits comments on all aspects of this proposed action. In particular, the ACHP seeks input on the following questions, which are not intended to preclude commenters from addressing other considerations. When addressing one of the particular questions below in a comment, or specific part of a comment, the ACHP requests that commenters identify the question number to which they are responding.

Question #1: Are the proposed changes appropriately aligned with other definitions within the NHPA regulations? Could the proposed changes have unintended impacts on other NHPA or NEPA requirements that are not addressed by existing regulations or in the proposed changes?

Question #2: Are the proposed changes too general or too specific? Are there additional ways for enhancing clarity and certainty in the regulations that should be considered?

Question #3: Does the proposed changes articulate the best interpretation of Section 106 of the NHPA in this proposal? Are there additional statutory text, history, or judicial precedent that the ACHP should consider?

Question #4: Have any parties taken actions in reliance on the current regulations, and do such parties have interests that would be affected by the proposed changes?

Question #5: As noted above, the proposed changes adjust the “memorandum of agreement” (MOA) process and rely on the “memorandum of decision” (MOD) process going forward. This appears preferable to the Council, because it places the ultimate decision with the responsible agency official, thus reinforcing democratic accountability. However, the Council solicits comment on whether the MOA process ought to be retained as an alternative to the MOD

¹⁴ See *Loper Bright*, 603 U.S. at 400.

process. The Council notes that both processes are adverted to in other parts of the Act's text outside of Section 106.

Question #6: As noted above, the proposed changes make public comment an optional, not mandatory, part of the Section 106 process. Are there reasons that public comment would always be beneficial, or conversely, why it would be better to vest the option to take public comment in the responsible agency official?

Question #7: Does the current Sec. 106 process delay agency actions on proposed projects, and how is the agency's ability to further the agency's mission impacted? Additionally, the proposed changes consider the option to alter any deadline, shorter or longer. Does altering the timelines resolve documented implementation issues or what type of flexibility would be helpful to consider. Please provide any details on impacts or statistics that further document the degree and nature of any impacts.

Questions #8: As noted above, the definition of "address adverse effects," has been added to refer to those measures adopted to avoid, minimize, or otherwise mitigate the adverse effects of the undertaking on historic properties. Are the proposed revisions appropriately capturing this phrasing and the options available when discussing considerations to avoid, minimize, or otherwise mitigate?

Question #9: These proposed changes remove detail on Tribal consultation recommendations that was not necessary to include in regulatory text, while not impacting the underlying federal responsibilities of the agency official to consult with any Indian tribe or Native Hawaiian organization that may be affected by an undertaking. Are there additional aspects of the requirements for Tribal consultation that are appropriate and useful to include in regulatory text to assist with implementation of the Act?

Question #10: As noted above, the proposed changes allow for public comment to be an optional, not mandatory, part of the Section 106 process. This accords with the text of Section 106, which provides explicitly for comment by the Council but not for public comment. Public participation may be useful, as when it can resolve community concerns that might otherwise ripen into litigation, but it may also come at the cost of other agency responsibilities or mission elements. In keeping with the statutory structure, which vests responsibility in the agency official to "take into account the effect of the undertaking on any historic property," the agency official may determine in his discretion whether public comment would be helpful as regards a specific undertaking. Are the proposed changes appropriately recognizing the agencies responsibilities in recognizing and incorporating public input where necessary? Are there additional aspects of public participation that are appropriate and useful to include in regulatory text to ensure compliance with implementation of the Act?

Question #11: As noted above, the proposed changes clarify how an action should be considered under the definition of a federal undertaking. Are the proposed changes reflective of the best interpretation of Section 106 of the NHPA? Are there additional statutory text, history, or judicial precedent that the ACHP should consider to provide additional clarity?

Question #12: As noted above, the proposed changes revise the criteria for "adverse effect" to

remove references to indirect and cumulative effects and including “only those reasonably foreseeable effects that have a reasonably close causal relationship to the undertaking.” Are the proposed changes reflective of the best interpretation of Section 106 of the NHPA and do they capture the necessary effects on historic properties that should be considered in any Section 106 process?

Question #13: As noted above, the definition of “area of potential effects,” has been adjusted to clarify between direct and indirect impacts. Are the proposed revisions appropriately capturing the appropriate scope that should be considered? Are the proposed changes reflective of the best interpretation of Section 106 of the NHPA? Are there additional statutory text, history, or judicial precedent that the ACHP should consider to provide additional clarity?

IV. Reviewing the Regulations

In accordance with the President’s direction and the general policy set forth in Executive Order (E.O.) 14192, “Unleashing Prosperity through Deregulation” (90 FR 9065, January 31, 2025), the ACHP reviewed Part 800 with the goal of reducing potential regulatory burdens and eliminating regulations that are no longer necessary or lack current or future applicability.

Part 800 provides for the timely involvement of the ACHP as appropriate, the participation of the State Historic Preservation Officer, opportunities for public participation, and steps to identify historic properties, assess effects, and resolve adverse effects. Therefore, to eliminate obsolete and outdated regulations, the ACHP proposes to amend 36 CFR Part 800.

V. Text of Proposed Amendments

List of Subjects in 36 CFR Part 800

Administrative practice and procedure, Historic preservation, Indians, Inter-governmental relations. For the reasons stated above, the Advisory Council on Historic Preservation proposes to amend 36 CFR part 800 as follows:

PART 800—PROTECTION OF HISTORIC PROPERTIES

[TO ADD WITH FINAL REVISIONS TO TEXT]

VI. Regulatory Compliance Analysis

a. E.O. 12866, “Regulatory Planning and Review”

[TO ADD]

b. Congressional Review Act (5 U.S.C. 801 *et seq.*)

[TO ADD] XXXX

c. Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*)

The rule does not contain any information collection requirements that require the approval of the OMB under the Paperwork Reduction Act (44 U.S.C. chapter 35).

d. Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)

The ACHP has determined that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if finalized, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require the ACHP to prepare a regulatory flexibility analysis.

e. Sec. 202, Public Law 104-4, “Unfunded Mandates Reform Act”

Section 202 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532) requires agencies to assess anticipated costs and benefits before issuing any rule whose mandates require spending in any one year of \$100 million in 1995 dollars, updated annually for inflation. That threshold is currently approximately \$206 million. This rulemaking will not result in the expenditure by State, local, or Tribal governments, in the aggregate, or by the private sector, in excess of the threshold. Thus, no written assessment of unfunded mandates is required.

f. E.O. 13132, “Federalism”

The ACHP has determined that this action does not contain policies with federalism or “takings” implications as those terms are defined in E.O. 13132 and E.O. 12630, respectively. This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of Government. This action contains no Federal mandates for State and local Governments and does not impose any enforceable duties on State and local Governments.

g. E.O. 13175, “Consultation and Coordination with Indian Tribal Governments”

[TO ADD]

List of Subjects in 36 CFR Part 800

[TO ADD]

For the reasons stated in the preamble and under the authority of 54 U.S.C. 304108(a) and 42 U.S.C. 5320(c), the Advisory Council on Historic Preservation proposes to [XXXX] Part 800 in title 36 of the Code of Federal Regulations.