

RESPONSES OF THE ACHP FOUNDATION TO QUESTIONS POSED BY THE ACHP REGARDING
REVISION OF THE SECTION 106 REGULATIONS
February 27,2026

Before turning to the specific questions posed, the ACHP Foundation would like to offer some general observations. The initiation of the current review of the regulations is commendable and long overdue. In carrying it out, we believe that it is critical that the ACHP examine all the factors that affect the efficiency of the Section 106 process and its ability to meet statutory goals. When problems are identified, they should be analyzed to determine whether the source lies with a regulation provision or whether other factors are the real cause. Otherwise, the review and revision effort may fall short of achieving its goals.

The Congress created a comprehensive program in the 1966 National Historic Preservation Act and its subsequent amendments that has multiple interconnected components. Section 106 is but one part, dependent upon policies and programs beyond the ACHP's jurisdiction. The legislation established roles and responsibilities for federal agencies, State and Tribal Historic Preservation Officers, local governments, and the public that directly affect how the Section 106 process functions. When participants in the process are unable or just fail to fulfill those responsibilities, it can create uncertainty and delay in Section 106 reviews.

It is also important to recognize the practical limits of the ACHP's regulatory authority. For example, the current regulations specify strict time frames for input from all preservation entities and the public, but the regulations do not (and, given the wide range of federal undertakings, should not) attempt to set time frames for agency action at the various steps of the process. Yet experience shows that it is quite often the failure of an agency to move the process forward that causes delay.

So we would urge the ACHP to look broadly and deeply at ways to improve the Section 106 process to achieve the goal stated so well in Section 800.1(a) of the current regulations:

"The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning."

In developing solutions, the ACHP should not simply look to regulation revision but also use its statutory authority to "review the policies and programs of Federal agencies and recommend to Federal agencies methods to improve the effectiveness, coordination, and consistency of those policies and programs with the policies and programs carried out under [the NHPA]." We believe that can produce long-term and impactful improvements.

Goals. The Administration and Senate Energy and Natural Resource Committee members have provided input on challenges that stakeholders are encountering in the use of the current Section 106 regulations. The challenges they have identified include, but are not limited to, lengthy and protracted reviews; confusion on addressing indirect and cumulative effects; burdensome requirements for long, linear projects; difficulty reaching agreement on routine effects to historic properties; and the unnecessary delay to critical projects that serve the American people. It is also essential that the members themselves, using their own experiences, identify other areas for improvement. The goal of this effort will be to consider how the Section 106 regulations might be modified, clarified, or streamlined to better accomplish the statutory objectives and requirements of the National Historic Preservation Act (NHPA). To inform this effort, Members should consider the following questions:

- Could the Section 106 regulations, or any portion thereof, be streamlined to more effectively achieve the statutory objectives of the NHPA? If so, what changes should be made?*

We believe the basic framework of the regulations is sound and that further clarification of their application to specific kinds of undertakings and resources to improve efficiency could largely be achieved through non-binding guidance and interpretations issued by the ACHP. That said, we do see several areas where refining the regulatory provisions might be useful:

- Section 800.3(c)(2) allowing for designation of a lead SHPO for multi-state projects should be examined to see if it could be better used on linear projects, etc. The question is whether the provision needs attention or whether there have been non-regulatory impediments to its use.
 - The regulations overall should be examined to see if there are ways to encourage early initiation of the process and required consultation, which is key to an efficient process. Failure of federal agencies to properly integrate the Section 106 process into their planning schedule is a major and ongoing cause of delay and diminishes opportunities to reach reasonable solutions to preservation issues.
 - Section 800.4(b)(1) regarding the level of effort to identify historic properties could be clarified to better adapt general rules to large- and small-scale projects. This again might be better handled in guidance.
 - Section 800.11 establishing documentation standards should be reviewed to determine what is necessary for review purposes and whether contemporary technology should be acknowledged in some way.
 - Section 800.11(c) deals with confidentiality. These provisions should be reviewed to determine if they are consistent with current legal requirements and practice.
- Is there any portions of the Section 106 regulations that are difficult to interpret or have become unnecessary, ineffective, or ill-advised? If so, please identifying them.*

Because the Section 106 regulations cover the full range of federal, federally-assisted, and federally-licensed undertakings, provisions are often general in nature and the lack of specificity calls for further clarification. Over the years, the ACHP has provided useful guidance and that vehicle should be seriously considered to address areas of concern. We believe the following provisions should be examined to determine whether guidance or regulation revision would be useful:

- Section 800.5(a)(1) specifies criteria of adverse effect. The terms “indirectly or directly” could be omitted, as the critical test is whether the undertaking will alter the characteristics that made the affected property eligible for the National Register.
- Section 800.5(a)(2) provides examples of adverse effects. The provision could be reviewed to see if they might be clarified, but again this would appear to be better done in non-regulatory guidance that could be updated as needed.
- Section 800.5(a)(2)(vi) specifies that neglect of a property is an adverse effect. It has never been clear how this applies because neglect is a failure to act, not a proposed undertaking. This provision should be reviewed to see whether there is a need to have it in the regulations.
- Section 800.9(d) provides for ACHP review of agency operations. This is unnecessary in the regulations, as the ACHP can provide advisory comments on how an agency conducts 106 reviews under its general advisory authorities without such a provision.
- Section 800.14 authorizes program alternatives to tailor the Section 106 process to specific programs and project categories. The tools provided have been highly successful over time to address a wide variety of federal programs and activities. It is timely to review the specifics to determine whether the alternatives can be improved and whether other program alternatives might be added. There are also operational issues that should be addressed. For example, recent initiatives appear to inappropriately use the program comment tool and standard treatments and alternate procedures are rarely used. The ACHP should assess whether these are issues caused by the regulatory language or whether other steps should be taken to make them more useful to adapt the Section 106 process to agency needs.
- 800.15 would authorize state and local program alternatives to substitute for the standard 106 process. This has never been implemented. The ACHP should review the concept and either implement it by publishing this section or eliminate the section.

• *Have the Section 106 regulations, or any portion thereof, become outdated? If so, how can they be modernized to better accomplish the statutory objectives of the NHPA?*

There are definitely parts of the regulations that need to be reviewed to ensure that they are consistent with current law and policy.

- The entire regulation needs careful review to fully incorporate ACHP policies and other executive branch directives and policies relating to engagement of

indigenous peoples. Most of those currently in effect were created after adoption of the current regulations in 2004.

- Section 800.4(c)(1) is a specific example of the need for general review. It states: “The agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.” The provision needs updating to conform to the ACHP’s policy on Indigenous Knowledge.
- Section 800.8 delineates a process for coordinating Section 106 reviews with those required by the National Environmental Policy Act. The stated policy of early coordination is sound, but the section needs revision to conform to recent NEPA compliance changes.
- Section 800.9(b) regarding agency foreclosures of the ACHP opportunity to comment needs clarification. What is actually a foreclosure and what happens when it occurs?
- Section 800.10 establishes special provisions for the consideration of impacts on National Historic Landmarks as required by Section 110(f) of the NHPA. It should be reviewed to determine how effective it has been in meeting the statutory purpose. This section should provide special consideration for US World Heritage Sites, most of which are NHLs. The federal government has a treaty obligation as a state party to the World Heritage Convention to protect them.

- *Can any new technologies be leveraged to modify or streamline the Section 106 regulations? If so, please identify them.*

This is a rich area to explore and the current ACHP initiative to develop a Cultural Resource Data Platform is commendable. The ACHP should examine how artificial intelligence and other advanced technologies could be used in carrying out the specific steps in the Section 106 process. For example, defining the area of potential effects, identifying historic properties, and developing and evaluating alternatives to resolve adverse effects could benefit from these new tools. Consideration should also be given to how new technologies could simplify and expedite the provision of necessary information for Section 106 reviews. It would be important to determine whether regulatory provisions need to be changed or whether supplemental guidance is the appropriate way to incorporate improvements based on technology.

- *What additional information should the ACHP collect regarding the Section 106 process? Should the collection of such data be directed in the regulations?*

Information requirements for individual projects should be reviewed to determine if they are adequate and whether any are unnecessary. Information requirements for assessing the overall performance of the Section 106 process should not be set forth in the regulations. Section 203 of the NHPA authorizes the ACHP to obtain information from agencies for that purpose. Section 800.9(d) references that now, but it is unnecessary and could be deleted.

• Are the Section 106 regulations, or any portions thereof, inconsistent with any E.O.s or directives issued by the President? If so, what modifications would ensure consistency with the orders and applicable law?

We have not reviewed these directives.