



STRATEGY SESSION

ACHP's Proposed Rewrite of the Section 106 Regulations

A briefing for preservation allies on what's proposed, what it would mean, and how we respond together

Cultural Heritage Partners, PLLC | Law, Policy & Strategy for Cultural Heritage

YOUR HOST

Who We Are

Cultural Heritage Partners, PLLC is a private law firm with a public mission: we believe cultural heritage is a human right.

We are experienced Section 106 practitioners — the federal historic preservation program is core to our practice, not a side issue.

We represent Tribal Nations, local governments, community organizations, and preservation advocates nationwide.

We are in active litigation against the Trump Administration to stop the President's plans to paint the Eisenhower Executive Office Building and to demolish the Kennedy Center.

Through our "War Room" initiative, we are actively tracking and responding to ACHP's Section 106 regulatory overhaul.



Marion F. Werkheiser

Founding Partner & Managing Attorney

Full team & bios: culturalheritagepartners.com/team

Nothing in this presentation creates an attorney-client relationship. This presentation is for general informational purposes only and does not constitute legal advice.

WHERE WE'RE HEADED

Agenda



01

Moment of Grief

Naming what's happening and why it hits hard



02

Summary of Regulatory Changes

What the draft actually does, section by section



03

Strategy Options

How preservation allies respond, together



04

Next Steps

What to do this week

01

SECTION ONE

Moment of Grief

Before we get into the regulatory detail, let's name what's happening.



MOMENT OF GRIEF

This Is Worse Than Many of Us Feared

These draft revisions would effectively eliminate the consultative Section 106 process as we know it — the process that has protected historic places for nearly 60 years.

There is so much at stake:

1 Our ability to protect and preserve historic places

2 The right of Tribes, states, local governments, descendant communities, historic property stewards, and the public to have a say in what the federal government allows to happen to historic properties

3 The future of the CRM industry and public support for identifying and studying historic properties

4 Our quality of life — the character of the places we call home

MOMENT OF GRIEF

Name It. Don't Deny It.

A lot of us are angry — and we should be. These ACHP regulations are an existential threat to the federal historic preservation program.

We cannot go into denial about what is happening.

The way we combat fear and act to stop these changes is through collective action. We need to organize, support each other, and take smart actions together.



Take 10 seconds — scream if you need to — then let's get to work.

02

SECTION TWO

What the Revisions Do

First, let's all get on the same page about what these draft regulations would actually do. Three major themes emerge:

1



Consolidates Agency Control

Consultation becomes optional and agency-directed

2



Reduces Application of Section 106

Fewer projects would be reviewed at all

3



Reduces Scope of Consideration

Less counts as “historic” or “adverse”

THEME 1 · CONSOLIDATES AGENCY CONTROL

Consultation Becomes Optional

Consultation with SHPOs, THPOs, and local governments becomes optional, at the agency's own discretion — no longer a required step for every undertaking.

Tribal consultation remains mandatory only in the limited circumstance of developing program alternatives affecting tribal lands.

Rewrites the definition of “consultation” itself: consultation now only means “seek and consider” other parties’ views, not discuss them or seek agreement with them.

THEME 1 · CONSOLIDATES AGENCY CONTROL

Agencies Control Who's at the Table

Applicants — including for federal permits, licenses, and funding — may now initiate and conduct early consultation directly with SHPOs/THPOs on the agency's behalf, including with Tribes.

Agencies gain broad new authority to shorten, lengthen, or waive procedural deadlines — including the Council's own comment period — simply by publishing notice of the change.

Public participation becomes entirely discretionary. The draft states the agency “has exclusive discretion to determine the usefulness of public participation, including, e.g., as necessary to resolve community concerns. The agency shall consider how offering an opportunity for public participation is balanced against the cost of other values, such the public interest.” (yes, it’s missing a word.)

THEME 2 · REDUCES APPLICATION OF SECTION 106

What Counts as an “Undertaking”?

The draft rewrites what qualifies as a federal action subject to Section 106 review in the first place — before any other analysis happens. Many of these provisions are poorly drafted and their meaning is unclear.

For example, under the draft, these types of activities do NOT trigger 106:

- State, local, or tribal actions taken under delegated federal authority

- Federal grants where the government doesn't control how, to whom, or why funds are disbursed

- Actions “merely subject to a federal veto” that don't require affirmative federal approval

- Projects with “no or minimal” federal funding or involvement where a federal agency cannot control the outcome of a project. A but-for causal relationship is insufficient to make an agency responsible for a particular action and thus, does not by itself convert that action into a Federal undertaking

- Actions where another statute's process is deemed to substitute for Section 106 compliance

THEME 2 · REDUCES APPLICATION OF SECTION 106

New Off-Ramps to Skip Review Entirely

Beyond the carve-outs, the draft creates a streamlined process for agencies to exempt entire categories or programs of undertakings from Section 106 review altogether.

ACHP's own stated goal is to align Section 106 exemptions with NEPA's "categorical exclusions," so that far more project types face no historic-preservation review at all.

Public participation in creating an exemption is left to the "proponent of the exemption" to arrange — it is not required.

Once an exemption is approved, the Council's power to terminate it is limited and reactive, not automatic.

THEME 3 · REDUCES SCOPE OF CONSIDERATION

What Counts as “Historic”?

The definition of “historic property” is narrowed. Still means eligible for or listed on the National Register, except also:

A place must include, or have once included, tangible human improvements — built structures — AND

It must be “geographically compact.”

The draft says explicitly: “noncompact, unimproved natural features such as mountains, valleys, bodies of water, or landscapes, including ethnographic landscapes, do not qualify.”

This would exclude many traditional cultural places and sacred sites of deep religious and cultural significance to Tribes and Native Hawaiian organizations — places that were never about a single building.

Definition of “geographically compact” could also threaten rural historic districts, large urban historic districts, and large single property designations.

THEME 3 • REDUCES SCOPE OF CONSIDERATION

Fewer Effects Would Ever Count as “Adverse”

Removed entirely: consideration of indirect effects and cumulative effects on historic properties.

Removed entirely: “introduction of visual, atmospheric, or audible elements that diminish the integrity” of a property, and effects that “change of the character of the property's use.”

New standard: only effects with “a reasonably close causal relationship” to the undertaking count — and effects of other, separate projects don't count at all, even if related.

THEME 3 · REDUCES SCOPE OF CONSIDERATION

Cost Becomes the Deciding Factor

Field investigations and identification work (the heart of CRM practice) are only required “taking into account reasonable considerations and factors like the cost and time of doing so” — real discretion to do less.

“Reasonable mitigation” is redefined to mean only measures that are “technically and economically feasible” — cost can justify weaker mitigation.

Agencies are no longer required to avoid or minimize adverse effects, or to consider alternatives — they can simply document that “other considerations outweigh” historic preservation.

Binding Memoranda of Agreement give way to unilateral Memoranda of Decision: the agency decides, on its own, how (or whether) to address harm.

A FEW MORE RED FLAGS

Other Horribles

Broadened emergency authority: the draft preserves the sweeping “disaster or emergency declared by the President” trigger for bypassing Section 106 — the same authority already invoked under the January 2025 National Energy Emergency executive order to fast-track energy projects nationwide.

Agencies gain unilateral authority to alter almost any procedural deadline in the rule, shorter or longer, simply by notifying affected parties.

The draft is internally inconsistent in places — duplicate and renumbered provisions, undefined terms, and drafting errors — that create real ambiguity, and real litigation risk.

BEYOND PRESERVATION

Not Just Bad for Preservation — Bad for Everyone

1

Consolidates all of these functions inside federal agencies that don't have the staff to do this work.

2

Excludes Tribal expertise and undermines the federal government's trust responsibility to Tribes.

3

Excludes state and local expertise — inviting unanticipated discoveries, project delays, and tort liability for developers.

4

Strips project proponents of a structured way to resolve community concerns, pushing conflict into other, less predictable venues.

5

Poor drafting — internal inconsistencies, missing language, ambiguous cross-references.

6

Litigation risk goes up substantially, for agencies and applicants alike.

CONSEQUENCES FOR OUR COMMUNITIES

What Results – A Disproportionate Burden

No warning, no identification. Unmarked burial grounds and sacred sites – often best identified and known through community knowledge – bulldozed before communities have the opportunities to alert parties to their vulnerability and existence.

No seat at the table. Tribes, African American descendant communities, local governments, and other important rightsholders' participation is left to agency discretion; the ability to hold developers accountable through the lifecycle of a project severely limited.

Permanent, irreversible loss. Places central to cultural life destroyed with no record and no recourse. Tribal cultural resources and historic properties located off reservation and tribal land, including traditional cultural places, are especially vulnerable.

Fights shift to the courts, becoming more expensive and prolonged. Communities cannot resolve disputes with developers through early negotiation and the Section 106 consultation process and are left with few options: litigation and/or protest. The slower, costlier path is worse for both communities and developers.

03

SECTION THREE

Strategy Options

The ACHP must solicit public comments and is required to respond to substantive input before finalizing any rule. Here's how we make our voice count.



HOW WE GOT HERE, WHAT'S AHEAD

The Road to a Final Rule

1

ACHP Votes to Approve the Draft

Friday, July 24, 2026 — the Council votes on whether to approve the draft regulations for publication.

2

OIRA Review

The draft moves to the White House Office of Information and Regulatory Affairs for interagency review.

3

Federal Register Publication

Once published, the public comment period opens — and runs for only 30 days.

4

ACHP Responds & Issues the Final Rule

The Council must respond to substantive comments before it can finalize the regulations.



Litigation

Legal challenges will likely follow, contesting both the rulemaking process and the legality of the regulations themselves.

Timeline reflects the standard NPRM → OIRA → Federal Register → comment → Final Rule process under the Administrative Procedure Act.

HOW TO COMMENT EFFECTIVELY

Make Your Comment Count

1

Answer ACHP's Numbered Questions

Cite the specific question number from the NPRM you're responding to.

3

Cite the Exact Provision

Reference the specific section — e.g., § 800.16(k)(2) — not the rule in general.

5

State Who You Are

Tribes, SHPOs, CRM firms, and local governments each carry distinct weight.

7

Keep It Organized & Concise

Executive summary, section headers, one clear ask per point.

2

Lead With Evidence

Real projects, data, costs, and delays outweigh opinions in the record.

4

Propose Alternative Text

Don't just object — suggest the specific fix you want to see adopted.

6

Preserve Issues for Litigation

Courts generally only review arguments raised during the comment period.

8

Nail the Mechanics

30-day deadline; submit via regulations.gov with the docket/RIN number.

The NPRM's 13 numbered questions appear in its preamble, Section III, "Request for Comments."

LITIGATION READINESS

Lawsuit Will Follow the Publication of Final Rule

If ACHP issues a Final Rule, we can go to court and ask a judge to block it from taking effect while the case is litigated. Potential claims include but are not limited to:



Failure to Consult

Lack of tribal consultation



Failure to Consider Comments

The APA requires agencies to genuinely grapple with significant comments — not just collect them for the file.



Provisions Exceed ACHP's Authority

Several provisions conflict with the text of the NHPA itself



Want to Help Build This Case?

Our team is already structuring the most effective possible lawsuit — claims, plaintiffs, venue — and budgeting what it will take to litigate it well. If your Tribe, government, organization, or company is interested in serving as a plaintiff or supporting the litigation, please reach out to Marion after this session to discuss.

HOW WE FIGHT BACK

Build the Record + Press/Communications + Litigation Strategy

Build the Record



We have to maximize the quality and number of comments filed on the record. Start organizing now and getting the word out. Start drafting your comments now.

Engage Congress



Congress is already working on “permitting reform” and changes to the NHPA. The ACHP’s proposed regulations complicate that effort and will not achieve the goals of making infrastructure quicker or easier— quite the opposite. We must coordinate our efforts to educate Congress about what is happening and what is at stake.

Litigation



Need to prepare for litigation now so that we are ready when the issues are ripe for the court.

Engage Press



Media outreach will help inform the public about what is happening and what is at stake. It will help us reach policy makers at all levels. We must coordinate our messaging and outreach.

04

SECTION FOUR

Next Steps

What to do this week — concrete actions you can take right now.



WHAT TO DO THIS WEEK

Next Steps

Please take a few minutes after this Zoom to send me an email letting me know if you are potentially interested in (you are not making a commitment) joining these working groups:

Litigation: To support litigation strategy as potential plaintiff, funder, or expert

Communications: To coordinate messaging and outreach to our memberships, media, and elected officials

Public Comments: To coordinate content of comments for the administrative record

Email marion@culturalheritagepartners.com



Get in Touch

Confidential tip line

fightback@culturalheritagepartners.com

Signal: marionchp.106

General inquiries

info@culturalheritagepartners.com

(202) 567-7594

CLOSING REFLECTION

A Moment of Connection

This overreach is also an opening. For decades, this work has happened quietly — in agency offices, comment docket, and courtrooms. Now the whole country is watching.

This is our chance to tell the American public what we do every day: help Tribes, communities, and local governments have a real say in what happens to the places that hold their history — and why that matters to everyone, not just specialists.

If we do this right, we don't just stop these absurd regulations — we revitalize the preservation movement and build lasting public support for stronger protections for our cultural heritage.





Thank You.

Let's protect what matters — together.

Cultural Heritage Partners, PLLC

Richmond, VA · Washington, DC

info@culturalheritagepartners.com · (202) 567-7594

Nothing in this presentation creates an attorney-client relationship. For general informational purposes only; not legal advice.