

NPCA Coalition Meeting --- July 22, 2026

ACHP's Proposed Rewrite of the Section 106 Regulations

What it would mean for preservation advocates, historic places, Tribes, descendant communities, and the public

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.
- Through our “[War Room](#)” initiative, we are actively tracking and responding to ACHP’s Section 106 regulatory overhaul.

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



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Today's conversation

1

What is happening

The ACHP's draft rewrite and where it is in the process right now.

2

How it cuts the public out

The specific changes that weaken consultation, public comment, and consulting party status

3

What we do about it

Comments, coordination, and litigation, and how your organization can plug in.

4

Hearing from you

This is a forum for discussion. Your questions and concerns shape the path forward.

WHY WE ARE HERE

Section 106 is one of the primary tools preservationists use to protect historic sites, traditional cultural places, and districts

For nearly sixty years, Section 106 of the National Historic Preservation Act has been how the federal government stops to ask, before it acts, whether a project will destroy a historic house, bridge, alter a historic district, or impact a Tribe or other community's sacred or traditional site. It is also one of the few points in federal law where a Tribe has a right to be at the table.

The ACHP's draft would fundamentally weaken the role of state historic preservation offices, local governments, Tribes, descendant communities, and the general public in that process and undercut the consideration of all forms of historic sites, properties and districts.

"These revisions would eliminate the capacity of Americans across the United States to voice their concerns about federal undertakings impacting their communities and the historic places they value."

– Elizabeth Merritt
Deputy General Counsel,
NTHP

THE BOTTOM LINE

This is worse than many of us feared

These draft revisions would effectively eliminate the consultative Section 106 process as we know it. The changes would gut the contributions from State Historic Preservation Offices, local governments, non-profit preservation advocacy organizations (including those with unique knowledge regarding the resources), descendant community representatives, Tribes, and members of the public. This is what is at stake:

Our ability to protect

Many forms of historic places are excluded from the new regulations' definitions.

Advocates' voices

Consultation becomes optional and agency-directed, no longer a required step.

Industries that preserve

Cultural resource management (historic architecture, archaeology, ethnography, and other specialist industries) are imperiled.

Our quality of life

The character of the places we love

CONSULTATION BECOMES OPTIONAL

From a required conversation to “listen, then proceed”

“May” replaces “shall”

The rule now says consulting parties “may have consultative roles.” Consultation is no longer a required step for every undertaking. It is at the agency’s discretion.

“Consultation” is redefined

It once meant seeking, discussing, and, where feasible, seeking agreement. The draft cuts it to only “seeking and considering” views. You may be heard, but no one has to discuss with you or try to reach agreement.

Tribal government-to-government relationship undermined

A project’s own applicant may now initiate consultation directly with Tribal Historic Preservation Offices, and the language keeping agencies responsible for their government-to-government relationships with Tribes is deleted. Agency is only responsible for “findings and determinations.”

Agencies Control Who is 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 is missing a word.)*

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 does not control how, to whom, or why funds are disbursed
- Actions “merely subject to a federal veto” that do not 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

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 is not required, rather creating an exemption is left to the "proponent of the exemption" to arrange.
- Once an exemption is approved, the Council's power to terminate it is limited and reactive, not automatic.

WHAT COUNTS AS “HISTORIC”

Existing historic properties under threat

The draft adds two new requirements to the definition of “historic property.”

To qualify, a place must:



Include tangible human improvements

It must include or once have included built structures. Excludes natural landscapes from eligibility.



Be “geographically compact”

Large, connected landscapes are excluded by design. Could exclude battlefields; rural historic districts, large urban historic districts, Main Street communities; large single property designations; National Historic Trails; and other large properties.



The draft language targets tribal TCPs:

“...[N]oncompact, unimproved natural features such as mountains, valleys, bodies of water, or landscapes, including ethnographic landscapes, do not qualify as property for the purposes of Section 106.”

That is a direct description of many traditional cultural places and sacred sites – places that were never about a single building.

Draft 36 CFR § 800.16(k)(2). The draft keeps a nod to “properties of traditional religious and cultural importance,” but how will they know what these are without consultation?

Even when 106 applies, less counts as harm



Indirect and cumulative effects – removed

The draft deletes consideration of indirect and cumulative effects. Harm from a related project down the road, or from many projects together, would not count.



Visual, atmospheric, audible – removed

Introducing an element that diminishes a site's setting, like a transmission tower right by a national park, or noise intrusions to a quiet ceremonial place, would no longer be an adverse effect.



Cost can outweigh preservation

Agencies need not avoid or minimize harm; they can document that “other considerations outweigh” it. The binding Memorandum of Agreement gives way to a one-sided Memorandum of Decision.

WHAT THIS MEANS ON THE GROUND

The preservation risks



No warning, no identification

More sites will be identified as they are damaged, during construction projects, because no survey was done or no one who knew they were there was involved in the process.



No rights to participate

Advocacy groups, preservation specialists, local and state governments, battlefield organizations, community organizations, state-recognized Tribes, and interested members of the public may carry no weight and have no rights to participate in the process or review materials prepared by the agency.



Permanent, irreversible loss

Places central to cultures and to location, state, and national history destroyed with no record and no recourse.



Fights shift to the courts

With no early consultation to resolve concerns, preservationists and allied groups are left with litigation or protest, slower and costlier for everyone.

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.

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 and 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.

Make your organization's comment count

1

Answer the ACHP's questions

Respond to the NPRM's numbered questions by number; propose the alternative text you want adopted.

3

Lead with evidence, and real places

Concrete examples of historic sites protected through 106 outweigh general opinion in the record.

5

Preserve issues for court

Courts generally review only arguments raised in comments. Raise consultation, sovereignty, and § 101(d)(6)(B).

7

State who you are

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

2

Cite the exact provision

Name the section or the existing and proposed regulations that you are discussing, e.g., § 800.16(k)(2) on sacred sites, § 800.2(c) on consultation, not the rule in general.

4

Proposed alternative text

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

6

Nail the mechanics

30-day deadline, via regulations.gov with the docket/RIN. NATHPO will share how and when to submit.

8

Keep it organized & concise

Use an executive summary, section headers, one clear ask per point, use formatting to clarify your points.

LITIGATION READINESS

Lawsuit will follow the final rule

If ACHP issues a final rule, we can ask a court to block it while the case is litigated. Likely claims include:

Failure to consult

Including the lack of meaningful Tribal consultation in developing this rule in the first place.

Failure to consider comments

The APA requires agencies to genuinely grapple with substantive comments – not just collect them.

Exceeds ACHP's authority

Several provisions conflict with the NHPA itself, including the Act's Tribal consultation mandate.

Interested in serving as a plaintiff, funder, fundraiser, or expert? We are looking for partner organizations for these roles.

WHAT TO DO THIS WEEK

Where your organization can plug in

CHP is forming the following working groups. If you want to join one, email marion@culturalheritagepartners.com. You are not making a commitment, just letting us know where you might help.



Litigation

Support the case as a potential plaintiff, funder, or expert witness. Provide lawyers with critical information to make our case more strong.



Communications

Coordinate messaging and outreach to memberships, media, and elected officials.



Public comments

Coordinate the content of public comments for the administrative record.

Get in touch: Reach out to join a working group or flag agencies cutting corners on 106 right now. Even if you are unsure where you fit, reach out, and we will find the right place together.

CLOSING

Your voice matters.

This overreach is also an opening. For decades, this work has happened quietly, in agency offices and comment dockets few people ever see. Now the whole country is watching.

This is our chance to say plainly what Section 106 protects: the right of organizations and the public to have a real say in what happens to the historic sites, buildings, battlefields, historic districts, and landscapes they visit and steward. First, we stop these regulations. Then, together, we build something stronger.

Let's protect what matters, together.

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[Link to our Section 106 War Room](#)



DISCUSSION

What do you see in the proposed regulations?

- Check out the proposed regulations on our website here:
<https://culturalheritagepartners.com/war-room-for-threats-to-section-106/>
- What types of impacts does this make you think of given your particular expertise and your organization's mission?
- What types of capacity, perspective, and relationships can you direct towards this fight?