

OFFICE OF INFORMATION AND REGULATORY AFFAIRS
EXECUTIVE ORDER 12866 REVIEW MEETING

Send the Section 106 Rewrite Back to the Drawing Board

ACHP's Proposed Rewrite of the Section 106 Regulations, 36 C.F.R. Part 800

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OIRA REVIEW MEETING · 2026



OUR COALITION

The Nation Is Watching This Rulemaking

700+

Tribes and public, private, and nonprofit sector organizations have joined our coalition to oppose this draft rulemaking.

7M+

Americans are organized to oppose this rulemaking and any efforts to undermine Section 106.

If ACHP proceeds with this ill-conceived draft, the Council will be inundated with public opposition during the comment process, and we will challenge the rules in court.

ROADMAP

Four Independent Reasons to Send This Back

01

Process

The ACHP broke its own rules.

02

Legality

The draft regulations conflict with the statute they implement.

03

Burden

The practical cost to the federal government itself is severe.

04

Evidence

The record doesn't support the delay, litigation, and cost claims used to justify it.

Any one of these four problems is enough on its own to warrant starting over.

PROBLEM 1 · PROCESS

ACHP Broke Its Own Rules

On June 4, 2026, the Council adopted a process for this rewrite — then didn't follow it.

WHAT THE COUNCIL PROMISED

- A schedule with milestones, produced by staff within 30 days
- A working group to develop draft regulations
- 60 days for Members to submit substantive feedback and proposed changes
- Government-to-government consultation with Tribes before any vote

WHAT ACTUALLY HAPPENED

- None of these commitments were honored
- Friday, July 17: Members received a total rewrite of Part 800
- Told to vote by email by 5:00 p.m. the following Friday
- No government-to-government consultation preceded the draft

The draft was labeled pre-decisional and not to be shared — **Tribes could not see it before the vote.**

PROBLEM 1 · PROCESS

ACHP Ignored its Own Tribal Consultation Policy

ACHP's tribal consultation policy — approved by OMB 25 years ago and updated in April 2021 to implement Executive Order 13175 — commits the agency to a defined process:

01

Earliest possible notice

The Vice Chairman notifies all Tribes when ACHP even considers revising the Section 106 regulations.

02

Full disclosure

Legal authorities, an impact analysis, a draft outline, and a proposed consultation plan and timeline.

03

60-day comment window

Tribal leaders receive no less than 60 days to submit initial comments and input.

04

Formal invitation to consult

ACHP considers and summarizes responses, then formally invites Tribes to consult as early as possible.

None of that happened. No notification of tribal leaders. No tribal consultation plan. No tribal input on the draft before you.

The Council Exceeded Its Rulemaking Authority

THE STATUTE

ACHP's rulemaking authority is at **54 U.S.C. § 304108(a)** — it authorizes regulations to govern the implementation of Section 106 only.

It does not give ACHP authority to interpret any other section of the NHPA.

THE DRAFT REGULATIONS

ACHP now proposes to redefine what is an “undertaking,” in direct contravention of the definition Congress provided at 54 U.S.C. § 300320.

See § 800.3(a)(2) of the draft.

The Council cannot use its Section 106 rulemaking pen to rewrite definitions Congress placed elsewhere in the Act.

Redefining “Historic Property” Contradicts the Act

01

“Historic property,” narrowed

Congress already defined “historic property” at 54 U.S.C. § 300308 with no geographic-compactness limitation; eligibility standards belong to the Secretary of the Interior, administered through NPS at 36 C.F.R. parts 60 and 63 under 54 U.S.C. §§ 302101–302103.

02

New tests contradict Tribal cultural landscapes

Adding “tangible human improvements” and “geographically compact” tests contradicts 54 U.S.C. § 302706(a), which allows property “of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization” to be National Register–eligible.

03

Listed properties would vanish from Section 106

Already-listed landscape TCPs would become non-properties for Section 106 while remaining on the Register. The draft also deletes recognition of Tribal expertise and the Keeper referral under 36 C.F.R. part 63.

Tribal Consultation Duties, Deleted

§ 800.14(a)(4) DELETED

Deleting § 800.14(a)(4) conflicts with the statutory right to use Tribal regulations on tribal land, established at **54 U.S.C. § 302705**.

THE DUTY TO CONSULT, REMOVED

The draft conflicts with **54 U.S.C. § 302706(b)**, which requires a federal agency to “consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance” — with no location limit.

Striking “regardless of location” cannot shrink that statutory duty.

Two more places where the draft simply contradicts the statute ACHP is bound to implement.

Transition Costs Will Be Substantial

This is not simply a matter of issuing a new Part 800 desk guide. Agencies would need to crosswalk and substantially revise existing policies, delegations, SOPs, templates, NEPA integration procedures, grant guidance, programmatic agreements, program alternatives, training materials, tracking systems, and staff roles — all while continuing to process active projects.

Thousands

of federal and contractor staff would need to be retrained

That transition period itself has real schedule and labor costs — layered on top of an agency workforce that is already stretched thin, at the very moment ACHP says it wants faster project delivery.

The Agency-Head Decision Requirement

Federal agencies already operate through formal delegations of authority issued by agency heads, with Section 106 and environmental-compliance decisions generally assigned to officials at appropriate organizational levels.

If the final rule requires the agency head personally to execute Memoranda of Decision, that could bypass existing delegation structures and route potentially large numbers of routine compliance decisions to Cabinet-level or agency-head offices.

For high-volume agencies, that is difficult to reconcile with a goal of faster project delivery.

New Standards Invite Litigation Risk

New standards concerning what constitutes an undertaking, federal grants and delegated programs, consultation, effects, National Register–eligible properties, and the relationship between Section 106 and NEPA will all have to be interpreted — by agencies, applicants, SHPOs/THPOs, Tribes, and ultimately courts.

The concern is not simply more litigation. A dispute over the rule's validity or interpretation can mean injunction requests, paused procurements, delayed construction, additional legal review, and applicants designing projects around requirements that may later be interpreted differently.

PROBLEM 3 · BURDEN

Duplicative State and Federal Review

Many project proponents currently benefit from preparing one cultural resources package that substantially satisfies both Section 106 and parallel state review. If federal standards for APEs, effects, consultation, or historic properties diverge materially from state requirements, agencies and applicants may need separate analyses and consultation tracks — and states may retain, modify, or diverge from existing requirements over time.

For infrastructure and grant programs drawing on multiple federal, state, and local funding sources, **that produces more — not less — compliance uncertainty.**

PROBLEM 4 · EVIDENCE

The Record Doesn't Support the Litigation Narrative

13M

federal cases filed over the last
35 years

266

asserted an NHPA claim — 7.6
per year

82%

of those, the NHPA claim was
one of many in a broader
dispute

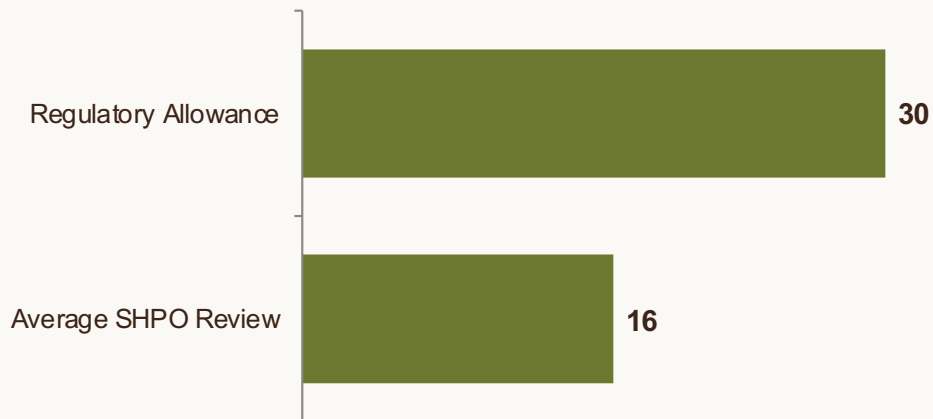
120K+

federal undertakings undergo
Section 106 review every year

The odds a Section 106 review causes a project to end up in litigation are about the same as the odds of being struck by lightning in your lifetime. **Citing litigation risk to justify this proposal — including forcing MOA signatories to waive their right to sue at § 800.6(c)(2) — is indefensible.**

PROBLEM 4 · EVIDENCE

Section 106 Is an Efficient Filter, Not a Bottleneck



97%

of new undertakings did not result in an adverse-effect determination (NCSHPO survey)

Only ~3 in 100

projects required the more intensive consultation
Section 106 is designed to provide

That is not the profile of a permitting system in crisis. It is an efficient screening process that clears the great majority of projects while reserving extra attention for genuine risk to America's irreplaceable historic resources.

OUR ASK

Send It Back to the ACHP

ACHP says its goal is to “enhance clarity, provide greater regulatory certainty, and align the rule with statutory and policy directives.” It will do none of these things. **If ACHP proceeds with this draft, litigation is a certainty.**

We urge you to send it back to the ACHP so it can conduct a legitimate process and produce draft regulations that comply with the law.

We will follow up with: our open letter to Congress, signed by 700+ Tribes and organizations · a sample of press coverage of this rulemaking · this presentation

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