



Presentation to Office of Information and Regulatory Affairs
E.O. 12866 Meeting re: RIN 3010-AA10
September 2, 2026

Good afternoon, we know you have a packed schedule and we appreciate your time. My name is Marion Werkheiser, and I am a founding partner and managing attorney of Cultural Heritage Partners, PLLC. I'm joined today by my law partner and co-founder, Greg Werkheiser.

Our practice is focused on Section 106 consultations—we help Tribal Nations, local governments, African American descendant communities, and historic preservation organizations get their voices heard during consultation, and we seek to resolve conflicts for our clients within the Section 106 process. Because that is what Section 106 is: it's a conflict resolution tool that surfaces potential concerns about effects of projects on historic properties and provides a framework for resolving those concerns through consultation.

Gutting this proven, effective tool for balancing development needs with community values will slow down projects, amplify controversies, and send parties to the courts, rather than to the negotiating table. ACHP's proposed rules will not do what they think they will do, and OIRA should send them back to the ACHP and direct them to start over.

Let me be clear: The nation is watching what this rulemaking. We have organized a coalition of more than 700 Tribes, and public, private, and nonprofit-sector organizations representing more than 7 million Americans to oppose this draft rulemaking. If the ACHP proceeds with this ill-conceived draft, it will be inundated with public opposition during the comment process, and we will challenge the rules in court.

Today I want to focus on why you should send this draft back to the drawing board, because this proposed rulemaking has four separate, independent problems, and any one of them is enough on its own to warrant starting over:

- 1. Process.** The ACHP broke its own rules.
- 2. Legality.** The draft regulations conflict with the statute it implements.
- 3. Burden.** The practical cost to the federal government itself is severe.
- 4. Evidence.** The record doesn't support the delay, litigation, and cost claims used to justify it, and eviscerating Section 106 in this way will actually slow down projects, not speed them up.

Let's start with process, because the record is very clear that ACHP has violated its own resolutions and tribal consultation policy governing this very rulemaking.

Problem 1: Process

On June 4, 2026, the Council adopted a process for this rewrite: they directed the staff to produce a schedule with milestones within 30 days, and to provide 60 days for Members to submit substantive feedback and proposed changes. The Vice Chairman committed to forming a working group of members to oversee the review process.

None of this happened.

On Friday, July 17, Council members instead received a total rewrite of Part 800 and were 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 “Not Public- Not for Further Distribution.” Tribes could not see it before the vote.

This conduct violates the ACHP’s tribal consultation policy, first promulgated by the Council and approved by OMB twenty-five years ago and updated most recently in April 2021. This policy is a formal plan for how ACHP consults with Tribal Nations pursuant to Executive Order 13175. That plan commits the agency to a defined process: It says that for each proposed action requiring tribal consultation pursuant to E.O. 13175, the ACHP will initiate consultation with Indian tribes at the earliest possible time to allow for robust and meaningful consultation.

The policy says that the Vice Chairman will send out letters to all of the tribes to notify them if the ACHP is even considering revising the existing Section 106 regulations.

The notification will:

- a.) Include all relevant legal authorities for such action, a description of the proposed action with an analysis of potential impacts to Indian tribes, and a draft outline of the proposed document with a proposed consultation plan and timeline;
- b.) Request information about the tribe’s interest in the proposed action and availability to consult with the ACHP;
- c.) Seek input on the proposed consultation plan; and
- d.) Request initial comments and input from tribal leaders no less than 60 days from receipt of the notification.

The policy says that then the ACHP will:

- a.) Consider tribal leader responses and requests to the initial notification and, to the maximum extent possible, incorporate them into the consultation plan;
- b.) Prepare a summary of all comments received as well as an explanation of how the comments were or were not incorporated in the plan; and,
- c.) Provide a copy of each of the above to tribal leaders. And the ACHP will formally invite Indian tribes to consult regarding the proposed action as early as possible.

None of that has happened. There has been no notification of tribal leaders, no tribal consultation plan, and no tribal input on the draft that is before you. This violation of process is an affront to the government-to-government relationship between the ACHP and the Tribes, and on that basis alone, the draft should be returned to the Council.

Problem 2: Legality

Now let's talk about how the draft regulations conflict with the text of the National Historic Preservation Act in a variety of ways. Let me share just a few examples:

- The Council's rulemaking authority is at 54 U.S.C. § 304108(a), which authorizes ACHP to promulgate regulations to govern the implementation of Section 106 of the Act. It does not give the ACHP authority to interpret any other sections of the NHPA.
- Yet 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.
- ACHP also proposes to change the definition of “historic property,” limiting it to geographically compact places. But Congress already defined “historic property” at 54 USC §300308 with no such limitation; that provision refers to National Register eligibility standards that belong to the Secretary of the Interior, administered through the National Park Service, at 36 C.F.R. parts 60 and 63 under 54 U.S.C. §§ 302101 to 302103.
- By adding “tangible human improvements” and “geographically compact” tests, the draft also contradicts 54 USC § 302706(a), which provides that property “*of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.*” The statutory definition has no such qualifiers.
- Already-listed landscape TCPs would become non-properties for Section 106 while remaining on the Register. The draft also deletes the recognition that Tribes hold special expertise in assessing these properties, and the Keeper referral under 36 C.F.R. part 63.
- Deleting § 800.14(a)(4) also conflicts with the statutory right to use Tribal regulations on tribal land established in 54 USC § 302705.
- The draft, which removes the duty to consult Tribes, conflicts with 54 U.S.C. § 302706(b), which states that in carrying out § 306108, a Federal agency “*shall 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 it.

These draft regulations directly conflict with the text of the National Historic Preservation Act in a variety of ways that are deeply problematic and justify returning the draft to the ACHP to start over.

Problem 3: Burden

Would this proposal actually make federal project delivery faster, cheaper, and more predictable? No. Rather, these changes would increase administrative burden and project risk, rather than streamlining the review process.

A few examples worth emphasizing:

1. Transition costs for federal agencies 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, training materials, tracking systems, and staff roles.

Thousands of federal and contractor staff who currently work from a well-established Section 106 process would need to be retrained while agencies simultaneously continue processing active projects. In addition, thousands of undertakings are covered by existing program alternatives that would have to be reviewed to determine if they are consistent with the new regulatory standards. That transition period itself has real schedule and labor costs.

2. The agency-head decision requirement is a particularly tangible administrative-burden example.

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 seems difficult to reconcile with a goal of faster project delivery.

3. 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 have to be interpreted by agencies, applicants, SHPOs/THPOs, Tribes, and ultimately courts.

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

4. 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.

States may retain existing requirements, modify them, or respond differently over time. For infrastructure and grant programs involving multiple federal, state, and local funding sources, that could produce more—not less—compliance uncertainty.

Problem 4: Evidence

Finally, the ACHP has failed to undertake any substantial analysis of what problems exist within the current Section 106 process and has no evidence on which to base these drastic changes.

The Council says it wants to speed up delivery of projects, but these changes will not do it. They will actually slow down projects and make the most complex projects much harder to advance.

Section 106 is a risk management tool for project proponents—letting them know of potential concerns early enough to make necessary changes to avoid effects. For example, Section 106's process to identify historic properties alerts energy companies and mining operations to historic burial grounds in the path of their projects before they are disturbed. Without that early warning system, companies will be exposed to expensive tort liability, not to mention project delays and reputational damage.

At its core, Section 106 is a conflict resolution tool that surfaces concerns about how projects will impact places that communities care about and provides a structure for considering the viewpoints of all Tribes stakeholders, and the public, and reaching consensus. By gutting consultation requirements and removing the agency's duty to discuss and try to reach agreement, and also removing the duty of the federal agency official to avoid or minimize adverse effects, the ACHP neutered that conflict resolution tool.

Under these draft regulations, Tribal citizens and the public will find out about federal projects only when the bulldozers arrive. That is too late to resolve conflicts in an orderly fashion.

So how will Tribes' and communities' concerns about how projects affect historic properties be resolved? That burden will fall on project applicants—and they will either need to recreate the Section 106 consultation process privately, at great effort and expense, or deal with angry protesters who will take them to court.

That result would be unfortunate, because right now, the National Historic Preservation Act does not generate much litigation at all.

Did you know that the odds you will get hit by lightning in your lifetime are the same as the odds of a Section 106 review process causing a project to end up in litigation? Industry advocates cite litigation risk as a reason to weaken Section 106. The actual numbers are startling. We reviewed the

approximately 13 million federal cases filed over the last 35 years. Just 266 complaints asserted a claim under the National Historic Preservation Act—an average of only 7.6 cases per year. In 82% of those 266 cases, an NHPA claim is just one claim among many. The cases usually concern much broader disputes. Against the enormous number of federal undertakings undergoing Section 106 review each year (more than 120,000), NHPA litigation is statistically almost nonexistent.

Citing litigation risk as a cause for this proposal is indefensible, and it certainly does not support the draft's proposal at § 800.6(c)(2) to require signatories to MOAs to waive their rights to sue.

Next point: Section 106 is not a bottleneck, as the draft describes. In addition to being a conflict resolution tool, it is a highly efficient screening system.

The National Conference of State Historic Preservation Officers found that 97 percent of new undertakings did not result in an adverse effect determination. In other words, only about three out of every one hundred projects required the more intensive consultation that Section 106 is specifically designed to provide when nationally significant historic resources may be affected.

The same survey found that SHPOs completed reviews within an average of just 16 days. That is roughly half the 30-day review period provided under the regulations.

That is not the profile of a permitting system in crisis. And it is not evidence that justifies stripping away public, Tribal, state, and local rights. It is the profile of an efficient screening process that quickly clears the great majority of projects while devoting additional attention to resolving conflicts only where America's irreplaceable historic resources are genuinely at risk.

Yes, there are cases where reviews have gone off the rails, but these are rare outliers. They should be analyzed to see if the causes were because of the regulations themselves, or how those regulations were implemented by the agencies.

Conclusion

The ACHP says its goal in advancing this proposal is quote "to enhance clarity, provide greater regulatory certainty, and align the rule with statutory and policy directives." It will do none of these things.

As I said at the beginning of the meeting, the nation is watching this rulemaking, and Tribes and communities across the country are outraged. If the ACHP proceeds with this draft, litigation is a certainty. We urge you to send it back to the ACHP so that they can conduct a legitimate process and produce draft regulations that comply with the law.

Thank you for your time.

We will follow up with:

- Our open letter to Congress about this rulemaking, signed by 700+ Tribes and organizations
- A sample of press coverage of this rulemaking
- This presentation and accompanying powerpoint deck